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" SIR CHARLES SARGENT, KT.

Puisne Judges:

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" M. MELVILL.
" C. J. KEMBALL.
" R. WEST.
" R. H. PINHEY.
" F. L. LATHAM (*Ag.*).
" J. SCOTT.

Advocates-General:

HON'BLE J. MARRIOTT.
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THE
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BOMBAY—VOL. III.

I.L.R., 5 BOMBAY.

INSOLVENCY.

Before Mr. Justice Marriott.

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INSOL-
VENCY.

5 B. 1.

IN THE MATTER OF COWASJI EDALJI, *Insolvent;*
THE LONDON, BOMBAY AND MEDITERRANEAN BANK, *Creditor.*
[11th August, 1880.]

Indian Insolvent Act, Stat. 11 *and* 12 *Vic., c.* 21, *s.* 60—*Trader—Mukadam.*

A mukadam is not a trader within the meaning of the Indian Insolvent Act, 11 and 12 Vic., c. 21, and is not, therefore, entitled to obtain a discharge, in the nature of a certificate, under s. 60 of that Act.

THE insolvent described himself in his schedule as "a mukadam of shipping and landing business." On the 19th May he obtained an order *nisi* for his discharge under s. 60 of the Indian Insolvent Act (11 and 12 Vic., c. 21), and he now applied to have the order made absolute.

Counsel for the opposing creditor contended that a mukadam was not a trader within the meaning of the Act, and that the insolvent was not, therefore, entitled to his discharge under s. 60.

The insolvent was examined, and gave the following evidence as to his occupation:—

"I am a mukadam. I land goods for merchants and ship them. I am paid so much per bale. I employ *ghatis* and labourers, and pay them their wages. I do not buy goods for sale or sell goods. I have no stock in trade. I hire boats and land and ship goods. I enter into contracts with different merchants, and land and ship their goods. The goods are delivered to the merchants at the warehouse. I have no warehouse."

Starling, for opposing creditor.—The insolvent is not a trader, and, therefore, is not liable to become bankrupt so as to enable [2] him to obtain his discharge under s. 60. The English statutes referred to in s. 9 of the Indian Insolvent Act, enumerate the classes who are to be deemed traders. These statutes are 6 Geo. IV, c. 16, ss. 2 and 5, and 6 Vic., c. 122, s. 10; 12 and 13 Vic., c. 106, s. 65; and 32 and 33 Vic., c. 71, sch. I. Neither the occupation of mukadam nor any business analogous to it

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is mentioned. The insolvent, therefore, can only protect his after-acquired property by satisfying the conditions of s. 59 of the Indian Insolvent Act, *viz.*, by paying in cash one-third of his debts or obtaining the consent of a majority in number and value of his creditors.

JUDGMENT.

5 B 1.

MARRIOTT, J.—It appears from the insolvent's own account of himself that the occupation which he followed did not come within the terms of any of the Acts which define and enumerate the classes of persons who are to be deemed traders. He cannot, therefore, obtain a certificate under s. 60 of the Indian Insolvent Act. Neither can he obtain one under s. 59 of that Act, as he has not complied with the provisions of that section by paying the required proportion of his debts or obtaining the assent of his creditors. I must discharge the order.

Order discharged.

Attorneys for the opposing creditors.—Messrs. *Tobin* and *Roughton*.

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5 B. 2.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

KHEVRAJ JUSRUP, DECEASED, BY HIS WIDOW AND HEIRESS NANDABHAI (*Original Defendant*), *Appellant v.* LINGAYA (*Original Plaintiff*), *Respondent.** [29th July, 1873.]

Mortgage—Execution—Sale—Right of purchaser—Effect of sale—Estoppel—Minor—Act XX of 1864.

On 10th September 1863, A. mortgaged a house to B., who registered the deed, but did not obtain possession of the premises. On 2nd July, 1868, A. mortgaged the same house to C., who registered the mortgage deed and took possession of the premises. On 10th October, 1868, B. sued on his mortgage and obtained a decree against A's son who was a minor and who was represented by his mother as his [3] guardian. She, however, had obtained no certificate of administration under the Minors' Act XX of 1864. On 17th December 1869, the mortgaged property was sold by the Court in execution of B's decree. The plaintiff bought it, and obtained a certificate of sale. On the plaintiff's attempting to take possession of the property, the defendant, who was C's widow and heiress, resisted him, and he, thereupon, sued to recover it.

Held, that the plaintiff was entitled to possession. He stood at least in the same position as had been occupied by B., before the sale, and B, as prior mortgagee had a superior title to that of defendant, who claimed under a subsequent deed.

Where mortgaged property is sold in execution of a decree in a suit brought upon the mortgage, the interest of the mortgagee, at whose instance the sale is made, is held to pass to the purchaser, and the mortgagee is estopped from disputing that such is the effect of the sale.

[**R.**, 5 B. 5 ; 5 B. 8 ; 22 B. 686 (692) ; 22 B. 945 (948) ; 35 B. 395 (400) = 13 Bom. L.R. 678 = 11 Ind. Cas. 989 ; 11 Bom. H.C. 139 (142) ; **D.**, 20 B. 290 (293).]

SUIT for possession of a house purchased by the plaintiff at a Court sale on the 17th December 1869.

On the 10th September, 1863, the house in dispute with two others was mortgaged by Krishnarav Narayan for Rs. 525 to Lachmandas.

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* Special Appeal No. 208 of 1873. See Printed Judgments for 1873, p. 19.

by a deed which was registered on the 28th November, 1863. The latter did not enter into possession under the mortgage. On the 2nd July, 1868, Krishnarav mortgaged the same three houses for Rs. 1,000 to Khevraj Jusrup, husband of the defendant Nandabai. That mortgage was registered on the 17th July, 1868, and accompanied with possession. On the 10th October, 1868, the earlier mortgagee, Lachmandas, obtained a decree on his mortgage for Rs. 809-12-0 against Balkrishna, the mortgagor's son, who was a minor and represented by his mother, Radabai, as guardian. She, however, had otained no certificate of administration of his estate under the Minors' Act XX of 1864. On the 17th December, 1869, the mortgaged property was sold by the Court in execution of Lachmandas' decree. At that sale the plaintiff Lingaya purchased the house in dispute for Rs. 201-8-0 and obtained a certificate of sale, dated the 26th February, 1870. As the plaintiff failed to obtain possession of the house, in consequence of the defendants' resistance, he brought the present suit to establish his right to, and to recover possession of it from her. The defendant, Nandabai, contended that she was entitled to the possession of the house under the mortgage deed of 1868 till the whole of the mortgage debt was paid off. The First Class Subordinate Judge of Ahmednagar (Rao Bahadur P. S. Biniwale), in whose Court the suit was filed, awarded the [4] plaintiff's claim. That decree was affirmed, in appeal, by the District Judge (Mr. A. Bosanquet) on the ground that the mortgage to Lachmandas was prior in date to the mortgage to Khevraj. The defendant thereupon brought a special appeal. It was contended in the High Court that the execution sale, under which the plaintiff claimed, was not valid, as the minor defendant was represented by his mother who was without a certificate under Act XX of 1864.

Ghanasham Nilkant, for the appellant, cited *Vasudev Vishnu* v. *Narayan Jagannath* (1), *Bai Kesar* v. *Bai Ganga*(2) and *Hari* v. *Mahadaji*(3).

Shivshankar Govindram, for the respondent.

JUDGMENT.

WESTROPP, C. J.—We do not think it necessary to give any opinion as to the effect of the judicial sale upon the equity of redemption, the validity of which sale is impeached by the appellant on the authority of *Vasudev Vishnu* v. *Narayan Jagannath* (1) and of *Bai Kesar* v. *Bai Ganga* (2), or upon the question whether that sale was only voidable and not void, *i.e.*, only an irregularity and not a nullity. The Court is not now called upon to say whether the infant Balkrishna Krishnaram could wholly or to any extent impeach the sale of the equity of redemption to the plaintiff, Lingaya, on the ground that Radhabai, his mother and guardian in the suit, brought by the earlier mortgagee, Lachmandas Joharimal, against them, did not properly represent her son's interest, inasmuch as she had not a certificate of administration under Act XX of 1864. The mortgage to Luchmandas, dated 10th September, 1863, and registered on the 28th November in the same year, is in evidence in this suit, and neither the execution of it by Krishnaram Narayan, nor its consideration is impeached by the defendant, Nandabai, the representative of the second mortgagee, Khevraj Jusrup, whose mortgage was executed on the 2nd July, 1868, and registered on the seventeenth day of the same month in that year. That being so, it is clear that the defendant, Nandabai, cannot deny the right of the plaintiff to stand in the same position

(1) 9 B. H. C. R 289. (2) 8 B. H. C. R A. C. G. 31. (3) *Ibid*, 50.

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APPELLATE CIVIL.
5 B. 2.

with respect to the house, the subject of the sale, as previously to that sale had been held by Luchmandas. And Luchmandas could not deny that proposition, inasmuch [5] as he was the plaintiff in the suit in which the sale took place and moved the Court to make that sale; and although it is not the practice of the Mofussil Courts to require a mortgagee who sues for, and obtains a sale of the mortgaged premises, formally to convey to the purchaser, and the latter must be contented with a certificate of sale to him of the right, title and interest of the mortgagor, yet, in fact, the interest of the mortgagee, who causes the sale to be made, is held to pass to the purchaser, and that mortgagee is completely estopped from disputing that such is the effect of the sale (see *Kasandas* v. *Pranjivan* (1)).

For these reasons we think that the plaintiff is, as at least standing in the position of Lachmandas, who held under a mortgage prior both in execution and *registration* to that of Khevraj, entitled to recover possession of the house from the widow and representative of the latter: *Hari* v. *Mahadaji* (2). Whether, under the circumstances of the case, either she or the infant Balkrishna would be entitled to sue the plaintiff to redeem the mortgage of 10th September, 1863 (Exhibit No. 49), by paying it off, we do not express any opinion. In so far as the decrees of the Courts below award possession of the house and premises in dispute to the plaintiff, we affirm the same with costs.

Decree affirmed.

[NOTE.—See the next case.]

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5 B. 5.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

SHESHGIRI SHANBHOG AND ANOTHER (*Original Defendants Nos. 3 and 4*), *Appellants v.* SALVADOR VAS (*Original Plaintiff*), *Respondent.**
[4th August, 1873.]

Mortgage—Sale—Decree—Execution—Effect of sale in execution of decree.

A. mortgaged his land to B. in 1861, which mortgage was then registered, but the mortgagee did not enter into possession. Subsequently in 1866, A. leased the same land to C. That lease was registered and C. entered into possession. In 1867 B obtained a decree upon his mortgage, and in execution attached and sold the mortgaged property. C. who had applied to have this attachment of the land removed and failed in his application, sued to establish his right under the lease and recover possession.

Held that, under the lease of 1866, he could only take what the mortgagor had to give him, *viz.*, a lease subject to the registered mortgage.

[6] Where a decree is obtained upon his mortgage by a mortgagee and the mortgaged property is sold under the decree for the purpose of paying off the mortgages, the interest of both mortgagor and mortgagee passes to the purchaser. The mortgagee is estopped from disputing that such is the effect of the sale, so far as his interest is concerned, although the officer of the Court may only have described the sale as one of the right, title and interest of the mortgagor. It is not the practice, in the Mofussil, to require the mortgagee to convey to the purchaser. The transfer takes place by estoppel.

[R., 5 B. 8; 22 B. 686; 22 B. 945 (948); 35 B. 395 (400)=13 Bom.L.R. 678=11 Ind. Cas. 989; 40 C. 173 (184)=16 C.L.J. 202=17 C.W.N. 137=16 Ind. Cas. 365; 11 Bom.H.C. 139 (142); D., 20 B. 290 (293).]

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* Special Appeal No. 460 of 1872. Printed Judgments for 1873, p. 25.

(1) 7 B. H. C. R. A. C. J. 146.

(2) 8 B. H. C. R. A. C. J. 50.

1873
AUG. 4.
APPELLATE CIVIL.
5 B. 5.

SUIT by a lessee to recover possession of land.

On the 4th May, 1861, the land was mortgaged by its owner Waman Pai, to one Mudulgiri, who duly registered the mortgage but did not obtain possession. On the 5th July, 1866, Waman's son Sheshgiri Pai (husband of defendant No. 1), let the same land to the plaintiff on lease for a period of ten years. This lease was also duly registered, and the plaintiff was put into possession. He occupied the land and paid rent to Sheshgiri Pai till his death, and after that event to his widow (defendant No. 1). On the 2nd July 1867, the mortgagee obtained a decree on his mortgage against Sheshgiri Pai's widow (defendant No. 1), in execution of which the land was attached. The plaintiff applied for the removal of the attachment, but his application was rejected, and at the execution sale, the land was purchased by Sheshgiri Shanbhog and his brother (defendants 3 and 4). The plaintiff thereupon sued to establish his right to and recover possession of the land, alleging that the auction-purchasers had notice of his right. Defendants Nos. 3 and 4 contended that they were entitled to the land in preference to the plaintiff, whose right was based upon a lease subsequent in date to the mortgage. The name of defendant No. 2 (Mudulgiri, the mortgagee and decree-holder) was struck out from the suit on the application of the plaintiff. The Subordinate Judge of Honavar, in whose Court the suit was filed, rejected the plaintiff's claim on the ground that it was not valid as against the auction-purchasers. That decree was reversed, in appeal, by the District Judge of Kanara (Mr. A. L. Spens) on the ground that what the defendants 3 and 4 purchased at the Court sale was the right, title and interest of the widow; that the land was subject to the plaintiff's lease when it was sold by the Court; that the mortgage was one without possession; that the auction purchasers (defendants 3 and 4) were only entitled to rent according to the terms of the lease. The Judge accordingly made [7] a decree in favour of the plaintiff. Defendants 3 and 4 brought a special appeal.

Shantaram Narayan, for the appellant.

Shamrav Vatal, for the respondent.

JUDGMENT.

WESTROPP, C.J.—The mortgage, dated the 4th May, 1861, though not accompanied by actual possession, was duly registered on the same day. Conformably to a decree made on the 2nd July, 1867, in a suit brought upon it by the mortgagee, the property (land) in dispute was sold to Sheshgiri Shanbhog and Mangesh Shanbhog (the defendants Nos. 3 and 4), who are the present appellants. The plaintiff, Salvador Vas, claims under a lease executed by the mortgagor on the 5th July, 1866, and subsequently duly registered.

Notwithstanding the form of the sale to the third and fourth defendants by the Court, the suit in which it took place being founded on the mortgage, and the sale being made for the purpose of paying off the mortgagee, the interest of the latter as well as that of the defendant in that suit (the mortgagor) passed to the purchasers (defendants 3 and 4): *Kasandas* v. *Pranjivun Asharam* (1), *Khevraj Jusrup* v. *Lingayya Rajaram* (2). The mortgagee is completely estopped from disputing that such is the effect of the sale so far as his interest is concerned, although the officer of the Court may only have described the sale as one of the right, title and interest of the mortgagor. It is not the

(1) 7 B. H. C. R. 146.

(2) 5 B. 2.

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APPELLATE CIVIL.

5 B. 3.

practice in the Mofussil to require the mortgagee to convey to the purchaser. The transfer takes place by way of estoppel.

The lessee, under the lease of 1866, could only take what the mortgagor had to give him, *viz.*, a lease subject to the prior right of the mortgagee, whose mortgage was duly registered, and, therefore, did not need possession to render it valid against subsequent alienations by the mortgagor: *Hari* v. *Mahadaji* (1). We must, therefore, reverse the decree of the District Judge, and make a decree for the defendants, with costs of the suit and of the appeal to the District Judge, but we direct that the parties respectively bear their own costs of the special appeal.

Decree reversed.

[NOTE.—See the next case.]

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5 B. 8.

[8] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

SHAIK ABDULLA SAIBA (*Original Plaintiff*), *Appellant v.* HAJI ABDULLA AND OTHERS (*Original Defendants*), *Respondents.**

[2nd August, 1880.]

Mortgage—Decree—Non-joinder—Sale of the right, title and interest of a mortgagor or his heir—Rights of an auction-purchaser—Equity of redemption.

The usual mode, in the Mofussil Civil Courts, of selling in mortgage suits "the right, title and interest" of the mortgagor or his heir, is not correct, if deemed to be his right, title and interest at the time of the sale. The intention of the Court is to pass to the purchaser the right, title and interest both of the mortgagor and mortgagee. What passes to the auction-purchaser under the certificate of sale, is the right, title and interest of the mortgagor as it stood when he made the mortgage, and not merely as it stood at the time of the Court sale.

One Umar Saiba mortgaged certain immoveable property to A.R. (defendant No. 1) for Rs. 400 on the 7th May, 1865. On the death of Umar the mortgagee A.R. brought a suit (No. 311 of 1871) against his widow K. (defendant No. 2), but did not make his (Umar's) children (who were minors) parties to it. On the 28th July, 1871, A.R. obtained a decree for Rs. 460, being the amount of principal and interest due on his mortgage, with further interest from the date of suit to date of payment. That decree directed satisfaction of the amount due under it out of the mortgaged property if it were not paid by the widow K. defendant No. 2). K. having failed to satisfy the decree, the Court on the application of A.R. (the decree-holder), sold the mortgaged property, on the 19th September, 1872, for Rs. 400, to the brother of A.R. On the 7th August, 1873, the auction-purchaser obtained a certificate of sale to the effect that he had purchase at the Court sale "the right, title and interest of K." (the widow) in the mortgaged property. On the 17th August, 1874, the auction-purchaser sold the property for Rs. 700 to the father of the plaintiff. In 1877 the plaintiff sued A. R. (the mortgagee and decree-holder) to recover possession of the property with mesne profits. Umar's widow K. and children (two sons and a daughter) were defendants in the suit, the plaintiff alleging, in addition to the facts just stated, that these defendants had colluded with the tenants of the property in dispute, and collected the produce thereof. Defendant No. 1 (A.R.) denied his liability. The answer of defendants 2, 3, 4 and 5 (respectively the widow, two sons and a daughter of Umar) substantially was that the Court sale did not affect the rights of defendants 3, 4 and 5, as they had not been parties to the mortgage suit No. 311 of 1871, and that they were entitled to hold the property. The

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* Second Appeal No. 202 of 1880.

(1) 8 B.H.C.R.A.C.J. 50.

subordinate Judge awarded the plaintiff's claim, holding that both the sales, *viz.*, the Court sale under the mortgage decree in suit No. 311 of 1871, and the subsequent private sale by the auction-purchaser, were *bona fide* and binding on defendants 2, 3, 4 and 5, inasmuch as the debt for which the property was sold, had been contracted by Umar. This decree was reversed in appeal, on the ground that the Court sale extended only to the right, title and interest of K. (defendant No. 2) in the mortgaged property, and [9] did not affect the rights of defendants 3, 4 and 5, who were not parties to it. On appeal to the High Court.

Held that the defect in the title of the purchaser (plaintiff) arose from the circumstances that the suit of A. R. (No. 311 of 1871) for foreclosure and sale was insufficiently constituted as to parties, both the sales having been found to be unimpeachable in all other respects and that the defendants Nos. 3, 4 and 5 were only entitled to the same relief which they would have obtained if they had been made parties to that suit, *viz.*, the right of redeeming the property by paying off the mortgage.

The High Court accordingly reversed the decree of the District Judge, and directed the defendants 3, 4 and 5 to pay to the plaintiffs, within six calendar months from date, the sum of Rs. 460, with interest on the principal (Rs. 400) from date of the institution of suit No. 311 of 1871, until payment. The Court further directed that, in default of payment, the mortgage should be foreclosed, and defendants 3, 4 and 5 precluded from redeeming the property which should be delivered up to the plaintiff.

Karsandas v. *Pranjivan* (1), *Shringarpure* v. *S.B. Pethe* (2), *Rarji* v. *Krishnaji* (3), *Khevraj* v. *Lingaya* (4), *Sheshgiri Shanbhog* v. *Salvador Vas* (5) referred to.

[R., 10 A. 520 (523)=8 A.W.N. (1888) 210; 5 B. 614 (618); 6 B. 515 (519); 16 B. 486 (491); 28 B. 153 (162, 163); 17 M. 247 (249); D., 19 B. 680 (693).]

THIS was a second appeal from the decision of A. L. Spens, District Judge of Kanara in appeal, reversing the decree of the Subordinate Judge of Honavar.

The suit was brought for possession of certain immoveable property under the following circumstances :—One Umar Saiba mortgaged the property in dispute for Rs. 400 to Abdul Rahiman (defendant No. 1) on the 7th May, 1865. On the death of Umar Saiba, the mortgagee (Abdul Rahiman) brought a suit (No. 311 of 1871), against Umar's widow, Kulsambi, but did not make his (Umar's) children, who were minors, parties to it. On the 28th July, 1871, Abdul Rahiman (the mortgagee) obtained a decree for Rs. 460, being principal and interest due on his mortgage, with further interest from date of suit to date of payment. The decree directed that Abdul Rahiman should recover the amount due under it from the mortgaged property, unless it was paid by Kulsambi (Umar's widow). Kulsambi having failed to satisfy the decree, the Court, on the application of Abdul Rahiman (the decree-holder), sold the mortgaged property on the 19th September, 1872, for Rs. 400 to Abdulla, brother of Abdul Rahiman. On the 7th August 1873, the [10] auction-purchaser (Abdulla) obtained a certificate of sale from the Court to the effect that he had purchased at the Court sale "the right, title and interest of Kulsambi" in the mortgaged property. On the 17th August, 1874, the auction-purchaser sold the property for Rs. 700 to Ibrahim Saheb, father of the plaintiff. In 1877 the plaintiff brought the present suit against Abdul Rahiman (the decree-holder), Kulsambi (Umar's widow) and his two sons and a daughter by her. The plaintiff alleged, in addition to the facts just stated, that defendants 2, 3, 4, and 6 colluded with the tenants of the property in dispute, and collected the produce thereof; that plaintiff, therefore, sued to recover possession of the property, with mesne profits for previous years.

(1) 7 B. H. C. R. A. C. J. 146. (2) 2 B. 662.
(3) 11 B. H. C. R. 139 (142). (4) 5 B. 2. (5) 5 B. 5.

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Defendant No. 1 (Abdul Rahiman) denied his liability. Defendant No. 2 (Kulsambi, widow of Umar and mother of defendants 3, 4, and 5) denied all knowledge of the mortgage suit No. 311 of 1871, and the sale of the mortgaged property by the Court to Abdulla on the 19th September, 1872. She, however, admitted the mortgage of the property in dispute by her husband to defendant No. 1 (Abdul Rahiman), but contended that, under the Mahomedan Law, defendants 3, 4 and 5 (her two sons and a daughter by Umar Saiba) were entitled to the property; that defendant No. 1 (Abdul Rahiman) ought to have made them parties to his suit No. 311 of 1871; that the decree and sale, therefore, could not be upheld; that the property was worth Rs. 2,000, and its sale by the Court was very much under its value; that only Rs. 400 were due to defendant No. 1 on account of his mortgage. The answer of defendants 3, 4 and 5 substantially was that they were entitled to, and were rightfully in possession of, the property; that the mortgage suit No. 311 of 1871, and all the subsequent proceedings therein did not affect their rights, as they were not parties to it; that the sales alleged in the plaint were fraudulent and were not binding on them. (Defendant No. 4 was a minor, and represented by his brother, defendant No. 3.)

The Subordinate Judge held that both the sales were *bona fide* and not fraudulent, and that the Court sale was binding on defendants 2, 3, 4 and 5, and affected their rights, inasmuch as the debt, for which the property was sold, had been contracted by [11] Umar Saiba, as whose heirs the said defendants claimed. He, therefore, made a decree in favour of the plaintiffs.

In appeal, which was preferred by defendants 3, 4 and 5, the District Judge reversed the decree of the first Court on the ground that the Court sale, under the decree in the mortgage suit No. 311 of 1871, extended only to the right, title and interest of Kulsambi in the property sold, and did not affect defendants 3, 4 and 5, because they were not parties to the suit. He accordingly dismissed the plaintiff's claim on the 27th January 1880.

On the 16th April 1880, the plaintiff appealed to the High Court.

Shantaram Narayan, for the appellants.—What was really sold at the Court sale, was the interest of the mortgagee and the mortgagor's equity of redemption, and not merely the right, title and interest of Kulsambi, as held by the Judge. He ought to have held that the mortgage suit No. 311 of 1871, was against all the parties then competent to represent the estate of the mortgagor and that Kulsambi represented not only her own interest but that of her minor children by Umar Saiba, inasmuch as she was their natural and lawful guardian. The mortgage debt was a *bona fide* charge on the property and admitted by the defendants even in this suit. The plaintiff, therefore, as representing the interest of the mortgagee, was entitled to retain possession of the mortgaged property till the satisfaction of the mortgage debt. Even assuming that the defendants ought to have been *pro forma* parties to the suit No. 311 of 1871, and that they were not bound by the decree and Court sale, they were entitled to nothing more than the equity of redemption, and the plaintiff has a right to hold possession of the mortgaged property till it is completely redeemed.

Shamrav Vithal, for the respondents.—The Court expressly sold at the auction sale the right, title and interest of Kulsambi in the mortgaged property, as appears from the certificate of sale. The Court sale and the subsequent private sale, therefore, in no way affected the rights of defendants 3, 4 and 5, as held by the District Judge.

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JUDGMENT.

[12] The following is the judgment of the Court :—

WESTROPP, C.J.—The immoveable property, the subject of this suit, was mortgaged on the 7th of May, 1865, for Rs. 400 by Umar Saiba to Abdul Rahiman, the interest payable thereon being 10 khandis of rice per annum. The validity of that mortgage is not disputed. Umar Saiba (the mortgagor) having died, Abdul Rahiman (the mortgagee) instituted a suit (No. 311 of 1871) against Kulsambi, the widow of Umar Saiba, but omitted to make the children of Umar Saiba parties to that suit. Those children were then and some of them were at the institution of the present suit still minors. On the 28th July, 1871, Abdul Rahiman, in his suit (No. 311 of 1871), obtained a decree on his mortgage that unless Kulsambi paid the amount then due, *viz.*, Rs. 400 principal and Rs. 60 interest, and further interest from the date of the plaint up to the time of payment, he should recover the amount from the mortgaged property, which decree was substantially a decree for sale of that property, in default of payment by Kulsambi, of the amount decreed. Kulsambi not having paid that amount, the property was sold for Rs. 400 by the Court on the 19th September, 1872, to Abdulla, the brother of Abdul Rahiman, the mortgagee; and a certificate of that sale, dated the 7th August, 1873, was given to the purchaser, who, on the 17th August, 1874, sold the same property for Rs. 700 to Ibrahim Saheb, the father of the plaintiff. By the certificate of sale given by the Court to Abdulla, the first purchaser, it appears that what the Court put up for sale was "the right, title and interest of Kulsambi" in the mortgaged property. She, as widow of the deceased mortgagor, was only entitled to a small share in or maintenance out of his property, his sons being entitled to the rest of it. Therefore, she represented only her own limited interest in the equity of redemption of the mortgaged premises. If she had been sole heir, she would have represented to the whole of the equity of redemption. The mode, usual in the Mofussil Civil Courts, of selling in suits on mortgages "the right, title and interest" of the mortgagor or his heirs, is not correct, if the right, title, or interest so sold are deemed to be only his right, title and interest *at the time of the sale*. In fact, the intention of the Court is to pass to the [13] purchaser the right, title and interest both of the mortgagor and mortgagee. And in order to surmount the difficulty caused by the form of sale adopted in the Mofussil in mortgage suits, this Court has ruled that "the right, title and interest" of the mortgagor, as it stood *when he was making the mortgage* (and not merely as it stood at the time of the Court sale), is what passes under the certificate of sale to the purchaser: *Kasandas* v. *Pranjivan* (1), *Shringarpure* v. *Pethe* (2); and [the mortgagee who puts the Court in motion to sell, is held to be estopped from denying that his interest as mortgagee has passed under the sale of the right, title and interest of the mortgagor or his heirs to the purchaser, although the mortgagee has not executed a conveyance to the purchaser:] *Ravji* v. *Krishnaji* (3), *Khevraj* v. *Lingaya* (4) and *Sheshgiri Shanbhog* v. *Salvador Vas* (5). The defect in the title of the purchasers in the present case is due to the suit of Abdul Rahiman for foreclosure and sale having been insufficiently constituted as to parties: *Assamathem Nessa Bibi* v. *Roy Lutchmiput Singh* (6), the sale to Abdulla, and the sale by him to Ibrahim

(1) 7 B.H.C.R.A.C.J. 146. (2) 2 B. 662. (3) 11 B.H.C.R. 139 (142).
(4) 5 B. 2. (5) 5 B. 5. (6) 4 C. 142.

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Saheb having been found to be in all other respects unimpeachable. We quite discredit Kulsambi's affectation, in her written statement in the present suit, of ignorance of the foreclosure suit. She did not attempt, in the Courts below, to raise any issue as to her not having been duly served with process in it.

If the sons of Umar Saiba had been made parties to that foreclosure suit, it is clear that they could not have averted a decree for sale and foreclosure, except by redeeming the property by paying off the mortgage. To that decree of relief only we think them now entitled—the payment, however, must be to the defendants, the heirs of Ibrahim Saheb, who now stand in the place of Abdul Rahiman, inasmuch as his rights, at least, as mortgagee passed by the Court sale to his brother Abdulla, and have by him been conveyed to Ibrahim Saheb; and should the heirs of Umar Saiba, under the decree which we are now about to make, fail to redeem, the heirs of Ibrahim Saheb will be entitled to have the mortgage foreclosed in his favour and for his benefit, and to recover possession of the mortgaged premises.

[14] Accordingly, we reverse the decree of the District Judge and order the defendants in the present suit, other than Abdul Rahiman and Kulsambi, to pay to the plaintiff (who now stands in the former position of Abdul Rahiman as mortgagee; for the as well as Kulsambi are bound by the decree and sale in the foreclosure suit), the sum of Rs. 460 and further interest on Rs. 400 from the date of the plaint filed in suit No 311 of 1871 at the rate of 10 khandis of rice *per annum* down to the day of payment. And in the event of the said defendants, other than Abdul Rahiman and Kulsambi, not paying the said sum of Rs. 460, and the said further interest within six calendar months from this second day of August 1880, it is decreed that the mortgage on the 7th of May, 1865, be foreclosed, and that the defendants be for ever barred from redeeming the property, the subject thereof, and that they do deliver up possession thereof to the plaintiff. The plaintiff and defendants respectively must bear their own costs of this suit and of both appeals.

Decree reversed.

[NOTE.—See the next case.]

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5 B. 14 = 5 Ind. Jur. 368.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

JATHA NAIK (*Original Defendant*), *Appellant v.* VENKTAPA (*Original Plaintiff*), *Respondent.** [3rd August, 1880.]

Mortgage—Suit for foreclosure and sale—Parties—Minor—Guardian—Certificate—Madras Reg. V of 1804*—Act XX of* 1864*—Form of decree.*

J. (defendant No. 1) brought a suit (No. 374 of 1861) against the plaintiff's father G. on a mortgage-bond, dated the 2nd April 1856. G. having died before any decree was passed, his widow (plaintiff's mother) was substituted as defendant, and a decree was made against her *ex parte*. It was, however, set aside after her death on the application of M. (defendant No. 2) the sister of G., on the ground of want of due service of process upon G. and his widow. M. was substituted as defendant in the suit, and a new decree was made in her favour. That decree was reversed, in appeal, by the District Court, which allowed J.'s

* Second Appeal No. 188 of 1880.

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claim. In execution of the decree of the Appellate Court the mortgaged property was sold and purchased by J. for Rs 250. J. obtained a certificate of sale, headed thus :—"Jatha Naik, son of Lakshmi, plaintiff; Govinda, son of Naga, deceased, supplement or (substitute) his sister Manji, defendant," and it [15] certified that J. had purchased "all the right title and interest, which the said defendant had in the said property." J. was put into possession of the property. In 1877, the plaintiff (son of the original mortgagor G.) filed the present suit against J. and M., alleging that the mortgage-bond on which J. had obtained his decree had been forged by J.; and contending that the decree and subsequent proceedings under it did not affect his rights, inasmuch as he had not been made a party to them. The prayer in the plaint was that the decree and sale should be set aside, and the property restored to his possession. The defence of J. substantially was that the suit and appeal were defended by person who were proper guardians of the plaintiff and had been in the management of his property. M. did not appear. The Subordinate Judge rejected the plaintiff's claim, holding that M. was his guardian and manager of his property in the previous suit and appeal, and that the mortgage-bond was genuine. In appeal, that decree was reversed by the District Judge on the ground that the plaintiff had not been represented in the previous litigation by a guardian duly appointed under Madras Regulation V of 1804, and was no party to it. He accordingly allowed the plaintiff's claim. On second appeal to the High Court.

Held that, on the death of G. the plaintiff was his sole heir; that the equity of redemption in the mortgaged property vested in him; and that the inheritance was wholly unrepresented in the previous litigation, inasmuch as M. was not appointed guardian of the plaintiff's person or administratrix of his estate, either under Madras Reg. V of 1804, ss. 2, 19, 23, or under Act XX of 1864, nor was she appointed his guardian *ad litem* in the mortgage suit.

Ishan Chunder Mitter v. *Buksh Alli Soudagur* (1) referred to and distinguished.

[R., 9 B. 86 (92); 9 B. 429 (431); 12 B. 18 (22); 20 B. 338 (342); 24 B. 135 (141, 142) =1 Bom.L.R. 627; 14 C. 464 (482); 7 C.W.N. 11 (20).]

THIS was a second appeal from the decision of A. L. Spens, District Judge of Kanara, reversing the decree of the Subordinate Judge of Honavar.

The plaintiff Venktapa instituted this suit against (1) Jatha, and (2) Manji to recover possession of certain immoveable property, purchased by defendant No. 1 at a Court sale. The following are the facts of the case :—Jatha brought a suit (No. 374 of 1861) against Govinda, father of the plaintiff, on a mortgage-bond, dated the 2nd April, 1856, and purporting to have been executed by the said Govinda to him (Jatha). Govinda having died before any decree was passed, his widow (plaintiff's mother) was substituted as defendant, and a decree was made by the Court against her *ex-parte*. That decree, however, was set aside after her death on the application of Manji (defendant No. 2) Govinda's sister, on the ground that due service of the process had not been made either on Govinda or his widow. Manji (defendant No. 2) was [16] substituted as defendant in the suit, and a new decree was made in her favour. It was reversed, in appeal (No. 53 of 1865) by the District Court, which awarded Jatha's claim. The defendant (Manji) having failed to satisfy the decree, the mortgaged property was attached and sold in execution of it, and purchased by Jatha himself for Rs. 250. Jatha obtained a certificate of sale from the Court, which was headed as follows : "Jatha Naik, son of Lakshmi, plaintiff; Govinda, son of Naga, deceased, supplement or (substitute) his sister Manji, defendant." The certificate stated that Jatha had purchased "all the right, title and interest which the said defendant had in the said property." Jatha was duly put into possession. In 1877 the plaintiff brought the present suit, alleging that the mortgage-bond on which Jatha obtained a decree in appeal No. 53 of 1865 (in Suit No. 374 of 1861), had

(1) Marshall, Calc. Rep. 614.

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been forged by him ; that the decree and all the subsequent proceedings under it did not affect his rights, inasmuch as he (plaintiff) had not been made a party to them. He, therefore, prayed that the decree and sale should be set aside, and that he should be placed in possession on the property.

The defence of Jatha (No. 1) substantially was that the claim was barred by limitation ; that the suit No. 374 of 1861 and appeal No. 53 of 1865 were defended by persons who were proper guardians of the plaintiff, and had been in the occupation and management of the property in dispute ; that no fraud had been committed in any of the proceedings. Manji, defandant No. 2, did not appear.

The Subordinate Judge found that the suit was not time-barred ; that the mortgage-bond was genuine and not forged ; that Jatha had not obtained the previous decree by fraud ; that Manji, defendant No. 2, was the plaintiff's guardian under Madras Reg. III of 1802, s. 16, cl. 3, and manager of his property in the previous suits and proceedings. He accordingly rejected the plaintiff's claim.

In appeal, the District Judge reversed the decree of the first Court, on the ground that the plaintiff was not represented in the previous litigation by a guardian duly appointed under Madras Reg. V of 1804, ss. 2, 19, and 23, and that, therefore, **[17]** he was not a party to it. The Judge accordingly made a decree for the plaintiff.

Jatha thereupon appealed to the High Court, Manji, defendant No. 2, did not join in the appeal.

Shamrav Vithal, for the appellant.—The Subordinate Judge found that the mortgage deed was genuine, and that the interests of the plaintiff were properly guarded in the previous litigation. The Judge decided the case on the technical ground that the guardian was not appointed by law. The provisions of Madras Reg. V of 1804 must be taken to have been substantially complied with, because Manji, who appeared in the previous litigation, was actually the plaintiff's guardian, and, as such, managed his property, as found by the first Court. In *Ishan Chunder Mitter* v. *Buksh Alli Soudagur* (1), the Calcutta High Court upheld the title of the purchaser at a Court sale, although the decree under which the property was sold, was against the mortgagor's widow, and although his son, who was a minor, was not a party to it.

The learned pleader also referred to *Bai Kesar* v. *Bai Ganga* (2), and *Hoo* v. *Marquis* as quoted in *Naoroji Beramji* v. *Rogers* (3), to show that though the alienations in them were held invalid as against the minor, the Court placed him under terms to repay the purchase-money before recovering the property alienated.

Ghanasham Nilkanth Nadkarni, for the respondent.—Manji had no certificate of the plaintiff's guardianship while defending the mortgage suit and appeal. She does not appear in them, even as the plaintiff's guardian *ad litem*. The name of the plaintiff does not appear in any of the proceedings in the previous litigation. There was, therefore, no adjudication between him and Jatha. He was in no sense a party to the former suit and appeal. In *Assamathem Nessa Bibi* v. *Roy Lutchmeeput Singh* (4) a Full Bench of the Calcutta High Court held that the omission of one of the heirs of a deceased mortgagor rendered invalid a sale of the mortgaged property under a decree of the Court. In *Vasudev* **[18]** *Vishnu* v.

(1) Marshall, Calc. Rep. 614.
(2) 8 B.H.C.R. A.C.J. 31.
(3) 4 B.H.C.R. O.C.J. 43 (78).
(4) 4 C. 142.

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Narayan Jaggannath (1) the Court set aside the proceedings of the lower Courts made under s. 327 of Act VIII of 1859, on the ground that the guardian of the minor defendant had no certificate under Act XX of 1864. In the case cited from Marshall's Reports, the widow was held to have been sued in her representative capacity (see I. L. R., 4 Calc., 146). In the present case the plaintiff may be put in possession of the property in dispute, and the defendant referred to a suit on his mortgage. He will then have an opportunity to show that the mortgage is forged, as alleged by him in the plaint. The Judge has not gone into the question of the genuineness of that document.

JUDGMENT.

WESTROPP, C.J.—The plaintiff by this suit seeks to recover certain immoveable property (a house and piece of land) which had belonged to his father Govinda, and now is in the possession of the defendant Jatha Naik. The plaintiff alleges that the defendant Jatha Naik forged a mortgage-bond (dated 2nd April, 1856) purporting to be executed by Govinda and to mortgage to Jatha Naik the property above mentioned. That defendant commenced a suit (No. 374 of 1861) upon the mortgage-bond against Govinda in 1861. Previously to any decree being made in that suit, Govinda died. Thereupon his widow was substituted as defendant, and on the 28th June, 1862, a decree was made against her *ex parte*, which was after her death set aside on the application of Manji, the sister of Govinda, upon the ground of want of due service of process upon him and his widow. Manji being substituted as defendant in that suit, the Munsif, on the 31st January, 1865, made a decree in her favour, which was, however, reversed by the District Court, and on the 29th November, 1865, a decree was made by it in favour of Jatha Naik, *viz.*, that in default of payment, by the defendant, of Rs. 300 and costs, he should recover that amount from the mortgaged premises. The Rs. 300 consisted of Rs. 258 principal, and Rs. 42 interest. The mortgaged premises were sold under that decree to Jatha Naik himself for Rs. 250. The certificate of sale, dated the 18th March, 1871, was headed thus: "Jatha Naik, son of Lakshmi, plaintiff; Govinda, son of Naga, deceased, supplement or (substitute) his sister, Manji, defendant." It then proceeded as follows: "The property mentioned **[19]** below was attached and put to auction as the property of the said defendant in execution of the decree on appeal obtained against the said defendant by the plaintiff Jatha Naik on the 29th of January, 1865, in the District Court of Kanara." After describing the mortgaged premises in detail, it certifies that the plaintiff had purchased for Rs. 250 "all the right, title and interest which the said defendant had in the said property."

The order of the Secretary of State for India in Council, annexing Kanara to this Presidency of Bombay, was dated 28th February, 1862. The proclamation of the Governor-General in Council announcing that annexation was dated 15th April, 1862, and Bombay Act III of 1863, introducing the Bombay Regulations and Acts into North Kanara from and after the 16th March, 1862, received the assent of the Governor-General on the 25th March, 1863.

Neither under Madras Reg. V of 1804 (ss. 2, 19, 23), nor under Act XX of 1864, was Manji appointed guardian of the person of the present plaintiff, or administratrix of his estate, nor was she appointed

(1) 9 B.H.C.R. 289.

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his guardian *ad litem* in the mortgagor's suit, although throughout it, and until quite recently, he has been a minor. Nor is there any mention whatever in that suit that Govinda, the mortgagor, left a son surviving him. His existence was ignored by both parties, so far as the proceedings and decrees in that suit are concerned; although he, on the death of his father Govinda, was his sole heir, and accordingly the equity of redemption in the mortgaged premises then vested in him (the plaintiff). The widow of Govinda would have been entitled to maintenance only out of his estate, and Manji (his sister) had not any share or interest whatever in it. The inheritance, therefore, was wholly unrepresented when the decree of the District Court of the 29th November, 1865 against Manji and the sale in virtue of it were made. It is impossible to say, in the language used in some of the cases which have been cited, that the inheritance was "substantially represented." In *Ishan Chunder Mitter* v. *Buksh Alli Soudagur* (1), which has been strongly relied upon for the defendant Jatha Naik, it appeared on the plaint in the suit in which the sale took place "that Juggomohun (the judgment-[20]debtor) had given a bond for Rs. 999, which amount he promised to pay at the end of the year, and that he died leaving Ishan Chunder, his minor son, as his heir, under the guardianship of his mother Shubatra, the widow" of Juggomohun, and the suit was brought against Shubatra, as being in possession of the estate of Juggomohun (2). In the advertisement of sale, although in one column the property to be sold was described as the estate of Shubatra, in another column it was stated to be the rights and interests of the debtor (Juggomohun) that were to be sold. So that it was evident that the widow was only sued in her representative capacity. That case differs materially from the present case, inasmuch as in the suit on the mortgage by Jatha Naik the existence of the present plaintiff (then a minor) was ignored. In *Assamathem Nesa Bibi* v. *Roy Luchmeeput Singh* (3) the omission of one only of several heirs of a deceased Mahomedan mortgagor was by a Full Bench held fatal to a sale in a mortgage suit so far as the sale affected that heir. That case is not in conflict with *Gopey Mohun Thakoor* v. *Sebun Cower* (4), because in the latter, the mortgagor, a Hindu, having died without a son, the equity of redemption vested in the mortgagor's widow; and she fully represented it, albeit that her power of alienation may be limited (5). How particular the Courts of Equity in England are that the mortgagor's heir should be before the Court, whenever the equity of redemption may be affected, will be seen from the cases collected in *Vithaldas Narotamdas* v. *Karsandas Keshavdas* (6).

Under the above circumstances there must be a new trial to ascertain whether or not the mortgage-bond in the plaint mentioned was executed by Govinda, the father of the plaintiff, and, if that question be determined in the negative, the plaintiff will be entitled to recover possession of the property, the subject of this suit. But, if that question be determined in the affirmative, the plaintiff cannot recover the property without redeeming the mortgage by paying the amount due upon it, there not being any allegation that the mortgage-debt was incurred by Govinda for illegal [21] or immoral purposes. For, although by reason of Govinda's death and the absence of his heir (the present plaintiff) from the suit of Jatha Naik for sale and foreclosure, the decree for sale and the sale itself made

(1) Marshall, Calc. Rep. 614.
(2) *Vide* S.C. W.R. Special Number, p. 119.
(3) 4 C. 142
(4) East's Notes No. 64; 2 Morley Dig. 105.
(5) See the cases cited in 8 B.H.C.R. O.C.J. at p. 156.
(6) 5 B.H.C.R. O.C.J. 76.

in that suit cannot stand as against the present plaintiff, yet, on the hypothesis that the mortgage was executed by Govinda, and not for illegal or immoral purposes, it would bind the mortgaged property as against Govinda's son (1) : *Girdharilali* v. *Kantoo Lali* (2). Jatha Naik being (on the hypothesis of the due execution of the mortgage-bond) now at the least a mortgagee in possession, the present plaintiff cannot be permitted to recover that property without redeeming the mortgage, and, if under such circumstances he had been a defendant in Jatha Naik's suit for sale and foreclosure, he (the present plaintiff), could not have averted a decree for sale and foreclosure, except by paying off the mortgage.

The point of limitation made by the defendant in the Courts below was abandoned in this Court.

We reverse the decree of the District Judge, and remand this cause for a new trial by him to ascertain whether the mortgage-bond in the plaint mentioned was executed by Govinda, the father of the plaintiff. If that question be determined by the District Judge in the negative, he should make a decree that the plaintiff do recover the property, the subject of this suit, from the defendant with costs of this suit and of both appeals therein. But if the said question be determined by the District Judge in the affirmative, he should make a decree that the plaintiff do pay to the defendant the sum of Rs. 300, together with interest on Rs. 258 from the 29th November, 1865, until the date of payment ; such interest is to be at the rate prevalent at the date of the said mortgage in the district (wherein it was executed) as stipulated in the said mortgage, and such rate is to be ascertained by the District Judge ; but he, in fixing the total amount to be paid in respect of such interest, shall allow credit to the plaintiff for the rents and profits received by the defendant from the time he was put into possession of the said mortgaged premises (after the sale **[22]** thereof to him in the former suit) in respect thereof, but deducting from the said rents and profits all allowances which should be justly made to the defendant in respect of land revenue, cess-taxes, repairs and other expenses (if any) properly incurred by him in respect of the said mortgaged premises during the period of his possession. If the defendant has not been in receipt of rents and profits of the said premises, but has been in personal occupation thereof, the account of what should be debited to the defendant in respect of the said premises should be taken by charging him with a fair and reasonable occupation rent in respect thereof during the period of such personal occupation. The balance due from the plaintiff to the defendant in respect of the said sum of Rs. 300 and interest, after crediting the plaintiff with such rents or profits or occupation rent as aforesaid, but deducting such allowances as aforesaid, should be notified by the District Judge to the plaintiff or his authorized agent or pleader as soon as may be, and the District Judge should make a decree that if the plaintiff do not pay to the defendants such balance and the costs of this suit and of both of the appeals therein within four calendar months after such notification as aforesaid, the plaintiff shall be for ever barred and foreclosed from redeeming the said mortgage or recovering the said mortgaged premises or any part thereof, and that the plaintiff do pay to the defendant the costs last aforesaid.

Decree reversed and case remanded.

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(1) Dig. Bk. I, ch. v, pl. clxvii.

(2) 1 I.A. 321 and see *Surai Bunsi* v. *Sheo Prashad*, 6 I.A. 88 (104) *per* Sir J. Colvile.

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Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

VADJU (*Plaintiff*), *Appellant v.* VADJU AND ANOTHER (*Defendants*), *Respondents.** [21st September, 1880.]

Mortgage—Redemption before expiration of time—Cause of action.

The general principle as to redemption and foreclosure is that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem, and the right to foreclose are co-extensive.

A mortgage deed, dated the 30th April, 1870, stipulated that the mortgagor would pay the debt, with interest, within ten years and redeem the mortgaged [23] property. In a suit instituted on the 30th July, 1877, for the redemption of the property, the mortgagee contended that the time had not expired.

Held that the suit was unsustainable, because prematurely instituted, the mere use of the word " within " not being a sufficient indication of the intention of the parties that the mortgagor might redeem in a less period than ten years.

[**N.F.**, 201 P.R. 1889; 137 P.W.R. 1908; **F.**, 8 A. 95; **Rel.**, 8 Ind. Cas. 707 (708); **R.**, 29 A. 471 (473)=4 A.L.J. 375=A.W.N. (1907) 133; 20 B. 677 (684); 39 C. 828 (830)=17 C.W.N. 149=15 Ind. Cas. 287; 16 M. 486; 16 C.P.L.R. 59 (63); 18 M.L.J. 235 (238); **Cons.**, 10 A. 602 (609); 23 M. 33.]

THIS was a second appeal from the decision of R. F. Mactier, Judge of the District Court of Satara, reversing the decree of P. S. Banivali, First Class Subordinate Judge at the same place.

The plaintiff brought this suit against (1) Narhar, and (2) Vadju, and sought to recover possession of certain land, alleging that he had purchased it for Rs. 100 from defendant No. 1 (Narhar) under a deed of purchase, dated the 21st February 1876, and that he was obstructed by defendant No. 2 (Vadju) in obtaining possession. The plaintiff also claimed mesne profits from the date of purchase until the date of the institution of the suit. The plaint was filed on the 30th July 1877.

Defendant No. 1 (Narhar) admitted the sale, and stated that he had no objection to give possession of the land to the plaintiff; that the land had been mortgaged to defendant No. 2 who refused to accept payment of his mortgage-debt and to re-convey the land. Defendant No. 2 (Vadju), among other things. answered that the land had been mortgaged to him by defendant No. 1 for a period of ten years, under a deed (Exhibit No. 11), dated the 30th April, 1870, and that it could not be redeemed before the expiration of that time.

The mortgage-deed stipulated that the mortgagor would pay the mortgage-debt *within ten years*, and redeem the mortgaged property from the mortgagee.

The Subordinate Judge found the mortgage proved, but held the plaintiff entitled to recover the land on payment of the mortgage debt. He made a decree accordingly and gave the plaintiff mesne profits against Narhar (defendant No. 1).

In appeal, the District Judge reversed the decree of the first Court on the ground that the plaintiff had no right to redeem before the expiration of the time fixed in the mortgage-deed.

The plaintiff appealed to the High Court.

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* Second Appeal No. 4 of 1880.

[24] *Manekshah Jehangirshah*, for the appellant.—The plaintiff is entitled to sue for possession of the land, although ten years from the date of the mortgage have not elapsed. He has a right to redeem at any time within that period, as stipulated in the said deed.

G. R. Kirloskar, for the respondent.—The present case is not an exception to the general rule of law, that the right to redeem and the right to foreclose are co-extensive. The mortgagee would not be permitted to sue for a foreclosure of the mortgage before the expiration of ten years. No suit therefore, would lie for redemption before the expiration of that time.

JUDGMENT.

WESTROPP, C.J.—The general principle as to redemption and foreclosure is that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose must be regarded as co-extensive: *Sakharam* v. *Vithul Lakha Gouda* (1), *Lila* v. *Vasudev* (2), *Brown* v. *Cole* (3), (and see per Lord Kingsdown in 7 Moore's Indian Appeals 355.) It is admitted that, under the mortgage to the second defendant Vadju Raghu, he could not foreclose that mortgage until the expiration of ten years from its date (the 30th of April 1870) and we think that the mere use of the Marathi word "*ant*," which signifies "within," is not a sufficient indication of an intention of the parties that the ordinary principle should not prevail with respect to the mortgagor, and that he might redeem in a less period than ten years. We should expect some stronger expression than that word, if the intention were that the mortgagor's position was to be more favourable than that of the mortgagee. The plaint was filed on the 30th July 1877, *i.e.*, about two years and nine months before the expiration of the ten years. This suit was, therefore, prematurely instituted, and is accordingly unsustainable. That being so, the decree of the Subordinate Judge was wrong, not only so far as regards the defendant Vadju Raghu, but also as regards the defendant Narhar, against whom no mesne profits were recoverable, inasmuch as the plaintiff could not redeem until the ten years had elapsed. **[25]** The decree of the District Judge is affirmed. The plaintiff must pay to the defendant Vadju Raghu his costs of suit and of both appeals, and to the defendant Narhar's son his costs of the second appeal only. The conduct of the deceased defendant Narhar himself has been such that his son and heir must bear his own costs of the suit and of the regular appeal.

Decree affirmed.

(1) 2 B.H.C.R.A.C.J. 225. (2) 11 B.H. C. R. 283. (3) 14 Sim. 427.

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5 B. 25.

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APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice M. Melvill.

BHAGUJI (*Original plaintiff*), *Appellant v.* ANIABA AND OTHERS (*Original Defendants*), *Respondents.** [17th December, 1877.]

Bombay Act V of 1864—*Limitation Act, IX of* 1871, *sch. II, art.* 46—*Partition suit.*

Plaintiff, in 1876, filed a suit to establish his right to and to recover a fourth share of certain property which he alleged to be ancestral. He stated his cause of action to have accrued on the 17th May 1871, on which day he had been dispossessed by an order by the Mamlatdar, made under Bombay Act V of 1864. The District Court held that the suit was barred by art. 46, sch. II of the Limitation Act IX of 1871.

Held by the High Court, on special appeal, that art. 46 did not apply, and that the suit was not barred.

[F., 5 B. 27 ; **Appl.**, 15 B. 299 (305) ; **Expl.**, 26 B. 146=3 Bom. L.R. 594.]

THIS was a special appeal from the decision of G. Druitt, Assistant Judge at Poona, in Appeal No. 232 of 1876, reversing the decree of Janardan Ramchandra, Second Class Subordinate Judge of Khed.

The plaintiff, Bhaguji, sued to establish his right to and recover possession of a fourth share of a house which he alleged to be the ancestral property of himself and the defendants. The plaint was filed in the year 1876. He stated his cause of action to have accrued on the 17th May 1871, on which day he was dispossessed of the house in dispute by an order of the Mamlatdar under Bombay Act, V of 1864.

[26] Defendant No. 1 admitted the plaintiff's claim. Defendants 2 and 3 answered that there were three ancestral houses, one of which had been occupied by the plaintiff himself; that the defendants were divided in interest from him; that the plaintiff never occupied the house in dispute, except once when he entered it by force and was ousted by an order of the Mamlatdar, on the complaint of defendant No. 2, and that the suit was barred by limitation.

The Subordinate Judge found that the three houses were undivided ancestral property, and that the plaintiff was entitled to a fourth share of each. He made a decree accordingly.

Aniaba (defendant No. 2) appealed. The Assistant Judge held the suit barred by limitation under Act IX of 1871, sch. II, art. 46, because it was not brought within three years from the date of the Mamlatdar's order, as required by that article. He accordingly dismissed the plaintiff's claim.

The plaintiff thereupon appealed to the High Court.

Pandurang Balibhadra, for the appellant.

Y. V. Atle, for the respondents.

JUDGMENT.

WESTROPP, C.J.—The Court reverses the decree of the Assistant Judge and remands the cause for re-trial on the merits. The Court declares that the Mamlatdar's order of the 17th day of May 1871, does not interfere with a partition suit, such as the present. The District Court should ascertain whether any and what portion of the family property is undivided;

* Special Appeal No. 189 of 1877.

(whether the same consists of houses, lands or moveables), and should make a fair partition of such undivided property amongst the various co-parceners. Costs of suit and both appeals should be disposed of by the District Court in such manner as may be just.

Case remanded.

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5 B. 27.

[27] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F.D. Melvill.

SHIVRAM (*Original Plaintiff*), *Appellant v.* NARAYAN AND OTHERS (*Original Defendants*), *Respondents.** [25th August, 1880.]

Limitation Act, IX of 1871, *sch. II, art.* 46—*Partition suit*—Res judicata—*Bombay Act, V of* 1864.

Art. 46 of sch. II of the Limitation Act, IX of 1871, is not applicable to a partition suit.

In 1871, the plaintiff sued to establish his sole right to a portion of a field on the ground that it had been allotted to him by partition. The defendant also claimed it as his share obtained by partition. The Court rejected the plaintiff's claim, holding that no partition had taken place and that the field was the joint property of five co-parceners, including the plaintiff and defendant. In 1878, the plaintiff brought a second suit for a partition of the field, including the portion for which his former suit had been instituted.

Held that the present suit for partition was not barred by the previous suit which was brought to establish the plaintiff's sole right to the lands in question.

Bhaguji Raghuji v. *Aniaba* (1) followed.

[Appl., 15 B. 299.]

THIS was a second appeal from the decision of E. Hosking, Assistant Judge at Nasik in the District of Thana, in appeal No. 273 of 1878, reversing the decree of R. D. Paranjape, Second Class Subordinate Judge at Sinnar.

The plaintiff, Shivram, sued Narayan and three others to recover possession, by partition, of his fifth share in a field No. 159, situated at the village of Gonde in the Taluka of Sinnar. In 1871, the plaintiff sued Vithoji (defendant No. 3) in the Mamlatdar's Court for possession of the northern portion of the field in dispute under Bombay Act V of 1864. On the 11th August of that year, the Mamlatdar rejected the plaintiff's claim and gave possession of the land to defendant No. 3. The plaintiff thereupon brought a regular suit (No. 1126 of 1871) for possession of the land awarded by the Mamlatdar to defendant No. 3, alleging that it had been allotted to him by partition. The defendant No. 3 also claimed it as his share, obtained by partition. The Court, on the 20th October, 1875, rejected the plaintiff's claim, on the ground that no partition had taken place. The [28] plaintiff, therefore, brought the present suit on the 5th February, 1878, for a partition of the field in dispute and for possession of his fifth share therein.

Defendants Nos. 1, 2 and 4 admitted the plaintiff's claim. Defendant No. 3 (Vithoji) pleaded, among other things, that the claim was barred by the previous suit (No. 1126 of 1871).

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* Second Appeal No. 241 of 1880.

(1) 5 B. 25.

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The Subordinate Judge allowed the plaintiff's claim, holding that it was not barred by the former suit. His decree was reversed by the Assistant Judge in appeal (17th February, 1880), which was preferred by Vithoji (defendant No. 3) alone. The Assistant Judge observed: "under the Limitation Act of 1871, the plaintiff, after the order passed by the Mamlatdar, could only bring a suit to recover possession of the land awarded to Vithoji, within three years from the date of the order. His first suit having failed, he brought no other till the present suit was instituted; consequently, under the operation of s. 29 of Act IX of 1871, plaintiff's right to the land in Vithoji's possession is extinguished * * * * Plaintiff's remedy was to establish his right by suit within the time allowed by law, and this he neglected to do. Plaintiff having sued for a fifth of the whole field and one-fifth of the field not being liable to partition at his suit, the claim must be rejected as against all the defendants."

The plaintiff appealed to the High Court on the 7th June, 1880.

Pandurang Balibhadra, for the appellant.—The plaintiff was entitled to claim partition within twelve years from the date when his cause of action arose. The lower Court was wrong in holding his claim barred. The Mamlatdar's order does interfere with a partition suit, as ruled in *Bhaguji Raghuji* v. *Aniaba Raghoba* (1). Such order is not conclusive evidence of the facts of possession and dispossession, *Basapa* v. *Lakshmapa* (2).

Shantaram Narayan, for respondent (defendant No. 3).

JUDGMENT.

WESTROPP, C.J.—Following the decision in *Bhaguji* v. *Aniaba* we hold that art. 46 of sch. II of Act IX **[29]** of 1871 is not applicable to a partition suit. And this Court being requested by the parties to decide now whether the decree in suit No 1126 of 1871 brought by Shivram (the present plaintiff) constitutes the relief sought in the present suit for partition a *res judicata*, rules that question in the negative, as the suit No. 1126 of 1871 was brought to establish a sole right in Shivram to the seven acres of land, the subject of that suit, and not for a partition of the family estate at large, including the seven acres in question. The decree of the Assistant Judge is accordingly reversed and the Subordinate Judge is directed to proceed to make a just and equal partition amongst the coparceners of the undivided family of which the plaintiff and defendants are members, of the thirty-nine acres of land in the plaint mentioned. The parties respectively should bear their own costs of the suit and appeals.

Decree reversed.

(1) 5 B. 25.

(2) 1 B. 624.

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Before Mr. Justice M. Melvill and Mr. Justice Kemball.

KALYANBHAI DIPCHAND (*Appellant*) *v.* GHANASHAM LAL JADUNATHJI (*Respondent.*)* [13th September, 1880.]

Decree—Execution—Injunction restraining execution—Practice—Revival of proceedings by representative of decree-holder—Substitution of name of representative on the record—Limitation Act, XV of 1877, *sch. II, arts.* 178-79—*Act IX of* 1871, *art.* 167.

J. obtained a decree against the firm of M.R. in 1863, and on the 16th September 1869, applied for execution by attachment and sale of certain immoveable property. The property was attached, but the sale was delayed by various causes until the 5th February 1876, when it was ordered to take place on the 18th March 1877. Meanwhile P. brought a suit against J., and on the 14th March 1876, he obtained an injunction restraining J. from proceeding *pendente lite* to the sale of the attached property. J. appealed against the order granting the injunction, which, however, was confirmed on the 26th June 1878. Meanwhile, on the 22nd January 1877, J. had died, and thereupon the proceedings in the matter of the injunction as well as in P's suit were carried on by G as his representative. On the 19th January 1880, P's suit was dismissed and with it the injunction of the [30] 14th March 1876, fell to the ground. On the 5th February 1880, G applied to have his name substituted for that of J, in the application for execution of the 16th September, 1869, and to proceed with the case, and on the 19th February 1880, this application was granted, and an order made that execution should be proceeded with on J's application of September, 1869. K., as representing the firm of M. R., appealed.

Held that G. was entitled to execution.

Where an application for execution has been made and granted but the right to execute has been subsequently suspended by an injunction or other obstacle, the decree-holder may apply for a revival of the proceedings within three years from the date on which the right to apply accrues, *i.e.*, the date on which the injunction or other obstacle is removed: Art. 178 of sch. II of Act XV of 1877.

Where a decree-holder, whose right of execution has been thus temporarily suspended, dies, his representative has the same rights as he had himself to apply for and obtain a revival of the proceedings.

Where an injunction obtained against the execution of a decree has been dissolved, the time during which it was in force cannot be deducted under s. 15 of Act XV of 1877 in computing the period of limitation, within which an application for execution may be made. Section 15 only relates to injunctions which stay the institution of suits, and the word "suit" does not include an application (s. 3).

It was contended in the above case that G. had no right to apply for a revival of proceedings unless his name were substituted on the record as J's representative that as his right to apply for such substitution accrued immediately upon J's death which had happened more than three years previously, so much of his application of 3rd February 1880, as related to the substitution of names was barred by art. 178 of sch. 2 of Act XV of 1877; and that, consequently, the other portion of his application which related to execution was necessarily inadmissible, inasmuch as it depended upon the substitution of G.'s name, which it was too late to effect.

Held, that under the circumstances of the case, G.'s right to apply for the entry of his name in the place of that of J, could not be regarded as having accrued immediately upon J.'s death. At that time J.'s application for execution, being suspended by the injunction, was to all intents and purposes non-existent. It could not be revived until the injunction was removed. During the continuance of the injunction an application by G. for the entry of his name could not have been entertained by the Court, inasmuch as

* Appeal No. 18 of 1880 from order.

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J.'s application for execution was in abeyance, and would never be revived at all in the event of P. succeeding in his suit; and even if P. failed, it might also happen that J.'s application would not be revived in favour of G., for although he might be J.'s representative at the date of his application, he might be dead before the decision of P.'s suit.

[R., 5 A. 243=A.W.N. (1882) 8; 5 A. 459 (461); 5 A. 596 (598); 17 A. 425=A. W. N. (1895) 82; 18 A. 482 (496); 23 A. 13 (17) 10 B. 108 (111); 16 B. 294 (301); 20 B. 175 (178); 14 C. 385; 23 C. 397; 23 C. 437; 26 M. 780=13 M. L. J. 412; 28 M. 50=14 M.L.J. 401 (F. B); 30 M. 209=17 M.L.J. 194; 7 Ind. Cas. 886 (888); D., 7 B 293 (295).]

THIS was an appeal from the order of R. B. Mangeshrao Balvant, Subordinate Judge, first class, of Surat.

[31] The facts of the case and the arguments on either side are fully set forth in the judgment.

Farran, with him *Pandurang Balibhadra*, for the appellant, the original opponent.

Nanabhai Haridas, Government Pleader, for the original applicant.

JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—On the 2nd September, 1863, Jadunathji, father of the respondent Ghanashamlalji, obtained a decree for money against the firm of Manekchand Rupchand. On the 16th September, 1869, he applied for execution of the decree by attachment and sale of certain immoveable property. It is not disputed that this application was made within the period allowed by law. The property was attached, but the sale was delayed by various causes, which it is not material to consider, until the 5th February 1876, when the sale was ordered to take place on the 18th March following. Meanwhile, Premchand Roychand brought a suit against Jadunathji, the object of which was to restrain Jadunathji from the committal of the breach of a contract, whereby it was alleged that Jadunathji had covenanted with Premchand not to proceed in execution against the particular property which had been attached; and on the 14th March, 1876, Premchand obtained an injunction restraining Jadunathji from proceeding *pendente lite* to the sale of the attached property. The order granting the injunction was appealed against to the High Court, which, on the 26th June, 1878, confirmed the order. Meanwhile, on the 22nd January, 1877, Jadunathji had died; and thereupon the proceedings in the matter of the injunction, as well as in Premchand's suit, were carried on by the respondent as Jadunathji's representative. On the 19th January, 1880, Premchand's suit was dismissed; and with it, the injunction of the 14th March, 1876, fell to the ground. Immediately afterwards, namely, on the 3rd February, 1880, the respondent applied to the Subordinate Judge to substitute his name for that of his father in the application of 1869, and to proceed with the case. The Subordinate Judge refused at first to make any order on this application, because he was not satisfied that the applicant was [32] Jadunathji's legal representative; but on a similar application being made on the 19th February, the Subordinate Judge declared himself satisfied on this point, and, accordingly, ordered hat the respondent's name should be substituted for that of Jadunathji, and that execution should be proceeded with upon Jadunathji's application of 1869. Kalyanbhai, as representing the firm of Manekchand Rupchand, made an effort to induce the Subordinate Judge to revoke this order; but having failed in this effort, he has now appealed to this Court.

The only question which either party has asked us to decide is, whether the applications made by the respondent on the 3rd and 19th February, 1880, were or were not barred by the law of limitation. The fact of an application having been made on the 3rd February is really immaterial, and we may confine ourselves to the consideration of the application of the 19th February, on which the Subordinate Judge's order for further execution was passed.

The appeal has been argued at great length; but the grounds on which the appeal has been supported and resisted may be very briefly stated.

For the appellant, it was contended that the only course open to Jadunathji's representative was to make an application for execution in the manner prescribed in s. 232 of Act X of 1877; that his application of the 19th February, 1880, was not such an application as is contemplated in that section; and that even if it were so, it was barred by art. 179, sch. II of Act XV of 1877, inasmuch as it was not made within three years from the date of Jadunathji's application in 1869, which, it is said, was the only application answering to the description contained in the said art. 179. It was further argued that, even if art. 179 does not apply, yet art. 178 certainly applies; and that under that article no application could be made by Jadunathji's representative, after three years had elapsed from the date of Jadunathji's death.

For the respondent, it was argued that neither of the arts. 178 or 179 apply to the matter; that the application of the 19th February, 1880, was not a fresh application for execution, but **[33]** merely an application for a substitution of names, and for the revival of Jadunathji's original application of the 16th September, 1869; that, accordingly (having regard to the third paragraph of s. 3, Act X of 1877), the rules of procedure to be applied are those contained in Act VIII of 1859; that by s. 102 of that Act (which was extended to miscellaneous cases and proceedings by s. 38 of Act XXIII of 1861) nothing more was required than that an application for the substitution of names should be made within what the Court may consider a reasonable time; that the Subordinate Judge was right in considering that the respondent's application was made within a reasonable time; and that, at any rate, whether he was right or wrong, there is no appeal against his decision. It was further stated that even if art. 179, sch. II, Act XV of 1877, were held applicable to the case, the respondent was in a position to show that certain applications had been made by him in Premchand's suit, and in another suit, within three years preceding the 19th February, 1880, and that these applications sufficiently fulfilled the requirements of the said art. 179.

We may at once say that we do not entertain any doubt that if s. 102 of Act VIII of 1859 be applicable to this case, the words "within what the Court may consider a reasonable time" must be held to have been superseded from the 1st October, 1877, by the provisions of Act XV of 1877; and that it is by the rules of limitation contained in the last-mentioned Act that our decision must be governed. We are also satisfied that we are competent to entertain an appeal against the Subordinate Judge's order of the 19th February, 1880; the effect of that order being to authorise proceedings in execution in compliance with an application which (if the applicant's contention be well grounded) could not legally be entertained.

From the statement which we have made of the previous proceedings in this matter, it is clear that there has been nothing like *laches* on the part of either Jadunathji or the respondent. Jadunathji during

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his lifetime, and the respondent after Jadunathji's death, did everything that was possible to obtain the discharge of the injunction obtained by Premchand Roychand. So [34] long as that injunction remained in force, it was impossible for the respondent to proceed further with the execution. As soon as the injunction was dissolved, the respondent made his application for further execution. If that application be barred by the statute, the statute stands urgently in need of amendment.

The Subordinate Judge, in computing the period of limitation, has considered himself authorised by s. 15 of Act XV of 1877 to deduct the time of the continuance of Premchand's injunction. However reasonable it might be that the Legislature should sanction such a deduction, the section referred to cannot be held to justify it. The section only relates to those injunctions which stay the institution of suits; and the word "suit" does not include an application (s. 3.) We must, therefore, find some other means, if possible, to give effect to what we may suppose to have been the intention of the Legislature.

It is manifest that, if art. 179 were held to govern applications such as that which we are now considering, the most monstrous injustice would ensue. If an injunction like that obtained by Premchand were to remain in force for three years (and under our system of successive appeals it would frequently do so), the result would be that further execution would become impossible. For art 179, like the corresponding provision in Act IX of 1871, requires that an application for the execution of a decree should be made within three years from the date, not of the last proceeding (as under s. 20 of Act XIV of 1859), but of the last application: and, therefore, if, after the removal of the injunction, the decree-holder were to apply for execution, he would be met by the object that more than three years had elapsed between the dates of his former and his subsequent applications.

Both the Calcutta and the Allahabad Courts have evaded this difficulty by holding, in analogous cases, that an application made by a decree-holder, after the removal of an obstacle which has for a time rendered execution impossible, is not an application to execute the decree within the meaning of Act IX of 1871, sch. II, art. 167 (which corresponds with Act XV of 1877, sch. II, art. 179), but merely an application for the continuation [35] of the former proceedings: *Booboo Pyaroo* v. *Syud Nazir Husein* (1), *Issurree Dassee* v. *Abdul Khalak* (2), *Hurronath Bhunjo* v. *Ohunnilall Ghose* (3), *Paras Ram* v. *Gardner* (4). We think that we should accept and follow those decisions, as we do not see any more satisfactory mode of preventing the words of the statute from conflicting with what must have been the intention of the Legislature.

The decisions which we have cited, have reference to the provisions of Act IX of 1871. It is not clear that under that Act there would be any period of limitation provided for an application to revive a previous application which had been temporarily suspended. In the case of *Booboo Pyaroo* v. *Syud Nazir Husein* (1), reported 23 W. R. 183, Markby, J., throws out a vague suggestion, that the decree-holder might lose his remedy, if he were dilatory or negligent in pursuing it. In the Allahabad case the Chief Justice decided that the decree-holder had three years from the date on which the obstruction to execution was finally

(1) 23 W.R.C.R. 183.
(2) 4 C. 415.
(3) 4 C. 877.
(4) 1 A. 355.

removed, but he did not state on what provision of Act IX of 1871 he relied. The decision of the Chief Justice, however, would be strictly in accordance with the provisions of the new Limitation Act. Article 178, sch. II, Act XV of 1877, prescribes a period of three years for all applications for which no period of limitation is provided elsewhere; and the time begins to run from the date at which the right to apply accrues. It is clear that the right to apply for the revival of proceedings, which have been suspended by an injunction or other like cause, accrues, as a rule, on the date on which the injunction or other obstruction is removed.

Under this view, it is certain that if the application of the 19th February, 1880, had been made by the original decree-holder Jadunathji, no question of limitation could have been raised. This was indeed admitted in the course of the argument for the appellant. But it was contended that the case is different when the application is made, not by the original decree-holder, but by his representative; and this is the only question which it remains for us to consider.

[36] It is difficult to see why any difference should be drawn in this respect between the original decree-holder and his representative. We have pointed out the injustice which would result from the application of art. 179 to such a case; and this consideration applies as strongly to the representative as to the original decree-holder. His only remedy when an obstruction has lasted for more than three years, is to apply, as the decree-holder would apply, not for fresh execution, but for a revival of the original application; and as this is his only remedy, we must necessarily hold that it is reserved to him. He is, equally with the original decree-holder, prevented from making such an application, so long as the injunction or other similar obstacle continues; and, therefore, his right to apply cannot accrue until the obstruction is removed.

But it was contended, in opposition to the view, that a necessary preliminary to the revival of Jadunathji's application in favour of the respondent was the substitution of the respondent's name for that of Jadunathji on the record; that it was necessary for the respondent to apply for such substitution, and that, in fact, his application of the 19th February, 1880, was in part a prayer for such substitution; and that, as his right to apply for such substitution accrued immediately upon Jadunathji's death, which happened more than three years previously, so much of his application as related to the substitution of names was barred by art. 178, sch. II, Act XV of 1877, and that, consequently, the other portion of his application, which related to execution, was necessarily inadmissible, inasmuch as it depended upon the substitution of the respondent's name, which it was too late to effect. We do not, however, feel bound to hold that, under the circumstances of this case, the respondent's right to apply for the entry of his name in the place of that of the decree-holder accrued immediately upon the death of the decree-holder. In the analogous cases dealt with by the Calcutta Court to which we have referred (*Booboo Pyaroo* v. *Syud Nazir Husein* (1) and *Issurree Dassee* v. *Abdul Khalak* (2)), noapplication for the substitution of his name could have been made by the representative, if **[37]** the decree-holder had died; for the execution proceedings had been struck off the file, and there would therefore have been nothing on which the application could operate. In the present case Jadunathji's application was still on the file; but it was held in complete suspense, so long as

(1) 23 W.R.C.R. 183.

(2) 4 C. 415.

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the injunction continued in force. For the time being, it was to all intents and purposes as if it did not exist. It could not be revived for any purpose whatever, until the injunction was removed. If, during the continuance of the injunction, the respondent had applied for the entry of his name, we conceive that the answer of the Court to his application would have been this; that Jadunathji's application was in abeyance; that it might happen that it would never be revived at all, inasmuch as Premchand might succeed in his suit; that if Premchand failed, it might still happen that it would not be revived in favour of the respondent, for, even if he were Jadunathji's representative at the date of his application, he might be dead before the decision of Premchand's suit; and that for these reasons the Court refused to entertain his application, or to make any inquiry into his claim to be Jadunathji's representative, inasmuch as such inquiry would certainly be premature, and would possibly turn out to be useless.

For the reasons which we have stated, we are of opinion that the respondent's application of the 19th February, 1880, is governed, not by art. 179, but by art. 178, sch. II, Act XV of 1877: and that, inasmuch as it was made within three years from the date of the removal of the injunction, on which date we consider that the right to make the application accrued, the application was not barred by the provisions of the said article.

We, accordingly, confirm the order of the Subordinate Judge with costs.

Decree confirmed.

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5 B. 38=5 Ind. Jur. 372.

[38] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

SAMALBHAI NATHUBHAI (*Original Plaintiff*), *Appellant v.* SOMESHVAR, MANGAL, AND HARKISAN (*Respondents*).*

[2nd August, 1880.]

Partnership—Hindu Law—Joint Hindu family—Business carried on by one member as manager—Liability of all as joint owners—Ancestral trade and ordinary partnership, difference between—Indian Contract Act IX of 1872.

J., the father of the three defendants, established a trading firm in 1865 under the name of J. H. He and his three sons lived together as a joint Hindu family. J. died in 1872 and the business was continued under the same name by S. as the eldest brother and manager of the family. The youngest of the three brothers was a minor at the date of his father's death. The plaintiff sued the three brothers to recover money due on an account signed by S. in the name of the firm. The second defendant contended that he had never participated in the property of the business; that he had not resided at the family residence for six years; that he could not be considered a partner of the firm and, therefore, was not liable to the plaintiff:

Held that he could not repudiate a liability arising out of the ordinary transactions of the firm. During his father's life he was joint owner, and after his father's death he acquiesced in the continuance of the firm under the same name and ostensibly, therefore, with the same constitution. He had done no act to divest himself of his share. He had given no notice of repudiation, and made no partition, and there was nothing to prevent him from demanding his share of

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* Second Appeal No. 20 of 1880.

the partnership, or claiming to share in the profits. There was, therefore, nothing to exempt him from the ordinary rule of Hindu law, which makes every member of a united family liable for debts properly incurred by a manager for the benefit of the family. The debt due to the plaintiff for goods supplied to the shop was properly incurred in the course of the ordinary transaction of the firm, and presumably, therefore, for the benefit of all the joint owners of the firm.

The rights and liabilities arising out of joint ownership in a trading business created through the operation of Hindu law between the members of an undivided Hindu family cannot be determined by exclusive reference to the Indian Contract Act (IX of 1872), but must be considered also with regard to the general rules of Hindu law which regulates transactions of united families.

An ancestral trade may descend like other inheritable property upon the members of a Hindu undivided family. The partnership so created or surviving has many, but not all, of the elements existing in an ordinary partnership. For example, the death of one of the partners does not dissolve the partnership; nor, as a rule, can one of the partners, when severing his connection with the business, ask for an account of past profits and losses.

[F., 10 Ind. Cas. 978 (979) = 4 S.L.R. 260 (261); R., 29 A. 176 (180) = 4 A.L.J. 94 = A. W.N. (1907) 13; 14 B.189 (194); 26 B. 206 = 3 Bom. L.R. 738 (755); 34 B. 72 (80) = 11 Bom. L.R. 255 = 2 Ind. Cas. 173; 15 M. 356; 22 M. 166 (170) = 9 M.L.J. 3; 9 Bom.L.R. 1289 (1292); 11 Bom. L.R. 255 (265) = 2 Ind. Cas. 173; 8 Ind. Cas. 999 (1010) = 97 P.R. 1910 = 142 P.W.R 1910 = 11 P.L.R. 1911; D., 25 A. 378 (383); 28 M. 344; 10 Bom L.R. 668 (672, 673).]

THIS was a second appeal against the decision of S. H. Phillpotts, Judge of the District of Ahmedabad, amending the decree of R. S. Madhuvachhram, Subordinate Judge of Kapadvanj.

[39] The facts of the case, in so far as they are material for the purposes of this report, are as follows:—

The plaintiff sued on a balance of account, dated 24th April, 1896, signed by the first defendant Someshvar in the name of the firm of "Jivram Haribhai." This firm was established about the year 1865 by Jivram, the father of the three defendants. Jivram died in 1872, leaving the defendants, of whom Someshvar was about 23 years old, Mangal 17, and Harkisan, a minor. Till his death Jivram continued to be the owner of the firm, and on his death the three defendants succeeded him, and up to the date of the suit no partition had taken place amongst them. The family remained, as before, a joint Hindu family, but the business of the firm was transacted by Someshvar alone as the eldest brother and manager of the family.

Someshvar admitted the claim, but urged that the liability lay upon the firm, and not upon himself personally. The second and third defendants set up a plea of limitation, and contended that they were not the owners of the firm of "Jivram Haribhai" solely managed by Someshvar. On all these points the Subordinate Judge ruled in favour of the plaintiff, and made a decree accordingly.

Mangal alone appealed to the District Judge. He contended that he never participated in the profits of the firm, that he did not reside at the family residence, and could not be considered a partner of the firm.

The District Judge held that Mangal was not a partner. He said: "there is no evidence whatsoever that Mangal participated in the benefits of the firm, except the vague statement that the house expenses were paid out of its assets, but it is in evidence that Mangal has always been absent from Kapatvanj, where the family house is, since a year after his father's death; and there is no evidence that he has any wife or child supported at the expense of the firm. Under s. 241 of the Indian

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Contract Act, though Mangal had left the portion due to him as representative of his deceased father, that alone would not make him a partner. There is no evidence that Mangal has, by his conduct, led respondent to believe that he is a partner (s. 245), **[40]** or that he has consented to allow himself to be represented as a partner under s. 246 of the Indian Contract Act. The Subordinate Judge writes that the maintenance of all of them was derived from the business, but that is not proved; on the contrary, the only evidence in the case shows that appellant has been absent at Dongarpur almost entirely since his father's death, and that he has remitted moneys, which are debited to his own private account; and there is no evidence that he has drawn any moneys or received any benefit as partner." For these reasons the District Judge amended the decree of the Subordinate Judge by absolving Mangal from liability.

Nanabhai Haridas, Government Pleader, for the appellant.

Shantaram Narayan, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—This is not the case of an ordinary partnership arising out of contract. It is the case of joint ownership in a trading business, created through the operation of Hindu law between the members of an undivided Hindu family. The rights and liabilities arising out of such a relation cannot be determined (as the District Judge has determined them) by exclusive reference to the Indian Contract Act, but must be considered also with regard to the general rules of Hindu law, which regulate the transactions of united families.

As stated in *Ramall* v. *Lakmichund* (1), an ancestral trade may descend, like other inheritable property, upon the members of a Hindu undivided family. The partnership so created, or surviving, has many, but not all, of the elements existing in an ordinary partnership. For example, the death of one of the partners does not dissolve the partnership. Nor, as a rule, can one of the partners, when severing his connection with the business. ask for an account of past profits and losses.

Whether a Hindu, who becomes entitled by inheritance to a share in a trading business, is, *ipso facto*, and without his own consent, involved in all the liabilities of a partner, it is not necessary for us to determine. In the present case, we find sufficient reason for holding the respondent Mangal liable for the plaintiff's claim. The three respondents are brothers, and admittedly a **[41]** united family. The trading business, in respect of which the claim has arisen, was started by Jivram Haribhai, father of the respondents. At that time, and down to Jivram's death, Jivram and his sons lived together as a joint family. The presumption (which is not rebutted) is that the business was started by means of joint family funds. It, therefore, became the joint property of Jivram and his sons. After Jivram's death, Mangal continued to live with his brother for a year; but since that time he has generally been absent from Kapadvanj, where the firm is carried on. The business has been continued in the name of Jivram Haribhai, but has been managed by the eldest brother Someshvar only, Mangal having been absent, and the 3rd respondent being a minor. We cannot agree with the District Judge that these circumstances entitle Mangal to repudiate a liability arising out of the ordinary

(1) 1 B.H.C.R. Ap. 51.

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transactions of the firm. During his father's lifetime he was joint owner of the firm of Jivram Haribhai. After his father's death he acquiesced in the continuance of the firm under the same name, and ostensibly, therefore, with the same constitution. He has never done any act to divest himself of his share in the business. He has given no notice of repudiation and has made no partition with his brothers. He has only been absent for six years ; and there would, therefore, be nothing to prevent him from demanding his share of the partnership stock, or claiming to share in the profits. We can see no reason for exempting him from the ordinary rule of Hindu law, which makes every member of a united family liable for debts properly incurred by a manager for the benefit of the family. The eldest brother Someshvar must be regarded as manager on behalf of the family of so much of the family property as is represented by the trading business ; and it has never been suggested that the debt due to the plaintiff, for goods supplied to the shop, was not properly and necessarily incurred in the course of the ordinary transactions of the firm, and presumably, therefore, for the benefit of all the joint owners of the firm.

For these reasons we reverse the decree of the District Court, and restore that of the Subordinate Judge. Costs of appeal and second appeal on respondent Mangal.

Decree reversed.

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5 B. 42 = 5 Ind. Jur. 422.

[42] ORIGINAL CIVIL.

Before Sir Charles Sargent, Justice.

THE LONDON, BOMBAY AND MEDITERRANEAN BANK, LIMITED (*Plaintiffs*) *v.* BADEE BEEBEE AND OTHERS (*Defendants*).* [26th November, 1880.]

Jurisdiction—Cause of action—Letters Patent, 1865, *cl.* 12—*Company—Winding up—Suit on foreign judgment—Balance order—Service on defendant.*

The defendant, who resided outside the jurisdiction of the High Court, was sued at Bombay as a contributory upon a balance order made by the Court of Chancery in England in the winding up of the plaintiffs' bank. It was contended on his behalf that no part of the cause of action had arisen within the jurisdiction, and that the suit was therefore not maintainable. The plaintiffs contended that service of the balance order upon the defendant was necessary and constituted part of the cause of action, and that such ervice had been effected upon the defendant in Bombay, the Court had jurisdiction.

Held, that service of the balance order upon the defendant was not necessary, and that as no part of the cause of action had arisen within the jurisdiction, the suit should be dismissed.

THIS was a suit brought by the plaintiffs against the defendants as heirs and legal representatives of one Cazee Bhawoodeen, deceased, to recover Rs. 1,200, the balance of a call of £10 per share alleged to be due in respect of certain shares in the plaintiffs' bank standing in the name of the deceased.

By an order of the High Court of Chancery in England, dated the 20th July 1866, the plaintiffs' bank was ordered to be wound up, and by a subsequent order liquidators were appointed. On the 28th July 1870, the same Court ordered a call of £10 per share to be made upon the contributories, and by a balance order made on the 25th January 1871, it was

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* Suit No. 50 of 1877.

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5 B. 52=
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directed that "the contributories of the said bank should, on or before the 14th September 1871, *or within four days after service of the now stating order upon them respectively*," pay to the liquidators the sum set opposite their names, together with interest at the rate of £5 per cent. per annum until payment.

The present suit was based upon the balance order, and the plaint alleged that a copy of the said order had been served upon the said Cazee Bhawoodeen in Bombay on the 6th November 1874.

[43] The defendants pleaded to the jurisdiction, on the ground that Cazee Bhawoodeen (the original defendant) was not dwelling, or carrying on business, or personally working for gain within the local limits of the High Court at the time the plaint was filed. This was admitted by the plaintiffs ; but it was contended by the plaintiffs that the service of the balance order was necessary before the suit could be brought in, and that such service was therefore a part of the cause of action arising within the jurisdiction, and that leave to sue having been duly obtained under cl. 12 of the Letters Patent, 1865, the suit was rightly brought in the High Court.

Starling and *Russell*, for the plaintiffs.—An order of the Court of Chancery differs from a decree. Service of the former is necessary before it can be enforced : Daniel's Ch. Pr., p. 1114. [SARGENT, J., referred to the *Land Credit Company of Ireland* v. *Lord Fermoy* (1).] The terms of the balance order upon which we sue contemplate service : *Adkins* v. *Bliss* (2) is not in point. The balance order is in the same form as the call order, and is to be similarly construed ; and the call order under the rules of Courts 38 and 39 (3) could not be enforced without previous service : Daniel's Ch. Pr., p. 903.

[44] *Farran* and *P. M. Metha*, for the defendants.—This is a suit upon a foreign judgment. There is no doubt that ordinarily in the case of such a judgment service is not necessary before filing a suit upon it. No averment of such service was contained in the declaration : see *Bullen* and *Leake's* Precedents : see, also, No. 27 of the form annexed to Civil Procedure Code (Act X of 1877) : Roscoe on Evidence. The cause of action on a foreign judgment is the implied promise by the defendant to pay the amount of the judgment : see *Leake on Contracts* (ed. 1878), p. 128.

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(1) L.R. 5 Ch. Ap. 323. (2) 2 De G. and J. 286.

(3) Rule 38.—All orders for payment of calls, balances, or other monies due from any contributory or other person, shall direct the same to be paid into the Bank of England, to the account of the official liquidator of the company, unless on account of the smallness of the amount or other cause, it shall, having regard to the amount of the security given by the official liquidator, be thought proper to direct payment thereof to the official liquidator : Provided that where any such order has been made directing payment of a specific sum into Bank of England, in case it shall be thought proper for the purpose of enabling the official liquidator to issue execution or take other proceedings to enforce the payment thereof, or for any other reason, an order may, either before service of such former order, or after the time thereby fixed for payment, be made, without notice, for payment of the same sum to the official liquidator.

Rule 39.—At the time of the service of any order for payment into the Bank of England the official liquidator shall give to the party served a notice, to the purport or the effect set forth in Form No. 40 in the third schedule hereto, for the purpose of informing him how the payment is to be made ; and before the time fixed for such payment, official liquidator shall furnish the cashier of the Bank of England with a certificate, to the purport or effect set forth in Form No. 41 in the third schedule hereto, to be signed by such cashier, and delivered to the party paying in the money therein mentioned. [See Buckley on Companies (3rd ed.), pp. 485-86.]

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We rely, also, on the decision by Marriott, J., in the *London, Bombay and Mediterranean Bank* v. *Wamanrao Ramachandra* (1), where it was held that service of the balance order is no part of the cause of action.

JUDGMENT.

SARGENT, J.—This action is brought upon a balance order made in the winding up of the plaintiffs' bank by the Court of Chancery in England.

The case of the *Land Credit Company of Ireland* v. *Lord Fermoy* (2) is an authority that service of a decree or order of the Courts of Chancery is not requisite as a preliminary to its execution except in proceedings founded on the old process of contempt; but it was contended that the words of the balance order which called upon the defendants to pay "on or before the 14th September 1871 or within four days after service of the order" made it obligatory upon the plaintiffs to effect such service. I think, however, that the case of *Adkins* v. *Bliss* (3) is conclusive that these words do not impose any such obligation.

Lastly it was argued that, having regard to its own rules in similar cases, this Court would not treat the order as constituting a cause of action until it had been served. No doubt rule No. 34 requires that orders for calls should be served (4), but there is no **[45]** similar provision with regard to any other orders of the Court. Moreover there is a note to call order issued in the present case informing the contributories that unless the sums demanded should be paid by a certain day, an application would be made to the Court. This order gave all necessary information as to the nature and amount of the claim made by the plaintiffs and the steps which they were prepared to take in order to enforce their claim.

Upon the whole I am of opinion that service of the balance order upon the defendants in this case was not necessary, and, therefore, was no part of the plaintiff's cause of action. No part, therefore, of the cause of action having arisen within the jurisdiction of this Court, the suit must be dismissed with costs.

Suit dismissed.

Attorneys for plaintiff: Messrs. *Tobin* and *Roughton*.
Attorney for defendants: Mr. *Khanderav Moroji*.

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(1) Suit 149 of 1876 decided on 1st May 1880. Not reported.
(2) L.R. 5 Ch. Ap. 323. (3) 2 De G. and J. 286.
(4) Rule 34.—When any order for a call has been made, a copy thereof shall be forthwith served upon each of the contributories included in such call, together with a notice from the official liquidator specifying the amount or balance due from such contributory (having regard to the provisions of the said Act) in respect of such call; but such order need not be advertised unless, for any special reason, the Judge shall so direct. [See Buckley on Companies (3rd ed.), p. 484.]

5 B. 45=5 Ind. Jur. 424.

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ORIGINAL CIVIL.

Before Sir Charles Sargent, Justice, and Mr. Justice M. Melvill.

MITHIBAI (*Plaintiff*) *v.* LIMJI NOWROJI BANAJI AND OTHERS (*Defendants*); HARRIVULLUBHDAS CALLIANDAS (*Original Defendant*), *Appellant v.* ARDASAR FRAMJI MOOS (*Receiver and Respondent*).* [3rd December, 1880.]

Practice—Appeal—Order refusing to remove a Receiver—Civil Procedure Code—Act X of 1877, *ss.* 2, 244, 503, 540, 588—*Act XXIII of* 1861, *s.* 11.

By a decree in an administration suit, A. was appointed Receiver "to manage the estate." A. died, and by a subsequent order B. was appointed Receiver. One of the defendants in the suit applied to have B. removed from the office of Receiver on the ground of his alleged mismanagement of the estate. The application was refused.

Held that the order of refusal was appealable, whether the former Code or the present Code of Civil Procedure was deemed to be applicable, being an order made in respect of a question arising between the parties to a suit relating to the execution of the decree.

[R., 14 C.L.J. 489 (492)=12 Ind. Cas. 745; 17 Ind. Cas. 583=(1912) M.W.N. 1208.]

APPEAL against an order of Bayley, J., dated the 8th October, 1880, refusing an application made by the appellant for the removal of the respondent from the office of Receiver in the suit.

[46] This was an administration suit filed by one Mithibai against Limji Nowroji Banaji and others, wherein the plaintiff prayed for the usual relief. The appellant was subsequently made a defendant, being the assignee of the property of one of the original defendants. The case came on for hearing on the 24th February 1872, and on that day a decree was made referring the suit to the Commissioner to take the necessary accounts. By that decree Mr. H. Gamble was "appointed sole Receiver without giving security to manage the said estate."

On Mr. Gamble's death the respondent, Ardasar Framji Moos, was, by order of Court, dated 25th June 1877, appointed Receiver. In September, 1880, a motion was made to the Court, on behalf of the defendant (appellant) Harrivullubhdas Calliandas, for an order that Ardasar Framji Moos might be removed from the office of the Receiver and that some fit and proper person might be appointed to act as Receiver in his stead." This motion was refused on the 8th October, 1880, and Harrivullubhdas Calliandas, thereupon, filed an appeal against the order of refusal.

By agreement of the parties the case now came on for argument of a preliminary point, *viz.*, whether the order of the 8th October, 1880, refusing to remove the Receiver, was appealable.

Latham and *Inverarity*, for appellant.—We contend that an appeal lies, whether the order be regarded as made under the former Code of Civil Procedure (Act VIII of 1859) or under the new Code (Act X of 1877). In order to ascertain which Code applies, it is necessary to construe the word "proceedings" in the last clause of s. 3 of the Civil Procedure Code (Act X of 1877). If it is interpreted as referring *in the aggregate* to the various steps taken in a suit subsequently to decree, then this question will be governed by the old Code, inasmuch as the inquiry and taking of

* Suit No. 877 of 1870.

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accounts in the course of which the present matter has arisen, were commenced and pending in the Commissioner's office on the 1st October, 1877; but if each step in this course of the inquiry and taking of account is held to be a separate *proceeding* within the meaning of the word as used in the section, then the point for determination must be decided under the new Code, Act X of 1877.

[47] If the case is governed by the former Code, this order is appealable (1st) under s. 11 of Act XXIII of 1861. This is a question relating to the execution of the decree by which the Receiver was appointed. He was appointed to manage the estate and the application for his removal was based on his alleged mismanagement. (2nd)—This order is expressly appealable under ss. 92, 93, 94, of Act VIII of 1859.

If the case is governed by the new Code, Act X of 1877, this order is also appealable under ss. 2, 244, and 540, the latter of which refers to questions relating to execution of decrees. By s. 2 orders made under s. 244 are decrees and from all decrees an appeal lies under s. 540.

Again, under ss. 503 and 588 of the new Code, such an order as the present is expressly made appealable. There are three classes of orders dealt with in s. 588. *First.*—Orders only appealable when granted, *e.g.*, orders referred to in cls. (1) and (4). In this class there is no appeal if the order is refused. *Second.*—When the order is an order of refusal, *e.g.*, the orders referred to in cls. (20) and (27). In this class there is no appeal if the application be granted. *Third.*—Cases in which an appeal is given whether the order made is one granting or refusing an application, *e.g.*, orders made under cl. (24). The present order comes under the last class.

The Advocate-General (*Hon. J. Marriott*) and *Farran* for the respondents.—Section 588 does not give an appeal from an order refusing to appoint a Receiver. Such an order is not one made under s. 503. Section 492 gives the Court express power to refuse an injunction, and, therefore, an order refusing an injunction is an order made under the section and is appealable under s. 588. Section 244 of Act X of 1877 refers only to final decrees, as is shown by the other sections of the chapter, and there has been no final decree in this suit.

This is not a matter arising in execution of the decree. The decree appointed Mr. Gamble to be Receiver. The respondent was appointed by a separate and subsequent order. Any proceedings against him would be taken under that order, and not under the decree.

JUDGMENT.

[48] SARGENT, J.—We think an appeal lies from this order as being an order upon a question arising between the parties to a suit relating to the execution of a decree. Adopting that view of the case, it is unnecessary for us to decide whether the point is one to be dealt with under the former Code or under the present Code of Civil Procedure, inasmuch as both of them contain provisions which authorize an appeal from orders of that nature. Here the Receiver was appointed by the decree to manage the estate. The management of the estate, therefore, was a matter relating to the execution of the decree, and the present question between the parties is as to whether the estate is being properly managed by the Receiver in compliance with the terms of that decree. It has been argued that the management directed by the decree was management by Mr. Gamble and not by the respondent; but we think that the subsequent order under which the

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respondent was appointed Receiver must be regarded as incorporated into the decree in substitution of that part of it by which Mr. Gamble was originally appointed.

We are of opinion, therefore, that this order is appelable under either Code of Civil Procedure, the question between appellant and the respondent being a question between parties to the suit relating to the execution of the decree.

Attorneys for the appellant.—Messrs. *Craigie, Lynch* and *Owen.*

Attorneys for the respondent.—Messrs. *Tobin* and *Roughton.*

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5 B.48 (P.C.) = 7 I.A. 181 = 4 Sar P.C.J. 173 = 3 Suth. P.C.J. 778 = 3 Shome L.R. 217 = 4 Ind. Jur. 472 = 7 C.L.R. 320.

PRIVY COUNCIL.

PRESENT:

Sir J. W. Colvile, Sir B. Peacock, Sir. M. E. Smith, and Sir R. P. Collier.

[*On appeal from the High Court, Bombay.*]

LAKSHMAN DADA NAIK (*Original Defendant*), *Appellant v.* RAMCHANDRA DADA NAIK (*Original Plaintiff*), *Respondent.*

[6th, 7th and 11th May, 1880.]

Hindu Law—Mitakshara—Alienability by a co-parcener of his undivided share of ancestral estate—Will—Limitaton Act XIV of 1859—*s.* 1, *cl.* 13—Res judicata—*Act VIII of* 1859, *s.* 2.

A Hindu of the Southern Maratha Country, having two sons undivided from him, died in 1871 leaving a will disposing of ancestral estate substantially in favour of his second son excluding the elder who claimed his share in this [49] suit. In 1861, a suit brought by this elder son against his father and brother to obtain a declaration of his right to a partition of the ancestral estate was dismissed on the ground that he had no right in his father's lifetime to compel a partition of moveables; and that as to the immoveable, the claim failed because they were situated beyond the jurisdiction of the Court.

Held, first that the suit was not barred under Act VIII of 1859, s. 2; the proceedings of 1861 not having amounted to an adjudication between the brothers as to their rights in the estate arising on their father's death.

Secondly: that the suit was not barred under the Limitation Act XIV of 1859, s. 1, cl. 13. As to the immoveables; setting aside the fact that the plaintiff had remained in possession of one of the houses of the family which had been treated by the father as continuing to be part of the joint property, the decision of 1861, based as to the immoveables in the absence of jurisdiction to declare partition of them, caused this part of the claim to fall under the provisions of Act XIV of 1859, s. 14. As to the moveables; assuming that they could, on the question of limitation, be treated as distinct from the moveable, and that no payment had been made within twelve years before this suit by the ancestral banking firm to the plaintiff, the adjudication of 1861, whether in law correct or incorrect, had been that the elder son could not assert his rights in the movables until his father's death. The defendant in this suit, who had taken the benefit of that judgment, could not now insist that it did not suspend the running of limitation on the ground that his brothers might have appealed from it, if erroneous.

So far, also, as the father's interest was concerned, the succession only opened on his death.

Thirdly; it having been contended that, as a father and his sons were during his life co-parceners in the family estate, one of such co-parceners being able, according to the decisions of the Courts, by act *inter vivos* to make an alienation of his undivided share binding on the others, it followed that the father might dispose by will of his one-third share.

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Held that under the Mitakshara law, as received in Bombay, the father could not dispose of his one-third share by will.

The doctrine of the alienability by a co-parcener of his undivided share, without the consent of his co-sharers, should not be extended, in the above manner, beyond decided cases. The Bombay Court had ruled that a co-parcener could not, without his co-sharer's consent, either give or devise his share, and that the alienation must be for value. The Madras Court had ruled that although a co-parcener could alienate his share by gift, that right was itself founded on the right to partition, and died with the co-parcener, the title of the other co-sharers vesting in them by survivorship at the moment of his death. Without a decision as to which of these conflicting views, in regard to alienation by gift, was correct, the principles upon which the Madras Court had decided against the power of alienation by will were held to be sound and sufficient to support that decision.

[R., 6 A.L.J. 263 (299, 301); 15 Bom. L.R. 266 (274) = 19 Ind. Cas. 558; 5 Ind. Cas. 752 = 6 N.L.R. 46; 8 Ind. Cas. 512(516) = 21 M.L.J. 21 (28) = 9 M.L.T. 3; 19 M. L.J. 62 = 5 M.L.T. 140 = 4 Ind. Cas. 1104.]

APPEAL from a decree of the High Court of Bombay (2nd August 1876) confirming, as to the questions raised in these **[50]** proceedings, a decree of the Subordinate Judge of Belgaum (8th January 1875).

This suit was brought by the respondent in October 1872, against the appellant, who was his brother, both being sons of Dada Naik, a Hindu resident in the Southern Maratha Country, with whom, until his death in July 1872, the brothers were an undivided family. A third son, Keshev Dada Naik, had become separate from them in 1868, having received his share of the ancestral estate. This consisted mainly of a banking business carried on by the family at Belgaum and in Bombay; and also partly of houses at Belgaum and at Shahapur in the territories of the Sangli State.

This claim was made on the ground that, although the above property had been derived from ancestral money, the second son, Lakshman Dada Naik, had, under his father's will, virtually obtained the whole of it to the exclusion of the elder son, the plaintiff.

The questions which arose on this appeal were—

First.—Whether this suit, in consequence of a prior suit having been decided in 1861, was not barred under s. 2, Act VIII of 1859, the Code of Civil Procedure, as *res judicata*. *Secondly.*—Whether it was not barred under Act XIV of 1859, s. 1, cl. 13, by limitation; the plaintiff, as was alleged, not having sued within twelve years from the date of the death of the person from whom the joint property descended, or from the date of the last payment to him out of the joint estate.

The prior suit referred to was instituted in the Supreme Court in March 1861, by Ramchandra Dada Naik, against his father and his two brothers, for a declaration of his right in, and for partition of, the joint estate. A demurrer, on the part of the father, was allowed, and the suit was dismissed, with costs, in August 1861: see *Ramchandra Dada Naik* v. *Dada Mahadev Naik and others*(1). The ground of the decision in that case was that a son could not, during his father's lifetime, compel a partition of ancestral moveables; and that the immoveables were, if partible, beyond the jurisdiction of the Court.

[51] The following particulars relate to the will:—

On the 8th December 1864, Dada Naik executed what purported to be an absolute deed of gift of all his property to his two sons, Lakshman Dada Naik and Keshav Dada Naik, subject to certain provisions for the maintenance, marriage and family ceremonies of the younger members of

(1) 1 B. H. C. R. App. lxxvi.

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the family. The document recited that Ramchandra, this respondent, had been misconducting himself towards his father for years and that he had already received more than his share in money, ornaments and clothes. It directed that a sum of Rs. 500 should be given to him after Dada Naik's death.

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On the 16th November 1868, a deed of release was executed by Keshav Dada Naik to his father and to his brother Lakshman, by which he accepted the sum of Rs. 45,000 in full satisfaction of his claims upon the family property.

On the 30th October 1871, Dada Naik made the will which caused the present litigation. In it he referred to the deed of gift of 1864, which, he said, he had afterwards revoked, and also to the partition in favour of Keshav Dada Naik. He stated that Ramchandra had received from him property to the value of Rs. 40,000. exclusive of Rs. 45,000 paid by the testator to compromise certain actions, arising out of the family disputes, against the Cantonment Magistrate of Belgaum.

With the exception of a legacy of Rs. 500, and a house at Shahapur in Sangli territory, said to be worth Rs. 5,000, which were given to Ramchandra, the whole of the testator's property (which he stated to be of the value of Rs. 1,52,824), was given to the appellant, Lakshman Dada Naik, subject to certain provisions for marriages, family ceremonies, and charities.

In July, 1872, Dada Naik died, and in October of the same year the respondent commenced this suit, claiming one-half of the house at Belgaum, one-half of the gold and silver ornaments of the family, and one-half of the capital stock of outstandings of the two banking establishments at Belgaum and in Bombay. In this suit the Subordinate Judge of Belgaum, who found that the plaintiff had not received his full share as elder son, made a [52] decree in his favour, awarding to the plaintiff such a sum as would, with the house already in his possession, make up his share to one-half the amount of the valuation of the ancestral family property given in the will.

Against this decree both parties appealed to the High Court: the defendant on the ground that the plaintiff was entitled to nothing, the plaintiff on the ground that he was entitled to more than had been decreed. The High Court affirmed all the findings upon which the decrees of the lower Court had been based, but reversed the decree itself, being of opinion that instead of awarding a fixed sum of money, it should have made a general decree for a partition and an account.

The judgment of the High Court, reported in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1), contains a review of the authorities on the subject of the alienation of ancestral property by one of several co-sharers, and concludes thus: "From the above authorities we come to the conclusion that it was not within the power of Dada Naik, whether his act be regarded in the light of a gift or a partition, to bequeath the whole, or almost the whole, of the ancestral moveable property to one son, and virtually to disinherit the other. The will must, therefore, be set aside as wholly inoperative."

Leith, Q. C., and *R. V. Doyne*, for the appellant.

Cowie, Q. C., and *J. D. Mayne*, for the respondent.

(1) 1 B. 561.

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For the appellant it was argued, in reference to s. 2, Act VIII of 1859, that the result of the decision of 1861 might be construed to be that the father was entitled to the moveable estate absolutely; and if that was the decision, the cause of action as to the moveable estate, which was the bulk of the claim, had been " heard and determined." As to Act XIV of 1859, s. 1, cl. 13, it was contended that a state of things had been shown to exist to which the rule declared in *Jwala Buksh* v. *Dharum Singh* (1) was applicable, *viz.*, that the possession of one member of the joint family could not be taken to be that of another, where that other had been plainly excluded. For fourteen **[53]** years before this suit, during which period the plaintiff had been practically separate, no payment on account of his share in the banking business had been made to him and he had resided apart, though one of the family houses was relinquished to him. Reference was made to the observations on the difficulty of applying this section in the case of an undivided family in the judgment in *Govindan Pillai* v. *Chidambara Pillai* (2).

If the suit was not barred, effect might be given to the will as a disposition of the father's share. The right to make such a disposition by will as had been made followed, as a logical consequence, upon the state of the law regarding alienations by way of gift on the part of co-sharers in joint family estate. It followed from the decisions under the Mitakshara; amongst others, from that of the Madras High Court, to the effect that a son " has as co-parcener a present proprietary interest in the ancestral property to the extent of his proper share, but beyond that he has vested in him, no legal interest whatever, whilst his father is alive :" *J. Rayacharlu* v. *J. V. Venkataramaniah* (3); also were cited *Virasvami Gramini* v. *Ayyasami Gramini* (4), *Palanivelappa Kaundan* v. *Mannaru Naikan* (5), *Narottam Jagjivan* v. *Narandas Harikisandas*. (6) In the latter case, the proposition, in support whereof the Bombay Court had cited *Vallinayagam Pillai* v. *Pachche* (7) was stated, *viz.*, that in Madras the testamentary power had been held to be co-extensive with the right of alienation *inter vivos*. This had not been admitted to be so in *O. Goroova Butten* v. *C. Narainsawmy* (8), but it followed as a necessary step after what had been decided.

For the respondent it was contended that the decision of 1861, not relating to rights identical with those now in dispute, could not bar this suit. Nor had limitation run against the plaintiff who had continued to be a member of the joint family, and in whose favour the time occupied in the former proceedings should be allowed. On the question of his continuance in the joint family was cited *Runjeet Singh* v. *Kooer Gujraj Singh* (9).

[54] On the question whether effect could be given to the will as a devise of the father's one-third share were cited *Vitla Butten* v. *Yamenamma* (10), special reference being made to the words in the judgment, " at the moment of death the right of survivorship, is in conflict with the right by devise; then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise;" also *O. Goroova Butten* v. *C. Narainsawmy Butten* (8).

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(1) 10 M.I. A. 511. (2) 3 M. H. C. R. 99. (3) 4 M. H. C. R. 60.
(4) 1 M. H. C. R. 471. (5) 2 M. H. C. R. 416. (6) 3 B. H. C. R. A.J. 6.
(7) 1 M. H. C. R. 326. (8) 8 M. H. C. R. 13. (9) 1 I. A. 9.
(10) 8 M.H.C.R. 6.

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Reference was made to the opinion of Mr. Colebrooke (1) on the case of *Ramasawmy* v. *Sosha Chella* (2), and to the distinction in the degrees of restriction maintained by the Courts of Bengal, Madras and Bombay, respectively, upon alienation by a co-parcener. To show that the Madras Court, and *a fortiori* the Bombay Court, maintained principles, according to which there must necessarily exist a distinction between the right to devise, and the permitted alienations *inter vivos* were cited *Tarachand* v. *Reebram*, (3) *Gangabai* v. *Ramanna* (4), *Vasudev Bhat* v. *Vyankatesh Sambhav* (5), *Udaram Sitaram* v. *Ramu Pandujt* (6), *Vankatapathy* v. *Lutchmee* (7).

Reference was made on both sides to Mitakshara, c. 1, ss. 1, 3, 6; Strange Hindu Law, 194, 202; *Sonatun Bysakh* v. *Srimati Jagatsoonderi Dossee* (8); *Baboo Beer Pertab Sahee* v. *Maharaja Rajendar Pertab* (9), *Deendyal Lal* v. *Jugdeep Narain Singh* (10): *Suraj Bunsi Kooer* v. *Sheo Proshad Singh* (11).

JUDGMENT.

Sir J. W. COLVILE delivered their Lordships' judgment:—

The appellant in this case is the second, and the respondent, the eldest, son of one Dada Mahadev Naik, who died on the 13th July 1872. Dada Mahadev Naik was a son of Mahadev Narayan Naik, who died in 1847, leaving another and eldest son called [55] Hurba, and seven grandsons, four of whom were sons of predeceased sons, and three, namely, the respondent, the appellant and a younger son, Keshav, were the sons of Dada Naik. All these persons, after the death of Narayan Naik, constituted a joint and undivided Hindu family, of which Dada Naik, his eldest brother Hurba being dumb and therefore incapacitated, became the manager. By virtue, however, of subsequent partitions and other family arrangements, the other members of the larger family became separate from Dada Naik and his three sons, who, in the year 1857, were the only members of the joint and undivided family with which their Lordships have to deal.

The family property consisted of a family house at Shahapur in the Southern Maratha Country, and of an ancestral business which was carried on partly there and partly in a koti at Bombay, which appears to have been managed by gomashtas. About the year 1858, great dissensions arose between the respondent and his father, the former claiming a right to take a larger share of the management of the business than his father was disposed to allow him. It is unnecessary to enter into the particulars of these disputes, but the result of them was that, in 1858, the father and his two younger sons left the family house, the respondent remaining there; and afterwards they, in the year 1864, built for themselves, with the family funds, another house at Belgaum.

Between the two last dates, and in March 1861, the respondent instituted a suit in the late Supreme Court of Bombay against his father and brothers, praying for a declaration of his rights in, and an immediate partition of, the ancestral property. The father demurred to the bill, and on the 13th August 1861, his demurrer was allowed. The effect of those proceedings their Lordships will afterwards consider.

(1) Appendix to 2 Strange Hindu Law 344; see also Note b. 1 M. H.C.R., at p. 474.
(2) 2 Strange (N. C. ed. 1827) p. 74.
(3) 3 M.H.C.R. 50.
(4) 3 B H.C.R. A.C.J. 66.
(5) 10 B.H.C.R. 139.
(6) 11 B.H.C.R. 76.
(7) 6 Mad. Jurist 215.
(8) 8 M. I. A. 66.
(9) 12 M. I. A. 138.
(10) 4 I. A. 247 = 3 C. 198.
(11) 6 I. A. 88 = 5 C. 148.

In 1868, Keshv Naik, the youngest son, formally separated himself from the joint family, taking Rs. 45,000 odd as his share in the joint estate, or the balance of it. The deed of release executed by him on the 16th November of that year, is on the record, and it may be observed that it treats the old family house at Shahapur as still part of the joint family estate.

[56] The father afterwards made a will, dated the 30th October 1871, whereby, after giving his account of what had taken place in the family, he treated his eldest son, the respondent, as having received already more than his share of the estate, gave him only the house at Shahapur and Rs. 500, and gave all the rest of the property to his second son, the appellant. He died, as has been before stated, in July 1872.

In the following October, the respondent brought this suit against his brother, the appellant. By it he claims to be entitled to one-half of the joint business and estate as it stood at the death of his father. Various defences were set up by the appellant, and the issues, as finally settled, were the following :—

"1. Whether the suit is barred by s. 2, Act VIII of 1859," that is, whether the decision of the Supreme Court on the demurrer amounted to *res judicata*. "2. Whether the suit is barred by cl. 13, s. 1, Act XIV of 1859," that is, whether it was barred by limitation under that statute. "3. Whether the property in suit is deceased Dada Naik's ancestral or self-acquired property. 4. If the former, whether plaintiff has taken or received so much out of it as could be considered more than what he was entitled to for his share ? 5. If the latter, whether the deceased Dada Naik made the original of Exhibit No. 16, and to what sum is the plaintiff entitled under it ? 6. Whether the property left by the deceased Dada Naik is correctly estimated ? 7. Whether the plaintiff is restricted in getting his share on any other ground, as alleged by defendant ?"

It was admitted at the bar that the findings of the Courts as to the 3rd, 4th, 5th, 6th, and 7th of these issues cannot now be questioned. It must, therefore, be taken that the property in question was ancestral; that the respondent, the plaintiff, has not received his full share of it ; that the *factum* of the will has been established: and that there is nothing but the will and the two pleas in bar, the first and second issues, to defeat the plaintiff's claim. Again, as to the will, it is now conceded that under the Mitakshara law, as received in Bombay, by which this family is governed, a father cannot, by will, make an unequal distribution of ancestral property, whether moveable or immoveable **[57]** between his sons. It has, however, been contended that, inasmuch as under the Mitakshara law a father and his sons are during his life joint co-parceners in family estate, and that as it has now been decided by the Courts in the south and west of India that one co-parcener may, by act *inter vivos*, make an alienation of his share which is binding on the others, it follows that he may dispose of his share by will. The result of his contention, which will be afterwards considered, is, if it is well founded, to reduce the property to be divided between the brothers to two-thirds of the joint property as it stood at the death of the father. The pleas in bar go, of course, to the whole claim.

Now, as to the first of these pleas, their Lordships have already intimated that it cannot be supported. It appears to them that all that was decided by the Supreme Court of Bombay in 1861 was that, the respondent could obtain no relief on his then bill, inasmuch as he had no right to compel his father in his lifetime to make a partition of moveable,

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though it might be ancestral, property; and that the Supreme Court had no power to make a partition of the immoveable property which was beyond the limit of its territorial jurisdiction. There is nothing, in their Lordships' opinion, which amounts to an adjudication between the brothers as to their rights in the joint ancestral estate on their father's death.

The plea of limitation is founded on the 13th clause of s. 1 of Act XIV of 1859, which is as follows:—

"To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property, and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate, the period of 12 years from the death of the persons from whom the property alleged to be joint is said to have descended or on whose estate the maintenance is alleged to be a charge or from the date of the last payment to the plaintiff, or any person through whom he claims, by the person in possession or management of such property or estate on account of such alleged share, or on account of such maintenance, as the case may be."

[58] In considering the application of this enactment to the present suit, we may leave out all that relates to suits "for recovery of maintenance," and treat it as confined to a suit "to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property." The section gives two periods from which the twelve years may be calculated; one is "the death of the persons from whom the property alleged to be joint is said to have descended," and the other is "the date of the last payment to the plaintiff, or any person through whom he claims, by the person in the possession or management of such property or estate."

It is contended that, in this case, which is governed by the Mitakshara law, the person on whose death the property which is alleged to be joint has descended must be taken to be, not the father, in which case, of course, there would be no ground at all for the application of the Statute of Limitation, but the grandfather, on whose death the father and his sons all became co-parceners in the property. It is possible, indeed, that on this construction it might be necessary to go back one or more generations beyond the grandfather in order to ascertain from whom the property descended, but for the present purpose it may be assumed that the property descended from the grand-father as the first acquirer of it.

Their Lordships agree with many of the observations made by Mr. Justice Holloway and Mr. Justice Collet in *Govindan Pillai* v. *Chidambara Pillai andothers* (1) as to the difficulty of applying this part of the clause in question to a joint family consisting of a father and sons governed by the Mitakshara law though such difficulty would not exist in the case of a like family governed by the law of Lower Bengal. They are not prepared, however, to affirm that in this particular case the father may not be held to be "the person from whom the property alleged to be joint is said to have descended" within the meaning of the Act. The claim is two-fold. It is to establish the right of the plaintiff as a co-parcener not only as to his original share in the joint estate, but also as to the moiety of the father's interest to **[59]** which he became entitled on the father's death by right of survivorship, and to have a partition on that basis. So far as the father's interest is concerned,

(1) 3 M. H. C. R. 99.

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the succession opened only on the father's death. Nor is it altogether clear upon the authorities how far the principle of inheritance as well as that of survivorship applies to such a succession by sons to their father. It may be observed, too, that this construction would receive some support from the arguments addressed to their Lordships upon the effect to be given to the will which proceeded upon the father's right of disposition over his undivided share. Their Lordships, however, do not think it necessary to decide, and do not decide, the question of limitation upon this construction of the clause in question.

Again, their Lordships think there is considerable force in the argument with the learned counsel for the respondent have founded on the possession by the respondent since 1858 of the family house at Shahapur. How do the facts on this part of the case stand? The respondent was, unquestionably, a member of the joint family, with the full rights of a co-parcener, up to 1858. There is no suggestion of a formal partition between him on the one side and his father and brother on the other. He has, ever since 1858, been in possession of the house at Shahapur, which has, nevertheless, been treated on the occasion of the family arrangement which resulted in the separation of the youngest son, and to which the appellant was a party, and also by the father when he made his will, as continuing to be joint family property. The contention of the appellant and of his father seems to be embodied in the 4th issue in the suit, *viz.*, that the respondent had taken and received so much out of the joint family property as would be considered more than what he was entitled to as his share, and so must be taken to have lost his rights as a co-parcener as he would have done upon a formal partition. This issue has, however, been found by both Courts in favour of the respondent, who must, therefore, be taken to be entitled to his full rights as a co-parcener, except so far as he may be barred from asserting them by the Statute of Limitation. Now, so far as the immoveable property of the family is concerned, there seems to be no ground **[60]** for the application of the statute. Not only has the respondent all along been in the enjoyment of part of that property, *viz.*, the house at Shahapur, but, under the 14th section of the Act, he is entitled to exclude from the computation of the period of limitation the time occupied in the prosecution of the suit of 1861, inasmuch as the decision of the Court, *quoad* the immoveable property, proceeded on the ground of want of jurisdiction over it. There is, therefore, no bar in this case to a suit for the partition of the immoveable property of the family. Nor has there been a total exclusion from the joint family estate, as a whole, if that, as suggested by Mr. Justice Holloway in the case above referred to, is necessary to lay the ground for the application of the statute at all. It is argued, however, on the part of the appellant that the claim is substantially claim to share in the ancestral business and other moveable property, and that the right to do so has been barred by reason of the respondent having received no payment thereout since 1858. Their Lordships will assume that the claim as to the moveable may thus be treated as distinct from that as to the immoveable property of the family, and that no payment out of the former has been established. They are, nevertheless, of opinion that the appellant is in this case estopped by the proceedings of the Supreme Court of Bombay from setting up the statute as a bar to the respondent's claim. They treat the order of the 30th of August 1861, whether founded on a correct or an erroneous view of the law, as an adjudication, binding on the parties to that suit, that the respondent was not entitled to sue in his

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father's lifetime for a partition of the moveable property, and consequently could not assert his rights in that property until his father's death. It would be in the highest degree unjust to allow the appellant, who has had for years the benefit of that judgment, to insist that it did not suspend the running of the Statute of Limitation because it was erroneous in point of law, and the respondent ought to have appealed from it. There seems, to their Lordships, to be no warrant in law for such a contention. For the above reasons, they are of opinion that the plea of limitation cannot be maintained.

[61] The only remaining question of which their Lordships have to dispose has been raised for the first time at the hearing of this appeal, and they have not the advantage of having the judgment of either Indian Court upon it. It has been ingeniously argued that partial effect ought to be given to the will by treating it as a disposition of the one-third undivided share in the property to which the father was entitled in his lifetime. The argument is founded upon the comparatively modern decisions of the Courts of Madras and Bombay which have been recognised by this Committee as establishing that one of several co-parceners has, to some extent, a power of disposing of his undivided share without the consent of his co-sharers.

Those cases have established that such a share may be seized and sold in execution for the separate debt of the co-sharer, at least in the lifetime of the judgment-debtor, and that it may be also made the subject of an alienation by a deed executed for valuable consideration. The Madras High Court has gone further and ruled that an alienation by gift, or other voluntary conveyance *inter vivos* will also be valid against the non-assentient co-parceners. And assuming this latter proposition to be law, the learned counsel for the appellant have insisted that it follows as a necessary consequence that such a share may be disposed of by will, because the authorities which engrafted the testamentary power upon the Hindu law have treated a devise as a gift to take effect on the testator's death, some of them affirming the broad proposition that what a man can give by act *inter vivos* he may give by will.

To this argument there are two answers. Their Lordships have to apply to this case the law as it is received at Bombay. The decisions of the High Court of Bombay, notably *Basudeb Bhat* v. *Venkatesh Sanbhav*(1) and *Udaram Sitaram* v. *Ranu Panduji and another* (2), have ruled that a co-parcener cannot, without the consent of his co-sharers, either give or devise his share; that the alienation of it must be for value; and if this be law, the whole argument in favour of the testamentary power over the undivided share fails.

Again, the High Court of Madras, though admitting that a coparcener can effectually alienate his share by gift, has ruled that [62] he cannot dispose of it by will (see the case reported, 8 Madras H. C. Rep., p. 6). Its reasons for making the distinction between a gift and a devise are, that the co-parcener's power of alienation is founded on his right to a partition; that that right dies with him; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the will can operate. This principle was invoked in the case of *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (3), and was fully recognised by their Lordships, although they decided the particular case, which was one of an execution against a mortgaged share, on the ground

(1) 10 B.H.C.R. 139. (2) 11 B.H.C.R. 76. (3) 6 I.A. 88 = 5 C. 148.

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5 B. 48 (P.C.)=7 I.A. 181=4 Sar. P.C.J. 173=3 Suth. P.C.J. 778=3 Shome L.R. 217=4 Ind. Jur. 472=7 C.L.R. 320.

that the proceedings had then gone so far in the lifetime of the mortgagee as to give, notwithstanding his death, a good title against his co-sharers to the execution purchasers. It follows from what has been said that the weight of positive authority at Madras, as well as at Bombay, is against the proposition of the learned counsel for the appellant.

Their Lordships are not disposed to extend the doctrine of the alienability by a co-parcener of his undivided share without the consent of his co-sharers beyond the decided cases. In the case of *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1), above referred to, they observed: "There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided family (governed by the Mitakshara law); and the law, as established in Madras and Bombay, has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition." The question, therefore, is not so much whether an admitted principle of Hindu law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence. Their Lordships do not think it necessary to decide between the conflicting authorities of the Bombay and the Madras High Courts in respect of alienations by gift, because they are of opinion that the principles upon which the Madras Court has decided against the power of alienation by will are sound, and sufficient to support **[63]** that decision. The appellant has, therefore, failed also upon the question which he has raised as to the effect of the will.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The costs of the appeal must follow its result.

Their Lordships wish to throw out for the consideration of the parties how desirable it is for both of them to come, either in one or other of the ways indicated by the High Court or in some other manner, to an amicable settlement of their differences upon the basis of this decree. It is obvious that if they persist in fighting out the case to its bitter end, by taking the accounts directed by the High Court hostilely, they are likely seriously to impair, if not destroy, the ancestral business which is the chief subject of dispute.

Solicitors for the appellant.--Messrs. *Ashurst, Morris Crisp & Co.*

Solicitors for the respondent.—Messrs. *Ramsdem* and *Austin.*

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5 B. 63=5 Ind. Jur: 425.

APPELLATE CRIMINAL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

EMPRESS v. BALA PATEL. [7th April, 1880.]

***Confession—Evidence—Indian Evidence Act I of* 1872, *s.* 30—*Joint trial—Dacoity —Receiving stolen property—Indian Penal Code, ss.* 395 *and* 412.

A and *B* were committed for trial; the former for dacoity under s. 395 of the Indian Penal Code, and the latter under s. 412 for receiving stolen property knowing it to be such. *A* made two confessions, and in both he stated he had handed over to *B* some pieces of gold and silver stolen at the dacoity. When *B* was

(1) 6 I.A. 88=5 C. 148.

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5 B. 63 = 5 Ind. Jur. 325.

arrested a gold ring and a silver wristlet were found in his possession. At the trial *A* pleaded guilty and *B* claimed to be tried. *A* goldsmith deposed that he had made the ring and wristlet found with *B* out of pieces of gold and silver given to him for the purpose by *B*. On this evidence and on the confessions made by *A* the Session Judge convicted *B*. On appeal to the High Court.

Held that *A* and *B* not having been tried jointly for the same offence, the confession of *A* was inadmissible as evidence against *B*. There was therefore no evidence of the identity of the goods stolen at the dacoity with those found in B's possession, and the case against him failed. Conviction quashed.

[R., 6 Bom.L.R. 517 (518).]

THE accused Bala Patel and one Bayaji were committed for trial by C.W. Richardson, Magistrate, First Class, at Satara, before the **[64]** Session Court. Bayaji was charged with dacoity under s.395, and the accused Bala Patel with receiving property knowing it to be stolen at the dacoity, under s. 412 of the Indian Penal Code. Bayaji had made two confessions, one before a third Class Magistrate immediately after his arrest, and the other, before the committing Magistrate at the preliminary investigation. In both of them, he stated, among other things, that at the request of the leader of the dacoits, he handed over some pieces of gold and silver stolen at the dacoity to Bala Patel. But in his first confession to the Third Class Magistrate, he had stated that they had been tied up in a piece of cloth and that he had not opened the bundle to see its contents. In the Session Court, Bayaji pleaded guilty and he was convicted and sentenced to transportation for ten years. Bala claimed to be tried and the Session Judge proceeded with his trial. When Bala was arrested, a gold ring and a silver wristlet were found in his possession, which were alleged to have been made of the pieces of gold and silver he had received from Bayaji. The Session Judge, on the confession of Bayaji to the committing Magistrate and on the evidence of a goldsmith who stated that he had made the ring and wristlet from pieces of gold and silver given to him for the purpose by Bala, convicted him of the offence charged and sentenced him to suffer rigorous imprisonment for three years and to pay a fine of Rs. 200.

Bala appealed to the High Court against the conviction and sentence.

Macpherson (with him *G. R. Kirloskar*), for the accused.—The only evidence in this case is the confession of Bayaji. But Bayaji and the present appellant were charged with different offences. Bayaji's confession, therefore, is inadmissible against the appellant under Act I of 1872, s. 30. The section itself is very clear, and is made still more so by the ruling of this Court in *Reg* v. *Amrita Govinda* (1). The learned counsel also referred to *Reg* v. *Kalu Patel* (2), the *Queen* v. *Jaffer Alli and others* (3).

Nanabhai Haridas, Government pleader, appeared for the Crown.

JUDGMENT.

WESTROPP, C.J.—The sole evidence of the identity of the goods stolen at the dacoity with those found in the possession of the **[65]** accused Bala is the confession to the committing Magistrate by the accused Bayaji, who has pleaded guilty to the charge of dacoity—a charge different from that made against Bala, *viz.*, receiving property knowing it to be stolen. That evidence, therefore, was inadmissible against Bala as he and Bayaji were not "being tried jointly for the same offence:" Indian

(1) 10 B. H. C. R. 497 (499).
(2) 11 B. H. C. R. 146.
(3) 19 W. R. C. R. 57 (64).

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5 B. 63 = 5 Ind. Jur. 425.

Evidence Act, s. 30; *Reg.* v. *Amrita Govinda* (1). The evidence being legally inadmissible, the case against Bala fails. But even if that evidence had been legally admissible, it would have been extremely dangerous to have acted upon it, inasmuch as Bayaji had, in his previous confession to the Third Class Magistrate, stated that the goods which he gave to Bala were "wrapped in a piece of cloth" which bundle he (Bayaji) did not open to see which it contained.

The Court quashes the conviction and sentence, and directs the prisoner to be discharged, and the fine, if paid, to be returned.

Conviction and sentence reversed.

5 B. 65 = 5 Ind. Jur. 426.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F.D. Melvill.

SORABJI FARDUNJI (*Original Defendant*) *v.* DULABHBHAI HARGOVANDAS AND OTHERS (*Original Plaintiffs*), *Respondent.**
[7th June, 1880.]

Partnership—Jurisdiction of District Court to wind up under s. 265 *of Indian Contract Act—The Indian Contract Act, IX of* 1872, *ss.* 354 *and* 265—*The Bombay Civil Courts Act No XIV of* 1869—*Power of District Judge to refer to Assistant Judge a case falling under s.* 265 *of Contract Act.*

A previous dissolution of partnership is necessary, in order to give jurisdiction to the District Court under s. 265 of the Indian Contract Act.

Accordingly, where a suit was instituted in the District Court of Ahmedabad, by some members of a partnership (which, however, was not dissolved at the date of the suit) for the winding up of the business of a ginning factory and for distributing among the shareholders any surplus that might remain, after providing for the payment of its debts, under s. 265 of Act IX of 1872, and the Assistant Judge, to whom it was referred for trial by the District Judge, directed the dissolution of the partnership and the winding up of its business, the High Court, on appeal, reversed the decree of the Assistant Judge and returned the plaint to the plaintiffs for its presentation to the proper Court.

[66] *Quære.*—Whether the District Judge had power, under the Bombay Civil Courts' Act XIV of 1869 to refer to the Assistant Judge a case falling under s. 265 of the Act IX of 1872.

[R., 6 B. 143 (144); 10 O.C. 669 (674).**]**

THIS was an appeal from the decision of A. L. P. Larken, Assistant Judge at Ahmedabad.

The plaintiffs, Dulabhbhai and others, brought this suit against Sorabji Fardunji, under s. 265 of the Indian Contract Act. The plaintiffs alleged in the plaint that on the 7th October 1877, they, the defendant, and one Kavasji Ratanji (who subsequently joined the suit as a plaintiff) opened a ginning factory in partnership and appointed the defendant as manager for conducting its business, under a deed dated the 17th of the same month; that the defendant mismanaged the business and acted fraudulently and contrary to the condition stipulated in the deed; that he did not furnish the shareholders with a statement of the accounts of the factory, and that his mismanagement caused loss to the concern.

* Appeal No. 7 of 1880.
(1) 10 B.H.C.R. 497.

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5 B. 65 = 5 Ind. Jur. 426.

They therefore prayed that the business of the partnership might be wound up and that any surplus that might remain, after providing for the payment of debts, might be distributed among the shareholders. The suit was filed in the Court of the District Judge of Ahmedabad, who, however, instead of trying it himself, referred it to the Assistant Judge for disposal. The plaintiffs valued their suit at Rs. 6,000.

The defendant answered that the plaintiffs ought to have sued for a dissolution of partnership under s. 254 of the Contract Act, and that s. 265 did not apply as the partnership had not been dissolved. The other allegations in his written statement were immaterial.

Two of the issues raised in the case, were, whether the Court had jurisdiction to try the suit, and whether the plaintiffs were entitled to ask for a dissolution of the partnership. The Assistant Judge found both the issues in the affirmative. He was of opinion that the ill-feeling between the parties was such as to justify him in dissolving the partnership and winding up its affairs under s. 254, cl. 6 of the Contract Act. He accordingly directed that the partnership should be dissolved and its business wound up. He did not, however, award costs to the plaintiffs.

[67] The defendant thereupon appealed to the High Court.

Bhaishankar Nanabhai, for the appellant.—The plaintiffs brought this suit, under s. 265 of the Contract Act, for the winding up of the partnership business, without a previous dissolution of the partnership, as required by that section. The District Judge, therefore, had no jurisdiction to accept the plaint. He was also wrong in referring it to the Assistant Judge for his disposal, under the Bombay Civil Courts' Act. The jurisdiction given by s. 265 of the Contract Act to the District Judge is exclusively vested in him and cannot be transferred by him. The decision of the Assistant Judge is also without jurisdiction, both because the partnership had not been previously dissolved, and because the value of the suit was fixed at Rs. 6,000. Taking the suit to be one for a dissolution of partnership, it ought to go before another Court, according to its pecuniary valuation.

Manekshah Jehangirshah, for the respondents, objected to the decree of the lower Court on the ground that the defendant ought to have been ordered to pay the plaintiffs' costs of the suit.

JUDGMENT.

WESTROPP, C. J.—The plaintiffs have failed to prove any termination of the partnership previously to the institution of this suit. Such a termination, *i.e.*, dissolution of the partnership, was necessary in order to give the District Court jurisdiction under s. 265 of the Indian Contract Act IX of 1872, and we observe in the decree of the Assistant Judge that he directs the dissolution of the partnership. Assuming that the District Judge had power to refer a case properly falling under s. 265 of that Act to the Assistant Judge under the Bombay Civil Courts' Act of 1869 (a point which we do not decide), still, it being evident that this case did not fall within s. 265 of the Indian Contract Act, we must reverse the Assistant Judge's decree, and order the plaint to be restored to the plaintiffs for presentation by them in the proper Court, *viz.*, that of the First Class Subordinate Judge, with such amendments as they may be advised to make.

The plaintiffs having resorted to the wrong Court, must pay to the defendant the costs of this suit and appeal.

Decree reversed.

[68] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice F.D. Melvill.

CHHAGANLAL AND OTHERS (*Original Defendants*), *Appellants v.* BAPUBHAI (*Original Plaintiff*), *Respondent.** [10th June, 1880.]

Limitation Acts XIV of 1859 *and IX of* 1871—*Suit to establish title and for arrears.*

The plaintiff sued the defendants to recover a share of the income of a certain vatan which was admitted to be connected with an hereditary office, but was not, strictly speaking, charged upon immoveable property. In 1861 the plaintiff had brought a previous suit and obtained a decree declaring his right to share in the vatan and awarding him arrears for six years. Under this decree he had received payment of his share up to the year 1860. In the present suit the plaintiff claimed arrears for twelve years, *viz.*, from 1862 to 1874. He admitted that he had received no payment for the year 1861, and that his claim for that year was barred.

The defendants contended that the period of limitation applicable to such a claim was six years, and not twelve years; that this was the case at any rate so long as the Limitation Act XIV of 1859 was in force, and that, therefore, the claim to so much of the arrears as was time-barred under that Act could not be revived by Act IX of 1871.

Held that, whether Act XIV of 1859 or Act IX of 1871 applied to the plaintiff's claim, the period of limitation was twelve years. Article 132 of sch. II of Act IX of 1871 was a distinct provision to that effect. There was no similar provision in Act XIV of 1859, but all hereditary offices, and all payments or allowances made on account of such offices, are to be regarded as immoveable property within the meaning and intention of that Act, and are therefore governed by the provisions of cl. XII of s. 1.

It was also contended on behalf of the defendants that even if the period of limitation were held to be twelve years, the plaintiff's claim was nevertheless barred *in toto*, inasmuch as he admitted that he had received no payment on account of his share for thirteen years preceding the institution of the suit. In support of his contention the cases of *Raiji Manor* v. *Desai Kallianrai* (1) and *Madvala* v. *Balvant* (2) were cited, where it was laid down that the cause of action to establish title, and the cause of action to recover arrears which rest on such title, are not distinct and independent of each other; so that if the former be barred, even the arrears which may be within the period of limitation cannot be recovered.

Held that, while this is the rule which must be applied to cases in which a plaintiff must establish his title before he can ask for arrears accruing due under such title, the same rule does not apply where, as in the present case, the plaintiff has in a former suit obtained a decree declaratory of his title. It is no longer necessary for him to establish his periodically recurring right against any person who is bound by that decree; and that being so, there is [69] nothing in the law of limitation which can be construed into a restriction of the plaintiff's right to recover the arrears falling due within the period of limitation.

[Diss., 8 B. 426 (432); N.F., 7 B. 191 (194); F., 16 A. 189 = A.W.N. (1894) 19; R., 9 B. 111 (114); 14 B. 236 (240); 15 B. 135 (141); 22 B. 669 (671); 26 M. 291 (298); 11 A.L.J. 580 (585); 2 O.C. 62 (63); U.B.R. (1897—1901), Vol. II, p. 535 (537); D., 22 M. 351.]

THIS was an appeal from the decision of A. L. P. Larken, Assistant Judge of Ahmedabad, confirming the decree of the Subordinate Judge of Ahmedabad.

The facts of the case, the arguments, and the authorities cited, fully appear from the judgment of the High Court.

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* Second Appeal No. 416 of 1879.

(1) 6 B.H.C.R.A.C.J. 56.

(2) 9 B.H.C.R. 260.

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Gokaldas Kahandas Parekh, for the appellants.
Jefferson, *Bhaishankar* and *Dinshak*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—This is a claim to share in the income of a certain vatan, which is admitted to be connected with an hereditary office, but is not, strictly speaking, charged upon immoveable property.

The principal objection to the claim is that it is barred by the law of limitation.

In 1861, the plaintiff brought a suit (No. 3023 of 1861) against the present defendants, or some of them, in which he asked for a declaration of his right to share in the vatan, and claimed arrears for preceding years. On the 13th October 1869, he obtained a decree in his favour. By this decree his title to a share was declared, and arrears for six years were awarded to him. The plaintiff has consequently received payment of his share up to the year 1860.

In the present suit, which was instituted in 1874, he claims arrears for 12 years, *viz.*, from 1862 to 1874. He admits in his plaint that he received no payment for 1861, and that his claim for that year is consequently barred.

It is contended, on behalf of the defendants, that the period of limitation applicable to a claim of this description is six years, and not twelve years; that, at any rate, this was so, so long as Act XIV of 1859 was in force, and that, therefore, the claim to so much of the arrears as was time-barred under Act XIV of 1859, cannot be revived by Act IX of 1871; and that, even if the period of limitation be held to be twelve years, the claim is nevertheless **[70]** barred *in toto*, inasmuch as the plaintiff admits that he has received no payment on account of his share for thirteen years preceding the institution of the suit.

There can be no doubt that under Act IX of 1871, the period of limitation applicable to the present claim is twelve years. Article 132 of the second schedule fixes this period for claims for money charged upon immoveable property, and the explanation subjoined to the article provides that "the allowances and fees called *malikanna* and *haks* shall, for the purposes of this clause, be deemed to be money charged upon immoveable property."

Act XIV of 1859 contains no such distinct provision as the above, and under that Act it would perhaps be impossible to hold that all payments, or allowances, coming within the designation of "haks" could be classed as an interest in immoveable property. But we have no difficulty in holding that all hereditary offices, and all payments or allowances made on account of such offices, are immoveable property within the meaning and intention of Act XIV of 1859. By s. 1 cl. 1 of Reg. V of 1827 hereditary offices were distinctly classed with immoveable property; and, as observed by the Judicial Committee in *Maharana Fatesangji* v. *Desai Kallianravaji* (1), that enactment was not repealed by Act XIV of 1859. In the statutes of limitation which have followed Act XIV of 1859, hereditary offices have been similarly treated as immoveable property. We do not see the least reason to suppose that the legislators, who enacted Act XIV of 1859, had any intention of treating hereditary offices differently from the legislators who preceded and followed them.

(1) 10 B.H.C.R. 281.

We are, therefore, of opinion, that, whether we apply Act XIV of 1859, or Act IX of 1871, to the present claim, the period of limitation is twelve years; and, that being so decided, the question which remains is, whether the present claim is barred in consequence of the plaintiff having received no payment on account of arrears for thirteen years.

In support of their contention on this point, the defendants rely on the decisions of this Court in *Raiji Manor* v. *Desai Kallianrai* (1) [71] and *Madvala* v. *Bhagavant* (2). In the latter of these cases (and the principle of decision in the former case was the same) it was laid down that the cause of action to establish title, and the cause of action to recover arrears which rest on such title, are not distinct and independent of each other; so that, if the former be barred, even those arrears which may be within the period of limitation cannot be recovered. Some doubt has been thrown upon these decisions by the observations of the Judicial Committee, at the close of their judgment, in *Maharana Fattesingji's* case already referred to (3), and it is perhaps not easy to reconcile them with the decision of the Privy Council in *Beema Shankar and others* v. *Jamasji Shapurji and others* (4). But assuming those cases to have been rightly decided by this Court (and, as at present advised, we think that they were rightly decided), they establish no more than this, namely, that when a plaintiff has (as he generally has) to establish his title to share in a "hak," before he can obtain a decree for arrears due on account of such share, he cannot be allowed to recover any such arrears, if he come into Court too late to establish his title. Thus art. 131, sch. II of Act IX of 1871 requires a plaintiff, who seeks to establish a periodically recurring right, to bring his suit within twelve years from the date when he was first refused the enjoyment of the right. If such plaintiff were to allow this period to elapse, without suing to establish his right, he could not be allowed indirectly to accomplish the same object by bringing a suit for arrears falling due within the period of limitation. But while this is the rule which (if the decisions referred to be correct) must be applied to cases in which a plaintiff must establish his title, before he can ask for arrears accruing due under such title, it does not appear to us that the same rule applies, when, as in the present case, the plaintiff has already in a former suit obtained a decree declaratory of his title. It is no longer necessary for him to establish his periodically recurring right against any person who is bound by that decree: and this being so, we find nothing in the law of limitation which can be construed into a restriction of the plaintiff's right to recover the arrears falling due within the [72] period of limitation. It has been put forward, as an argument against this conclusion, that, if it be so the plaintiff might keep his decree in his pocket for 50 years, or more, and might then sue for arrears; and that thus there would be practically no such thing as limitation. Assuming, for the sake of argument, that such would be the case, we do not see that there would necessarily be any violation of legal principles in the conclusion which we have stated. The principle upon which statutes of limitation rest is not so much that long adverse possession creates a presumption of title; (for the law could hardly treat such a presumption as irrebuttable); but, rather, that it would be unfair to call upon a defendant to defend his title when, through lapse of time, his muniments of title would be likely to have been lost. But this consideration can have

(1) 6 B.H.C.R. A.C.J. 56.
(2) 9 B.H.C.R. 260.
(3) 10 B.H.C.R. 291.
(4) 2 M.I.A. 23.

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no application in a case like the present, in which the defendants are not called upon to defend their title. The question of title, as between the plaintiff and the defendants who are bound by the decree of 1869, has already been determined, once and for all, in the plaintiff's favour. If the plaintiff has not exacted all which he might have recovered under that decree, his omission to do so has been a distinct gain to the defendants; but it affords no answer to the plaintiff's claim to recover arrears which have admittedly accrued due to him within the last twelve years. It might no doubt be unfair to call upon the defendants to meet a claim for arrears of older date; but that is only because it is likely that the evidence of payments made by them is no longer available to them. On this principle, and to this extent only, the statute of limitation operates in their favour.

We think that the Acting Assistant Judge was right in holding the defendant Vullubhbhai to be bound by the decree of 1869. The decree purports to declare his liability; and though he was not sued by name, yet it is clear that he was not prejudiced by the omission, for in a deposition made by him in the suit he himself admitted his liability.

The cross objections taken by the plaintiff are not, we think, sustainable. The Acting Assistant Judge has found, as a fact, that the emoluments of the "vatan," have been diminished by [73] one-half since 1866, and it has not been shown to us that this conclusion is not supported by the evidence. Under these circumstances the Acting Assistant Judge was justified in holding that the plaintiff was entitled to no more than Rs. 25 from 1866 to 1873.

We, accordingly, confirm the decrees of the Courts below with costs.

Decree confirmed.

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5 B. 73.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

BALKRISHNA VASUDEV (*Original Plaintiff*), *Appellant v.* MADHAVRAV NARAYAN (*Original Defendant*), *Respondent.**

[15th June, 1880.]

Sale of land for arrears of assessment—Fraudulent purchaser—Trustee for the owner in equity—Act X of 1876, *s.* 4, *cl.* (c)—*Clims to set aside a revenue sale—Forfeiture of tenancy—Jurisdiction.*

Whenever the land revenue is in arrear, Government is entitled to sell the land and to realize its due, whoever is the defaulter.

The plaintiff sued to recover possession of certain land and prayed to set aside the sale of it by the Revenue authorities for arrears of assessment due on the land. He alleged that he had let the land to the defendant, on condition of the latter paying the Government assessment and certain rent in cash and kind to the plaintiff; that the defendant having intentionally made a default in payment of the assessment, fraudulently caused the land to be sold by the Revenue authorities and purchased it himself. The defendant traversed the plaintiff's allegations and stated that he was in possession of the land as purchaser at the revenue sale. The Subordinate Judge rejected the plaintiff's claim, holding that he failed to prove either the defendant's liability to pay the assessment or any fraud on his part, with respect to the sale of the land, and that the sale could not be set

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* Second Appeal No. 88 of 1880.

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5 B. 73.

aside. His decree was affirmed on appeal by the Assistant Judge on the sole ground that the sale could not be set aside. He did not go into the merits of the case. On appeal to the High Court

Held, that the plaint ought not to have contained any prayer for setting aside the sale, but that, as it contained a prayer for possession, it might be read as praying (or at least that the plaintiff might have been permitted to amend it so that it might simply pray) that the defendant should, under the circumstances alleged by the plaintiff, be declared a trustee of the land for the plaintiff.

[74] *Held*, also, that if the plaintiff's allegations were true, the plaintiff would be entitled to such a declaration, and the defendant would be discharged of his sub-tenancy in consequence of his conduct which worked a forfeiture of any right to be continued as tenant.

Section 4, cl. (*c*) of Act X of 1876 excepts from the jurisdiction of the Civil Courts claims to set aside, on account of irregularity, mistake, or any other ground except fraud, sales for arrears of land revenue.

Quære—Whether the exception of fraud in the above enactment is confined to fraud on the part of officers conducting sales for arrears of land revenue.

[R., 21 B. 396 (399); 22 B. 271 (275); 30 B. 466 (473) = 8 Bom. L. R. 360; 3 Bom. L. R. 92 (93); D., 12 B. 595 (612).]

THIS was a second appeal from the decision of C. E. G. Crawford, Assistant Judge of Thana, in appeal, affirming the decree of Narayan Balwant, Second Class Subordinate Judge of Alibag.

The plaintiff, Balkrishna, brought this suit to recover possession of two portions of a certain oart, situate at Chaul in the taluka of Alibag, together with two years' arrears of rent. He alleged that the said two portions of the land belonged to him and were let to the defendant in November 1875, the latter agreeing to pay the Government assessment and Rs. 1-8 and two jack-fruits as rent to the plaintiff; that the defendant was in possession of the remaining third portion of the oart as mortgagee from one Govind Gangadhar; and that the defendant, having purposely made a default in payment of the assessment for the year 1875-76, fraudulently caused the land to be sold by the Revenue authorities and purchased it himself on the 29th June 1876. The plaintiff, therefore, prayed that the sale should be set aside and the land put in his possession and for arrears of rent and costs.

The defendant denied the truth of the plaintiff's allegations and stated that he had purchased the whole oart at the sale by the Revenue authorities for arrears of assessment, and that he was in possession of it as such purchaser.

The Subordinate Judge held that the plaintiff failed to prove the defendant's liability to pay the Government assessment or any fraud on his part with respect to the sale of the land and refused to set aside the sale. He accordingly rejected the plaintiff's claim on the 29th June 1878.

In appeal, the Assistant Judge raised only one issue, *viz.*, whether the sale could be set aside. He found it in the negative **[75]** and, without going into the merits of the case, affirmed the decree of the first Court (30th October 1879). He observed: "Under s. 4, cl. (*c*) of Act X of 1876, sales for arrears of land revenue cannot be set aside except on the ground of fraud, that is, fraud in the conduct of the sale by the officers conducting it. Supposing, therefore, that plaintiff (appellant) succeeded in proving the fraud he alleges on the part of defendant, the purchaser, he could not get what he prays for in the plaint, namely, the setting aside of the sale. It would, therefore, be waste of time to consider whether he has proved, or should be allowed to produce further evidence of the alleged fraud. It is still open to him to bring a suit against defendant for the

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damages caused him by the alleged fraud. I confirm the decree of the Subordinate Judge, with all costs of this appeal upon appellant."

The plaintiff appealed to the High Court.

Pandurang Balibhadra, for the appellant.—The lower Courts ought to have held the defendant to have purchased the land at the revenue sale on behalf and for the benefit of the plaintiff for whom he, the defendant, is a trustee in equity. The Assistant Judge ought to have gone into the merits of the case and considered whether the sale had been brought about by the defendant's fraud so as to entitle the plaintiff to have it set aside.

Ghanasham Nilkant, for the respondent.—The land revenue is a paramount charge on the land, and the sale of it for arrears of assessment cannot be set aside, as rightly held by the Courts below.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—The plaint in this case has been ill-drawn. It seeks to recover possession of the land from the defendant, and it also, quite unnecessarily as it seems to us, prays that the sale for arrears of land revenue should be set aside. Whether Govind Gangadar, or the plaintiff, or the defendant, or any other person was bound to pay the land revenue, and omitted to do so, Government was entitled to sell the land for the purpose of realizing that revenue which is the paramount charge on the land (see the authorities cited in the case of *The Secretary of State for* **[76]** *India* v. *Bombay Landing and Shipping Company* (1); see also *Abdul Gani* v. *Krishnaji Bhikaji* (2), *Gundo Siddhesvar* v. *Mardan Saheb* (3) and *Ghellabahi Bhikaridas* v. *Pranjivan Ichharam* (4), authorities which govern this case, the sale having been in 1876. Subsequent sales would be governed by Bombay Act V, 1879, ss. 56, 136 to 138, 153, 181, 182). We think that the plaint ought not to have contained any prayer to set aside the sale. Comprising, however, as it did, a prayer that the plaintiff should recover possession of the property, we think that the plaint might have been read as praying (or at least that the plaintiff might have been permitted to amend it so that it may simply pray) that the defendant should, under the circumstances in which the plaintiff alleges the defendant to have purchased, be declared a trustee of the land, the subject of the suit, for the plaintiff. This would avoid any difficulty arising on s. 4, cl. (*c*) of Act X of 1876, if that portion of that Act has under the first section of the Act be notified by the Governor-General in Council as yet in force. Section 4, cl. (*c*) excepts from the jurisdiction of the Civil Courts "claims to set aside, on account of irregularity, mistake, or any other ground except fraud, sales for arrears of land revenue." The Assistant Judge regards the exception of fraud as confined to fraud in the conduct of the sale by the officers conducting it. Whether or not the Assistant Judge is right in that view, we do not give, or think it now necessary to give, any opinion. On the assumption that the revenue was in arrear (and the plaintiff states it to have been so) Government was entitled to sell the land, whoever was the defaulter, and thus to realize its due. But if the defendant were as between him and the plaintiff bound to pay the land revenue to Government, and either wilfully or negligently omitted to pay, and thereby occasioned the sale, and became himself the purchaser,

(1) 5 B.H.C.R. O.C.J. 23 (48 to 50).
(2) 10 B. H. C. R. 416.
(3) 10 B.H.C.R. 419.
(4) 11 B. H. C. R. 218.

he is in equity liable to be declared a trustee of the land so purchased, for the plaintiff, and, moreover, we think, discharged of his (the defendant's) sub-tenancy in consequence of his conduct which worked a forfeiture to any right to be continued as tenant. In such a state of facts as above assumed, the defendant is in conscience bound to [77] hold the purchased land in trust for the plaintiff, and on demand to make it over to the possession of the latter. The Assistant Judge has not come to any finding whether such or any equivalent state of facts exists in the case, and looking at the plaint as we do, *viz.*, as substantially seeking to have the defendant declared a trustee for the plaintiff, and, as such, bound to make over the land to him, we are of opinion that the Assistant Judge's decree must be reversed, and that there must be a new trial by the Assistant Judge for the purpose of ascertaining how far, if at all, the allegations of the plaintiff are true—a question upon which we do not give any opinion. The plaint may be amended by striking out the prayer to set aside the sale and by more distinctly praying than it now does, that the defendant may be declared a trustee for the plaintiff and bound to make over the land to him. The decree of the Assistant Judge is reversed and the cause remanded for re-trial by him with reference to the observations hereinbefore made. Costs throughout must depend on the final result of the new trial.

Decree reversed and case remanded.

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5 B. 77.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

BHAI SHANKAR (*Appellant*) *v.* THE COLLECTOR OF KHAIRA (*Respondent*).* [3rd August, 1880.]

Narva—Bhag—Alienation previous to Bombay Act V of 1862—*Attachment—Dismemberment of Bhag.*

The principal object of Bombay Act V of 1862 is to prevent the further dismemberment of bhags or shares in bhagdari villages : it renders null and void any future alienation of any portion of a bhag, other than a recognized sub-division, but it does not invalidate previous alienations. A sale of a portion of a bhag, previously to the passing of Bombay Act V of 1862, amounts to a dismemberment of the bhag, and what remains in the bhagdar's hands continues to be a complete bhag, when the portion separated from it becomes a new bhag.

[D., 8 B. 596.]

THIS was an appeal from the order of S. H. Philipotts, Judge of Ahmedabad.

[78] The material facts of the case are as follows :—

In a village in the Ahmedabad District there was Narva holding consisting of several fields of which the Narvadar Bapuji Bhagwandas in 1816 sold one field, No. 501, to certain persons who at the time of this suit were represented by Daji Dhanji. In 1878 the whole bhag was attached in execution of decree against the said Bapuji in favour of the appellant Bhai Shankar. Daji Dhanji intervened and got the attachment raised from field No. 501. The Collector thereupon made the present application for the removal of the attachment on the remaining bhag, contending that the effect of the raising of the attachment on a part of the

* Appeal No. 1 of 1880 under Bombay Act V of 1862.

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bhag was to dismember it. This contention was allowed by the District Judge. The appellant, Bhai Shankar, therefore, appealed to the High Court.

Gokaldas Kahandas, for the appellant.—The field No. 501 having been detached from the bhag, before the passing of the Bhagdari Act, this Act could not render the rest of the bhag inalienable: *Ranchoddas* v. *Ranchoddas* (1). This field was a recognized bhag, and so must the remainder be considered.

Nanabhai Haridas, Government Pleader, for the Collector.—To allow the contention of the appellant would be equivalent to a dismemberment of the bhag which now belongs to several sharers and has *gabhan* land attached to it.

JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—The principal object of Bombay Act V of 1862 is to prevent the further dismemberment of bhags or shares in Bhagdari or Narvadari villages. It renders null and void any future alienation of any portion of a bhag other than a recognized sub-division, but it does not invalidate previous alienations. The sale, therefore, of field No. 501 to Daji Dhanji in A.D. 1861 was a valid sale, and conferred upon Daji Dhanji all the rights of a purchaser, including the right of alienation. The portion of the bhag which remained in the hands of the Bhagdar after the separation of the field No. 501 has now been attached, and the Collector has obtained an order setting aside the attachment on the ground that, notwithstanding the sale of field No. 501 to **[79]** Daji Dhanji, both that field and the remaining portion of the bhag continued to be divisions on the same bhag, and not having been recognized in his books, they are not "recognized sub-divisions" within the meaning of the Act, and that, consequently, neither of them is liable to attachment. We are of opinion that the Collector's contention on this point is erroneous. The effect of it would be to give a retrospective operation to the Act, and to alter the nature of the estate in the field No. 501, which was acquired by Daji Dhanji more than 60 years ago. For, if the field No. 501 were to be treated as an unrecognized sub-division of a bhag in Daji Dhanji's hands, it would follow that Daji Dhanji would be incapable of dealing with it; and his proprietary rights would thus be very seriously affected. This test is itself sufficient to show what injustice would be caused, if the Collector's view were adopted. We think that the sale of the field No. 501, previously to the passing of Bombay Act V of 1862, amounted to a dismemberment of the bhag, and that what remained in the bhagdar's hands continued to be a complete bhag, while the portion separated from it became a new bhag. The ground, therefore, on which the District Judge has proceeded is erroneous, and his decree or order must be reversed. The case must be remanded to him in order that he may determine the other questions between the parties, namely, whether the attached gabhan is or is not appurtenant or appendant to the attached bhag, and whether the attachment is invalidated by the fact (if it be a fact), that the judgment-debtor is not the sole proprietor of the bhag.

Costs to follow final decree.

(1) 1 B. 581.

5 B. 80=5 Ind. Jur. 427.

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5 B. 80=5 Ind. Jur. 427.

[80] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

VASUDEV AND ANOTHER (*Original Defendants*), *Appellants v.* VAMNAJI AND OTHERS (*Original Plaintiffs*), *Respondents.*[*]

[21st September, 1880.]

Religious rites and ceremonies—Jurisdiction of the Civil Courts—Civil Procedure Code, X of 1877, *s.* 11—*Suit by Temple Committees against Pujaris.*

Suits as to religious rites or ceremonies, which involve no question of the right to property or to an office, are not suits of a civil nature, nor are they intended to be brought within the jurisdiction of the Civil Courts. A suit, therefore, by the plaintiffs, as members of a committee of management of a Hindu temple, to compel the hereditary priests of the temple to take out certain ornaments from the treasury of the managing committee, and to place them upon the image of the god, on such high days and holidays as might from time to time be appointed by the managing committee, and to obtain a declaration that the said ornaments, after they had been so taken out of the treasury were in the custody of the priests, and that they were responsible for their safe custody was held unsustainable.

Section 11 of the Civil Procedure Code, Act X of 1877, introduces no new law, but merely declares the law as it has always been administered.

[**F.**, 32 C. 1072 (1076)=2 C.L.J. 570=10 C.W.N. 505; 2 M.L.T. 94; **R.**, 11 M.L.J. 215 (223); **D.**, 33 B. 387=11 Bom. L. R. 389 (394)=2 Ind. Cas. 419; 30 M. 158 =17 M.L.J. 1=2 M.L.T. 69.]

THIS was a second appeal from the decision of C. B. Izon, Judge of Ratnagiri, confirming the decree of the Subordinate Judge of Chiplun, who allowed the plaintiffs' claim. The defendants appealed to the High Court.

Pandurang Balibhadra, for the appellants.

Rao Saheb V. N. Mandlik, for the respondents.

JUDGMENT.

The facts, so far as they are material, appear from the following judgment of the Court delivered by

M. MELVILL, J.—This suit was brought by the plaintiffs, as members of a committee of management of a Hindu temple, to compel the defendants, who are hereditary *pujaris* or priests of the temple, to take out certain ornaments from the treasury of the managing committee, and to place the same upon the image of the god, on such high days and holidays as may from time to time be appointed by the managing committee; and, further, to obtain a declaration that the said ornaments, after they have been so taken out of the treasury, are in the custody of the defendants, and that the defendants are responsible for their safe keeping.

[81] The defendants took exception to the suit, on the ground that it had not been brought by all the members of the managing committee. They also stated that they had no objection to put the ornaments on the idol; but they alleged that they were not responsible for their safe custody, but that the duty of taking the necessary measures for the safety of the ornaments rested upon the managing committee.

Both the lower Courts have awarded the claim. It does not appear that in either Court any question was raised as to the jurisdiction of a

[*] Second Appeal No. 197 of 1880.

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5 B. 80 = 5 Ind. Jur. 427.

Civil Court to entertain such a suit: nor is any objection of the kind set forth in the memorandum of appeal to this Court. But, on the first statement of the case, it appeared to us more than doubtful whether a Civil Court is competent to issue an injunction, which could only be enforced by imprisonment, to compel the performance of the ceremonial of idol worship; and we, therefore, expressed a wish that the arguments should be, in the first instance, directed to this point; and we adjourned the case, at the request of the learned pleader for the respondents, as he was not at the moment prepared to discuss the preliminary question raised by the Court.

We have now heard this question fully argued; but we have heard no argument, nor has any authority been quoted to us, which has in any way altered the opinion which we were at first inclined to express. The regulation of religious ritual is not within the province of the Civil Courts. In England, no doubt there are Courts which have power to compel the due performance of public worship; but they are Courts specially constituted for the purpose; and this circumstance in itself indicates that there is no such jurisdiction inherent in the ordinary Civil Courts. And even the Courts so specially constituted can only deal with the ceremonial of the established church, which is the form of worship of the State; and they have no power to interfere for the purpose of regulating the rites and usages peculiar to any dissenting sect or body. In India there is no State Church; and no Courts empowered to deal with question purely ecclesiastical, whether arising in the Christian, Hindu, or any other community. It is the policy of the State to protect all **[82]** religions, but to interfere with none. It is for those who profess any form of religion to adopt such ritual as they think fit, and to make and enforce such rules as may be necessary to secure its due observance. With such matters the Civil Courts have nothing to do, unless and until they result in an infraction of civil rights. Section 11 of Act X of 1877 was passed after the present suit was instituted; but it introduces, as we think, no new law, but merely declares the law, as it has always been administered. That section provides that "a suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonials." It follows, by implication, that suits as to religious rites or ceremonies, which involve no question of the right to property or to an office, are not regarded by the Legislature as suits of a civil nature, nor intended to be brought within the jurisdiction of the Civil Courts.

For these reasons we are of opinion that the plaintiffs cannot obtain the injunction which they demand. Nor do we think that a declaration can be made, fixing by anticipation upon either party responsibility for a loss which may never occur. If the ornaments belonging to the temple should ever be lost or stolen, it will be time enough to apply to the Civil Courts to determine on whom the liability should be thrown.

The decrees of the lower Courts are reversed, and the claim rejected, with costs on the plaintiffs throughout.

Decrees reversed.

5 B. 83.

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5 B. 83.

[83] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., and Mr. Justice M. Melvill.

GIRDHAR AND OTHERS (*Appellants*) *v.* KALYA AND OTHERS (*Opponents*).* [23rd August, 1880.]

Caste question—Jurisdiction—Suit to recover cooking vessels—Regulation II of 1827, s. 21.

A claim by the members of one division of a caste against the members of the other division of that caste, for recovery of half of certain vessels belonging to the caste or their value is a caste question within the meaning of s. 21 of Regulation II of 1827, and cannot be made the subject-matter of a suit cognizable by a Civil Court.

[R., 19 B. 507 (521); 26 B. 174 (188, 189); 34 B. 467 (483) = 11 Bom.L.R. 1014 = 4 Ind. Cas. 108; D., 23 B. 122 (129, 130); 9 Bom.L.R. 569 (577).]

THIS was an application for the exercise of the High Court's extraordinary jurisdiction and to obtain the reversal of the decree of G. Druitt, Acting Assistant Judge of Surat, which reversed the decree of the Subordinate Judge of Broach.

The parties to the suit belonged to the Ghanchi caste, and were inhabitants of the town of Broach. In consequence of a dispute relating to the apportionment of certain marriage fees, the caste was divided into two factions. As usual amongst the inhabitants of Gujarat, the caste owned a number of cooking vessels which continued in the possession of the persons who had charge of them before the secession took place. The persons in possession and others who sided with them, objected to their use by the seceders, who, therefore, sued them to recover half the vessels or their value.

The defendants *inter alia* contended that the suit was not of a nature cognizable by the Civil Court as the claim involved a caste question, from the cognizance of which it was barred by s. 21 of Reg. II of 1827.

The Subordinate Judge disallowed this contention; the Assistant Judge considered that it was right on the strength of the Full Bench decision in *Nemchand* v. *Savaichand* (1). The subject-matter of the claim involving less than Rs. 500, no appeal lay to the High Court. The plaintiffs, therefore, made this application for the exercise of its extraordinary jurisdiction.

[84] On the 4th of March, 1880, PINHEY and F. D. MELVILL, JJ., granted a *rule nisi*, calling on the defendants to show cause why the decree of the Assistant Judge should not be reversed and that of the Subordinate Judge restored.

Nanabhai Haridas, Government Pleader, for the applicants, relied on *Dullabh Jogi* v. *Narayan Lakhu*(2).

Shantaram Narayan, for the opponents in showing cause, relied on *Nemchand* v. *Savaichand*, the case cited by the Assistant Judge.

JUDGMENT.

PER CURIAM.—Following the decision in the Full Bench case of *Nemchand* v. *Savaichand*, the Court discharges the rule with costs.

Rule discharged.

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* Extraordinary Application No. 24 of 1880.

(1) Unreported, but see note *infra*. (2) 4 B. H. C. R. 110.

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5 B. 84-N.

NOTE.—The case of *Nemchand* v. *Savaichand* (S.A. 591 of 1865) was decided on the 31st of July 1866, by COUCH, NEWTON, TUCKER, WARDEN and GIBBS, JJ. The suit in that case was brought by certain members of the Sharavak caste at Surat to obtain a decree declaring them to be the proper recipients of half the compensation granted by the Collector of Surat, in regard to certain shops belonging to the caste which had been divided into two factions, the plaintiffs forming one and the defendants the other of such factions. The defendants contended that the cognizance of the suit by the Civil Court was barred by s. 21 of Regulation II of 1827. The Munsif of Surat having allowed the claim, the defendants appealed to the Judge who raised three issues, of which the first was, "Is this a caste question with which a Court cannot interfere by law?" He decided the issue in the affirmative for the following reasons :—

"The property in which a right is sought to be so established as caste property belonging to a temple, respecting the disposal of which the caste alone adjudicate, none of the caste have any individual right in it, and the plaintiffs' only claim is on the ground that they have seceded, or rather that the caste has split into two divisions, and they demand a declaratory decree proclaiming the said right to the half of the said compensation money awarded by the Collector for certain houses, the property of the caste temple. Now this seems to me to be clearly a caste question : who but the caste can decide whether the plaintiffs had sufficient reason for separating themselves from the rest of the caste, and who but the caste can decide whether a seceding party has any right to the religious caste property?

"In the circumstances of this case I cannot see that there is any alleged injury to the caste and character of the plaintiffs arising from any illegal or unjustifiable conduct of the other parties. The question of plaintiffs' right to the half the temple property is simply a caste question ; it is not a right of any individual, nor can it be looked on as affecting the separate individual right of the parties. It is a question solely affecting the well-being of the caste, and, as such, I consider the Court cannot interfere."

[85] Against this decision the plaintiffs appealed to the High Court, urging that the District Judge was wrong in holding that the question involved was a caste question not cognizable by the Civil Court, and that it related merely to a civil right, *viz.*, a right of property. A Full Bench of the High Court, consisting of the Judges named above, confirmed the decree of the District Judge.

[F., 5 B. 83; **R.**, 19 B. 507 (521) ; 26 B. 174 (188, 189) ; 34 B. 467=11 Bom. L.R. 1014=4 Ind. Cas. 108 ; **D.**, 12 B. 225 ; 9 Bom. L.R. 569 (577).**]**

5 B. 85=5 Ind. Jur. 428.

[85] APPELLATE CRIMINAL.

Before Sir Charles Sargent, Kt., and Mr. Justice M. Melvill.

EMPRESS *v.* JAFAR M. TALAB.* [22nd September, 1880.]

Presidency Magistrates' Act, No. IV of 1877, *s.* 167, *Plea of guilty—Conviction—Sentence—Appeal.*

Where a person has, on his own plea, been convicted on a trial held by a Presidency Magistrate, an appeal to the High Court, on the ground that the conviction was illegal and therefore also the sentence, does not lie according to the provisions of s. 167 of the Presidency Magistrates' Act No. IV of 1877, albeit that the Magistrate has sentenced the person to imprisonment for a term exceeding six months or to a fine exceeding two hundred rupees.

THIS was a petition of appeal purporting to be under s. 167 of Act No. IV of 1877, praying for a reversal of the sentence of a fine of Rs. 250 passed on him by C. P. Cooper, Chief Presidency Magistrate of Bombay.

By virtue of the authority vested in the Municipal Commissioner for the city of Bombay by s. 74, cls. 1 and 2 of the Bombay Municipal Acts of 1872 and 1878, the accused Jafar Talab was required by a notice, dated the 1st of October 1879, to make a true return in writing showing the rent or annual value of a house belonging to him. The said accused was

* Criminal Appeal No. 2 of 1880.

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5 B. 85 = 5 Ind. Jur. 428.

cautioned that in the event of his failing to furnish the return within a week of the receipt of the notice, he would render himself liable under cl. 2, s. 74, to the penalty provided in s. 176 of the Indian Penal Code. A return was accordingly made on the 23rd October, 1879, but inquiries in the Municipal Office having awakened suspicions as to the accuracy of the returns, Edalji Rustamji Reporter, Assistant Assessor to the Municipality, laid an information before Mr. Cooper on the 17th of June 1880, **[86]** charging Jafar Talab under s. 177 of the Indian Penal Code, with having furnished false information to a public servant, and a summons was issued the same day.

Lang, for the petitioner.—This is a conviction under s. 74 of Bombay Act III of 1872 for having knowingly made a false or incorrect return. Section 296 of the Act provides that no person shall be liable to any penalty under the Act, for any offence made cognizable before a Magistrate, unless the complaint respecting such offence shall have been made before a Magistrate within three months next after the commission of such offence. The alleged false return in this case was made on the 23rd October 1873, and the complaint was not made till the 17th of June 1880; hence the Magistrate had no power to entertain the charge much less to convict the accused and pass sentence upon him.

The Hon. *F. L. Latham*, Acting Advocate-General, for the Crown. —The petitioner having pleaded guilty before the Magistrate, cannot appeal to the High Court on the ground of the illegality of his conviction. The proviso of s. 167 of the Presidency Magistrates' Act gives to a person convicted on his own plea an appeal for a limited purpose only. If the sentence be too severe, he can appeal to have it reduced ; or if it be not of the nature sanctioned by law, he can have that error remedied. If he has confessed to an offence punishable with fine only and the Magistrate has sentenced him to imprisonment, he can appeal to the High Court and have the illegality of the sentence removed ; but he cannot urge that his conviction is wrong. Moreover, it is open to the High Court, under s. 174 of the Presidency Magistrates' Act, to find the petitioner guilty under either s. 177 or s. 192 of the Indian Penal Code quite independently of s. 74 of the Municipal Act. His offence is complete even though s. 74 had never become law. The limitation of three months provided in this section cannot operate as a limitation on any offence contained in the Indian Penal Code. The Municipal Act is an Act of the Bombay Legislature ; under s. 43 of the Indian Councils' Act, 24 and 25 Vic., c. 67; and the enactment of such a limitation by it to affect an Act of the supreme legislature would be clearly *ultra vires*. To preserve harmony **[87]** it must be held that s. 296 of the Municipal Act was not intended to apply to s. 74.

Lang, in reply.—If the petitioner had pleaded guilty to acts which do not constitute any offence whatever, and the Magistrate had erroneously found him guilty of an offence he would have had a right of appeal, for his conviction and sentence would both have been clearly wrong. And this would have been the case even if he had been sentenced to imprisonment for less than six months or to a fine not exceeding two hundred rupees.

JUDGMENT.

The judgment of the Court was delivered by

SARGENT, J.—Section 167 of the Presidency Magistrates' Act (IV of 1877) provides that " any person convicted on a trial held by a Presidency

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Magistrate may appeal to the High Court if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees: Provided that when an accused person has been convicted on his own plea, no such appeal shall lie except as to the extent or legality of the sentence." We think that this proviso, construed in its plain and obvious sense, is to limit the right of appeal when the accused has pleaded guilty to such matter as may be special ground of complaint with respect to the sentence as distinguished from the conviction itself, whether on the ground that the extent of the sentence is beyond what the circumstances of the case required, or that the sentence is illegal as not authorized by law. The intention of the Legislature would appear to be to treat the plea of guilty as a waiver of the right to appeal except as to the justice and legality of the sentence itself. In the present case the petitioner, who had pleaded guilty, complains that his conviction on a charge of having committed an offence under s. 177 of the Penal Code is bad, having regard to s. 296 of the Bombay Municipal Act, and his application is, therefore, an appeal against the legality of the conviction which, in our opinion, is excluded by the proviso to s. 167 of the Presidency Magistrates' Act.

Order accordingly.

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5 B. 88.

[88] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice M. Melvill.

ANDARJI KALYANJI, DECEASED, HIS HEIRS HIS DAUGHTERS BAI AMBA AND ANOTHER (*Plaintiffs*), *Appellants v.* DULABH JEEVAN (*Defendant*), *Respondent.** [12th November, 1877.]

Limitation Act No. XIV of 1859, *s.* 4—*Acknowledgment—Signature.*

When an account stated was written by a debtor himself, with his name at the top of the entry, it was held to be sufficiently signed within the meaning of s. 4 of Act XIV of 1859.

[F., 5 B. 89; 31 C. 1043=9 C.W.N. 83; R., U.B.R. (1892—1896) Civil, 462.]

THIS case was submitted for the opinion of the High Court by E. Hosking, Assistant Judge at Surat, under s. 28 of Act XXIII of 1861. He stated it as follows:—

"The following is a translation of a stated account (Ex. 2) in the said appeal; 'Samvat 1924, Margashirsh vad 12th Sanivar (Saturday) the account of Desai Andarji Kalyanji passed by his own hand to Soni Dulabh Jairam after settlement of accounts—

$145\frac{1}{2}$, Balance Rs. $145\frac{1}{2}$, in figures one hundred and forty-five and a half; by his own hand.'

"I have found that this account was written by Andarji Kalyanji. The point on which I feel doubtful is, whether this account should be held to be signed by Andarji Kalyanji within the meaning of s. 4 of Act XIV of 1859, and, therefore, I refer this point to the High Court for decision. I have made my decision in the appeal contingent on the

* Civil Reference No. 20 of 1877.

decision of the High Court on this point. I am of opinion that the writing of his name by Andarji Kalyanji in the heading of this account, as above shown, is not a signature."

There was no appearance of parties in the High Court.

JUDGMENT.

WESTROPP, C.J.—The Court thinks that the account stated has been sufficiently signed by Andarji Kalyanji within the meaning of s. 4 of Act XIV of 1859. The signature is in one of the modes of signing most generally practised by natives.

5 B. 89.

[89] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

JEKISAN BAPUJI AND ANOTHER (*Plaintiffs*), *Appellants* v. BHOWSAR BHOGA JETHA, DECEASED, BY HIS SON AND HEIR SAMAL BHOGA, A MINOR, REPRESENTED BY HIS MOTHER BAI MANCHA (*Defendant*), *Respondent.** [28th September, 1880.]

Limitation Act, No. XV of 1877, *s.* 19—*Acknowledgment—Signature.*

Where the whole of an account stated (khata) was written by a debtor himself with the introduction of his name at the top of the entry, the khata was held to be sufficiently signed within the meaning of Act XV of 1877, s. 19.

[F., 31 C. 1043=9 C.W.N. 83.]

THIS case was referred for the opinion of the High Court by S. H. Phillpotts, Judge of the District Court of Ahmedabad, under s. 617 of Act X of 1877. The case came before him in appeal, and was stated by him as follows:—

"This action was instituted by appellants to recover Rs. 68 principal and Rs. 16 interest, less Rs. 10-8-0 as difference in currencies, on a balance of account alleged to have been stated on Maha vad 2, Samvat 1932 (11th February 1876), by the deceased Bhoga Jetha.

"Respondent denied all knowledge of the transaction.

"The Subordinate Judge of Kaira, Rao Saheb Dowlatrai Sampatrai, rejected the claim on the ground that the account not having been signed by deceased, the claim was barred by limitation. He appears to have been of opinion that the khata had been written by the deceased, but recorded no finding on the point.

"Appellants appealed on the grounds—

"(1) That the lower Court's decision was contrary to law and evidence.

"(2) That the lower Court was in error in rejecting the claim on the ground that the balance sued on did not bear the signature of Bhoga, because the said Bhoga had written his own name in the heading, and added 'dashkat pote' (his own signature).

"(3) It was proved that Bhoga had acknowledged the debt, yet the claim was rejected.

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[90] "(4) That it had been the custom of Gujarat for hundreds of years to take acknowledgments in this way, yet the lower Court decided contrary to the custom.

"The issues for decision are—

"(1) Was this account written by Bhoga Jetha?

"(2) If so, is the name of Bhoga Jetha at the head of the account a signature within the meaning of s. 19, Act XV of 1877?

"My finding on the first issue is in the affirmative.

"It is proved by the evidence of one witness, who was not cross-examined, that the deceased Bhoga wrote the account with his own hand. The widow simply expresses her ignorance on the subject, and has produced no evidence to prove that the khata is not in her deceased husband's hand-writing.

"As regards the second issue—

"The khata which, as I have above held, is written entirely in deceased's hand-writing, runs as follows (exhibit No. 2) :—

Shri.

Bhowsa Bhoga Jetha's khata of Samvat 1932, Maha vad—

68-0-0, in letters sixty-eight rupees, balance due up to Samvat 1932, Maha vad 2, having made up accounts were found due to you, that is, debited; (dashkat pote) *i.e.*, his own handwriting; errors excepted.

"It is admitted on both sides that the suit will be time-barred unless this acknowledgment is sufficient to bring the suit within the limitation. Mr. Broughton, in commenting on this section, says :—

"'The words 'signed by him' used in s. 4 of Act XIV of 1879, were considered sufficiently complied with where the signature appeared on the body of the instrument, which was delivered as complete, although not signed at the foot or the end, and he refers to 2 Mad. H. C. Rep. 79. However, in that case, it does not appear clear what kind of a signature was made, or where the name was written.

"'The decisions with regard to signatures in English cases have been mostly made with reference to the Statute of Frauds. It has [91] in them been ruled, that where the name of the party sought to be charged has been written by his authority it matters not whether it is written at the top or in the middle of the paper. It is a sufficient signature to satisfy the requirements of 'a signature' although not signed regularly at the bottom. There is always a question whether the party meant to be bound by it as it stood, or whether it was left so unsigned, because he refused to complete it;' (Smith on Contracts, p. 58.) In this case the evidence shows the respondent did write the account, including his own name, and the words 'dashkat pote' show that he regarded it as completed.

"I therefore find this issue in favour of appellant, subject to the opinion of the High Court whether in the case of a khata having been written by the judgment-debtor the entry of his name in his own handwriting is a sufficient signature under s. 19, Act XV of 1877. Subject to the opinion of the High Court, to which I refer the case under s. 617 of Act X of 1877. I reverse the Subordinate Judge's decree, and award the claim with costs."

There was no appearance of parties in the High Court.

The following is the judgment of the Court :—

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WESTROPP, C.J.—The Court answers the question of the District Judge in the affirmative. It agrees with him in thinking that the khata has been sufficiently signed by the deceased, the debtor's name having been introduced in his own hand-writing at the top of the entry, the whole of such entry being in the same hand-writing: *Khwaja Muhammad Janula* v. *Venkatarayar and another* (1), *Andarji Kalyanji* v. *Dulabh Jeevan* (2).

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5 B. 92.

[92] ORIGINAL CIVIL.

Before Sir Charles Sargent, Justice.

IN THE MATTER OF THE NURSEY SPINNING AND WEAVING COMPANY, LIMITED; NATIONAL BANK OF INDIA, CLAIMANT; H. R. CORMAC AND OTHERS, *Official Liquidators*. [28th August, 1880.]

Company—Winding up—Bill of exchange—Liability of Company on bill drawn by Directors—Misrepresentation—Indian Contract Act (IX of 1872), *ss.* 18 *and* 19.

On the 9th October 1878 the National Bank purchased from the N. Company a bill of exchange for 4,000 dollars, equivalent to Rs. 8,680, drawn by the N. Company upon the firm of N. K. & Co., of Hongkong. The bill was in the following form:—"Sixty days after sight of this first of exchange (second and third of same tenor and date not being paid) pay to the order of the National Bank of India the sum of dollars four thousand only, value received and place the same to account of Nursey Kessowji, Ghelabhoy Pudumsey, Directors. Nursey Kessowji Secretary, Treasurer and Agent. The Nursey Spinning and Weaving Company, Limited." The bill was duly accepted and presented for payment, but was dishonoured. On the 6th January 1879 the Bank gave notice of dishonour and demanded payment from the Company as drawers of the bill. On the 18th January 1879 the N. Company was ordered to be wound up, and the Bank sent in a claim against the Company *as drawers* of the bill, and subsequently sent in an alternative claim for Rs. 8,680 being the "amount paid by the Bank to and received by the Company."

Held on the authority of *In re The New Fleming Spinning and Weaving Company Limited* (3) that having regard to the form of the bill, the N. Company could not be made liable *as drawers*, *but held* also that the Bank was entitled to recover the amount of the bill from the N. Company as money received to the use of the Bank, on the ground that the Directors of the N. Company, while acting within their authority, had sold to the Bank on behalf of the Company, as a bill upon which the Company was liable, one upon which the Company was not liable, and had, therefore, been guilty of misrepresentation within the meaning of ss. 18 and 19 of the Indian Contract Act (IX of 1872).

THIS was a claim in the winding up of the above Company, made by the National Bank of India, to recover payment of the sum of Rs. 8,680 with interest, as money lent and advanced by the Bank to the Company.

On the 9th October 1878 the National Bank of India purchased from the Nursey Spinning and Weaving Company a bill of exchange for four thousand dollars (equivalent to Rs. 8,680), **[93]** drawn by the Company upon the firm of Nursey Kessowji & Co., of Hongkong. The bill was in the following form:—

"Due, 6th January 1879, exchange for $ 4,000.

Bombay, 9*th October* 1878.

Sixty days after sight of this first of exchange (second and third of the same tenor and date not being paid) pay to the order of National Bank

(1) 2 M. H. C. R. 79 (81). (2) 5 B. 88, *supra*. (3) 4 B. 275.

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of India the sum of dollars four thousand only, value received, and place the same to the account of.

(Signed) NURSEY KESSOWJI, („) GHELABHOY PUDUMSEY, } Directors.

NURSEY KESSOWJI,

Secretary, Treasurer and Agent,

The Nursey Spinning and Weaving Company, Limited."

Accepted. *Hongkong, 4th November* 1878. Due, 6th January 1879. NURSEY KESSOWJI & Co.

The bill was duly accepted and was presented for payment, but was dishonoured.

On the 6th January 1879 the National Bank gave notice to the Company that the bill had been dishonoured, and demanded payment of the amount of the bill from the Company as the drawers. On the 18th January 1879 the Company was ordered to be wound up, and the National Bank subsequently sent in their claim against the Company *as drawers of the bill.*

In consequence of a decision of the High Court in December 1879 in the case of the *New Fleming Spinning and Weaving Company* (1), where it was held that a Company was not liable as drawers of a bill drawn in a similar form, the National Bank, on the 3rd February 1880, withdrew their claim against the Company *as drawers of the bill*, and sent in their present claim against the Company *for money lent* by the Bank to the Company.

[94] It was admitted by the Liquidators of the Company that the Rs. 8,680 had been paid by the Bank to two Directors of the Company, *viz.*, Nursey Kessowji and Ghelabhoy Pudumsey, who signed a receipt for it which they were authorized to do by the Articles of Association. The sum was also placed to the credit of the Company in the Company's books.

Farran, for the National Bank.—The question is, did the Bank buy this bill for Rs. 8,680, or did it lend the money to the Company to be repaid ? It was clearly the intention of the parties that the Company should be liable if the bill was not paid by Messrs. Nursey Kessowji and Company, of Hongkong. It was not the intention of the Bank to buy the bill out and out. Both parties in their books treat the bill as a bill, of the Bank. The Bank got from the Company, together with the bill, documents relating to certain bales of yarn as further security for the money. If the bill had not been accepted, the Bank could have sold the yarn, and thus paid itself out of the property of the Company. This shows that the Company was to be liable: *Van Wart* v. *Woolley*(2). If one person delivers a bill to another without endorsement, the circumstances must be considered in order to ascertain if he is liable in case the bill is not paid.

(1) 4 B. 275.

(2) 3 B. & C. 439.

The circumstances here showed that the bill was taken for an advance to the Company: *In re London and Mediterranean Bank* (1). Counsel referred to the Contract Act (IX of 1872), s. 18, cl. 3.

Hon. *F. L. Latham* (Acting Advocate-General), and *Inverarity* for the Liquidators of the Company.—There is no evidence here that the money was a loan. There was no loan, but the purchase of a bill. There is no remedy against the seller of a bill either on the instrument itself or to recover the consideration: Byles on Bills (12th ed.) p. 169: *Milnes* v. *Duncan* (2). They cited Chalmers on Bills, p. 173; *Jones* v. *Ryde* (3); *Young* v. *Cole* (4).

JUDGMENT.

SARGENT, J.—The questions which I have to decide, arise upon the adjudication of the claim of the National Bank of India against the Nursey Spinning and Weaving Company in liquidation. **[95]** The circumstances on which the claim arises are stated by William Baker, Manager of the said Bank, and Thomas Matheson, Accountant of the same, in their joint and several affidavit, sworn on the 25th February 1880. They say that on the 9th October 1878 a sum of Rs. 8,680 was paid by the Bank to the Nursey Spinning and Weaving Company for a bill of exchange purchased by the Bank from the Company on the above date, which bill has been put in evidence as Exhibit A: that the said bill was duly presented for payment to the acceptors, Nursey Kessowji and Company, of Hongkong, but was dishonoured; that on the 6th day of January 1879 the Bank gave notice to the Company that the bill had been dishonoured, and demanded payment of the amount of the bill from the Company as the drawers of the Bill. The order for the winding up of the Company was made on the 18th January 1879, and it would appear that the first claim that was sent in to the Liquidators of the Company by the Bank in the course of 1879 proceeded exclusively on the basis of the Company being liable *on the bill*. In consequence, however, of a similar claim made by the Bank of Bombay against the New Fleming Spinning and Weaving Company, in liquidation, on a bill identical in form with Exhibit A having been adjudicated on by Mr. Justice Green unfavourably to that Bank (which decision was subsequently affirmed by the Court of Appeal(5), the National Bank, on 3rd February 1880, wrote to the Liquidators of the Nursey Spinning and Weaving Company to say, that in supersession of their former claim, already sent in, they claimed as against the Company the sum of Rs. 8,680, being the *amount paid by the Bank to and received by the Company* on the 9th October 1878, as appears by the receipt bearing that date and signed by two of the Directors, and by the Secretary, Treasurer and Agent of the said Company, together with interest on the said sum from the said 9th October 1878 until the date of the winding up. At the hearing of the claim for adjudication, however, I was asked to regard the claim as presented for proof in its double aspect, in order that the Bank might, if so advised, have an opportunity of appealing on either ground if my decision should be unfavourable to the claim.

[96] Now, so far as the claim seeks to make the Company liable on *the bill*, it is disposed of by the decision of Mr. Justice Green (confirmed on appeal), to which I have before referred, and cannot therefore, be allowed. I proceed, therefore, to consider whether the Bank is entitled to

(1) L.R. 3 Ch. Ap. 651. (2) 6 B. & C. 671. (3) 5 Taunt 488.
(4) 3 Bing. N. C. 724. (5) 3 B. 439. On appeal 4 B. 275.

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recover from the Company the sum of Rs. 8,680, which, as the Bank alleges, was paid to the Company on the 9th October 1878. Now, it is not in dispute that the Rs. 8,680 were actually paid to two Directors, Nursey Kessowji and Ghelabhoy Pudumsey, who signed a receipt for it, as authorized to do by cl. 104 of the Articles of Association; and, further, that the said sum was placed to the credit of the Company in the books of the Company. It is also to be remarked that Nursey Kessowji was the banker of the Company. The Rs. 8,680 must, therefore, for the purposes of the question I have to decide, be deemed to have been paid to the Company. As to the circumstances under which it was so paid, the affidavit of Mr. Baker, the Manager of the Bank, can leave no doubt that the money was not advanced as a loan, but was paid for the purchase from the Company of the bill (Ex. A), and the affidavit, filed in August of this year, of Premchund Roychund, who acted as broker for the Company in the transaction, shews that the bill was offered for sale to the Bank as the bill of the Company, upon which the Company was liable as drawers, and that it was purchased, as such, by the Bank, both parties being then admittedly under the impression that the Company was liable on the bill. That being so, I am unable to distinguish the case on principle from the cases of *Jones* v. *Ryde* (1) and *Gompertz* v. *Bartlett* (2). In *Jones* v. *Ryde* the defendant discounted with the plaintiff a navy bill purporting to be for £1,884-16s. 10d. without endorsing it. The bill turned out to have been forged by inserting the figure 1 before the figures £884, the amount originally mentioned in the bill. Both parties were ignorant of this having been done. Payment was refused at the Pay Office when the bill was presented. However, a new bill was issued to the plaintiff by the office, in lieu of the old bill, for the right sum paid. The plaintiff then sued the defendant for the difference between what he had received at the Pay Office and what he had paid to the defendant, and the Court held he was entitled to **[97]** recover it. Gibbs, C. J., says: "The defendant has in the present case put off this instrument as a navy bill of a certain description: it turns out not to be a navy bill of that amount, and, therefore, the money must be recovered back."

In the case of *Gompertz* v. *Bartlett* (2) the defendant had produced to the plaintiff, for the purpose of being discounted, an unstamped bill drawn at Sierra Leone and accepted at London, but which was, in fact, drawn at London. The defendant said he did not wish to put his name on it, but that plaintiff might enquire about it, and, if he was satisfied, defendant would pay a liberal discount. The plaintiff was satisfied and discounted the bill. The bill was dishonoured, and the acceptor becoming bankrupt, an attempt was made to prove, under the bankruptcy of the acceptor, for the amount of the bill, but the claim was disallowed, as the bill was not stamped. Under these circumstances the plaintiff brought his action against the defendant to recover what he had paid for the bill as money received for the use of the plaintiff, and it was held by the Court of Queen's Bench that he was entitled to recover it. Lord Campbell says: "This is the case of a thing which is not what it professed to be when sold, and upon this ground I think the money must be taken to have been paid upon a mistake of fact, the bill not answering the description of that sold." And after referring to *Jones* v. *Ryde* (1) and *Younge* v. *Cole* (3), as authorities in support of the action, he adds:

(1) 5 Taunt 488.
(2) 23 L.J.Q.B. 65; 2 El. & B. 849.
(3) 3 Bing. N. C. 724.

"In principle the case is the same as if the vendor had professed to sell a bar of gold which turned out to be mere dross, coloured and disguised." Wightman, J., says: "I am of the same opinion, on the ground that the thing sold does not answer the description of that which the vendor professed to sell."

Now here we have the Company, by their Directors, acting within their authority, and admittedly in perfect assurance, selling a bill to the Bank on behalf of the Company as a bill upon which the Company was liable, which, however, turns out to be one upon which the Company was not liable. I say, acting within their authority, for the transaction was in its very nature, and was understood by **[98]** the Bank to be, one for the purpose of raising money for the Company, as provided by cl. 102 of the Articles of Association; and, indeed, it was, I think, admitted to be one of the ordinary modes by which Spinning and Weaving Companies, in the course of their business, anticipate the sales of their yarn and piece-goods exported to the China markets. The only difference between the cases I have referred to and the present case is that, in the former, the bill sold was different from what, on the face of it, it purported to be, while in this case it is different from what it was expressly represented to be by the agents of the Company in the ordinary course of business which they were authorized to transact. In all three cases what was sold was different from what the vendor professed to sell; in other words, there was a misrepresentation within the meaning of s. 18 of the Indian Contract Act, which, coupled with s. 19, provides that a contract shall be voidable when there has been a misrepresentation, "causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement." It was said that the exception to s. 19, which excludes from the operation of the section the case where the party whose consent was obtained by misrepresentation had the means of discovering the truth with ordinary diligence, is applicable to the present case. But no ordinary diligence would have enabled the Bank to discover that the Company was not liable on this bill. The form of the bill would naturally lead the Bank, as it admittedly did lead other Banks, to suppose that it was the Company's bill as represented, and the discovery could only be made by persons learned in the law and after a careful examination of legal authorities. I am, therefore, of opinion that the Bank is entitled to recover the sum of Rs. 8,680 with interest from the 9th October 1878 up to the date of the order for the winding up of the Company.

Attorneys for the Liquidators of the Company.—Messrs. *Ardaseer and Hormusjee.*

Attorneys for the National Bank of India.—Messrs *Smith and Frere.*

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[99] ORIGINAL CIVIL.

Before the Honourable Mr. Justice West.

NARBADABAI (*Plaintiff*) *v.* MAHADEO NARAYAN, KASHI-NATH NARAYAN AND SHAMABAI (*Defendants*).*

[December, 1880.]

Hindu Law—Maintenance—Widow's right to maintenance—Gift of his property by a husband in fraud of his widow's right to maintenance—Nature of wife's interest in her husband's property—Transfer by her of her interest—Release to her husband—Arrears and future maintenance a charge on property of deceased husband.

A Hindu husband cannot alienate, by a deed of gift to his undivided sons by his first and second wives, the whole of his immoveable property, though self-acquired, without making for his third wife, who is destitute and has not forfeited her right to maintenance, a suitable provision to take effect after his death. After the husband's death she is entitled to follow such property in the hands of her step-sons to recover her maintenance, her right to which is not affected by any agreement made by her with her husband in his life-time.

A Hindu wife has no property or co-ownership in her husband's estate in the ordinary sense, which involves independent and co-equal powers of disposition and exclusive enjoyment. Her right is merely an inchoate right to partition, which she cannot transfer or assign away by her own individual act; and unless such right has been defined by partition or otherwise, it cannot be released by her to her husband.

Arrears of maintenance as well as prospective allowance during the widow's life awarded in the same decree and held to be a charge on the property in the possession of the donees of her deceased husband.

[R., 34 M. 7 (9)=6 Ind. Cas. 439=20 M.L.J. 785=8 M.L.T. 103; 14 C.P.L R. 114; 13 Ind. Cas. 136.]

SUIT for maintenance.—The plaintiff was a widow of one Narayan Ransord Mistri, who died on the 26th September 1879. The first two defendants were his ons by another wife, Shamabai, who was the third defendant in this suit. The plaintiff claimed arrears of past maintenance and a provision for her future maintenance, and prayed for a declaration that the immoveable property of her deceased husband, then in the hands of the first and second defendants, was charged with the payment thereof.

The immoveable property consisted of a house in Bombay which was self-acquired by the deceased. Shortly before his death he had quarrelled with the plaintiff, and the matters in dispute between them were referred to the arbitration of the caste. In pursuance of the award made by the caste, the deceased entered into an agreement with the plaintiff, dated the 3rd April 1879, whereby he allotted to the plaintiff (1) the free use of a room in **[100]** the said house for her residence, (2) the free use of the utensils and furniture therein, and (3) a separate allowance for maintenance at the rate of Rs. 7 a month. The counterpart of this agreement, produced by the plaintiff and marked No. 1, contained the following passage:—"I (Narayan) will continue to pay at the said rate, and my heir Kashinath Narayan (*i.e.*, defendant No. 2 on my behalf will continue to pay these rupees so long as *I am* alive." The plaintiff alleged that the words "*I am*" at the close of the sentence, had been inserted by the defendants after the execution of the agreement. No other evidence, however, on this point was adduced.

* Suit No. 186 of 1880.

The counterpart of the agreement, produced by the defendants and marked No. 2, was signed by the plaintiff, and in lieu of the above passage it contained the following clause :—" I (*i.e.*, the plaintiff) will behave and conduct myself according to the separate agreement which has been given to me * * * there remains no claim of mine to the house."

By an English deed of indenture, dated the 17th July 1879, the deceased conveyed the house in fee to the first and second defendants *as a gift*.

The first and second defendants contended (1) that the gift of the house to them was an absolute gift, and was not made subject to any charge on account of the plaintiff's maintenance ; (2) that the plaintiff had received ornaments and other property of the deceased, and that she had, therefore, no right to maintenance. They also alleged that, subsequently to the death of the deceased, the plaintiff had brought an action against them on the agreement of the 3rd April 1879, and had been nonsuited.

The following issues were raised at the hearing :—

1. Was the suit barred as *res judicata* against all or any of the defendants ?

2. Is the alleged deed of gift made by Narayan Ransord Mistri, deceased, in favour of his sons, genuine and valid ?

3. Does the said deed of gift bar or affect the plaintiff's claim for maintenance as against the defendants, or any of them, and, if so, how and to what extent ?

[101] 4. Has the plaintiff taken possession of Narayan Ransord's property so as to deprive her of any right she may have to maintenance, and what is the value of such property ?

5. What relief, if any, is the plaintiff entitled to ?

Vicajee and *Dhairyavan*, for the plaintiff.—The main question is, whether a Hindu can alienate the whole of his self-acquired property by way of gift so as to defeat his wife's right to maintenance after his death ? There is no direct authority on the point on this side of India. In *Bai Lakshmi* v. *Lakhmidas Gopaldas* (1) the widow's right to maintenance is said to be absolute and indefeasible. This case was disapproved in *Savitribai* v. *Luximibai* (2), but not upon this point. In this case texts are cited as to the imperative obligation of maintaining *parents* as distinguished from other relatives, and the term mother includes step-mother(3). *Jamna* v. *Machul Sahu* (4) is the only case which bears directly on the point. The ruling of the Court there is based on the analogy suggested by Mr. Mayne(5) between a devise by will and a gift *inter vivos*, and also on the doctrine, not fully recognized in Bombay, of a widow being considered " in a subordinate sense a co-owner with her husband in his property." As to separate maintenance, see *Udaram Sitaram* v. *Sonkabai* (6) ; and as to arrears of maintenance being allowed in a decree for future maintenance, *Rajah Prithee Singh* v. *Ranu Bai Kower* (7).

The second defendant appeared in person.

The third defendant did not appear, and was dismissed from the suit on the application of the plaintiff's counsel.

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(1) 1 B.H.C.R. 13.
(2) 2. B. 573; and see pp. 597 and 583.
(3) West and Buhler (2nd ed.), p. 90) Q. 5. 188 (*a*) 392 (*a*) Mayukh. ch. iv. s. 4, pl. 18, 19.
(4) 2 A. 315.
(5) Mayne's Hindu Law (2nd ed.), s. 389.
(6) 10 B.H.C.R. 483. See also *Sidlingapa* v. *Sidova*, 2 B. 634.
(7) I. A. 1872-73. Sup. Vol. 203.

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JUDGMENT.

16th December. WEST, J. On the issue of *res judicata* the defendant, Kashinath, conducting the case for himself and his co-defendants, has failed to produce anything more than a summons from the Court of Small Causes. How the suit was disposed [102] of, and on what grounds, I have no means of forming an opinion. I must, therefore, find the first issue for the plaintiff.

The genuineness and validity of the deed of gift by the deceased Narayan in favour of his sons, the defendants Mahadeo and Kashinath, has been admitted in the course of the hearing, and on the second issue I find accordingly.

The third and principal issue is, as to the effect of his deed of gift on the plaintiff Narbadabai's claim to maintenance as against the male defendants, and the property held by them. At the request of the plaintiff's counsel, her co-widow, Shamabai, has been dismissed from the suit.

Narbadabai was the third wife of Narayan. They seem, after some time, to have agreed very ill, and eventually the documents Nos. 1 and 2 were executed between them. By the one, Narayan engages to provide Narbadabai with an apartment and Rs. 7 a month during his life; by the other she renounces all claim upon his property. In Narayan's agreement, the Marathi word "*mi*" seems to have been interpolated, and the effect of this is to make the document an engagement during Narayan's life, which would otherwise be more properly construed as one for his wife Narbadabai's life. How the word was introduced does not, however, appear, and it was for the plaintiff, who held the document, to account for it. The grantor makes his heirs and representatives liable, as well as himself, for the fulfilment of his engagement, and this is hardly consistent with its having been originally intended to limit the operation of the deed to his life; but, still, the effect of the words "so long as I live" cannot be got rid of by the addition that the maintenance must be provided by the donor's heirs and representatives as well as by himself. As it stands, it makes no provision for Narbadabai should she become, as now she has become, a widow through the death of Narayan.

If a wife's right to maintenance rests on a joint ownership in her husband's property (1), and she is capable of dealing with her joint interest as if it were a separate estate, the release or counter contract entered into by Narbadabai, it might be contended, was [103] effectual to deprive her of all claims against Narayan's estate, and he might then deal with it free from any rights originally vested in Narbadabai by her marriage. His subsequent gift of the property to his sons would be unincumbered by Narbadabai's claim to maintenance or a share, which otherwise would have accompanied it into the hands of Mahadeo and Kashinath. But the co-ownership of the wife in her husband's property, if that can properly be called ownership at all, which involves no independent or co-equal powers of disposition or exclusive enjoyment (2), is not of a kind that accepts the rules applicable to an ownership in the ordinary sense. Her right to maintenance does not depend on it, for the husband is bound to support her, though he should have no property at all. It is rather a latent right coming into operation only when natural affection, which

(1) Smriti Chandrika, ch. ix, s. ii, par. 14; ch. ix, s. i, par. 4, 19; Cole. Dig. Bk. V. t. 87, 88, Comm.

(2) Viramitrodaya, p. 165.

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usually prompts the mutual acts of members of families, fails of its proper effect, and law has to step in with its rigid rules and imperfect remedies (1). Unless she be deserted, or the family be divided, the wife is strictly dependent as to her so-called property (2). In these events a right to a share of the estate springs up, but till then she has only a right which is completely subordinate (3). It is not one that she can transfer by her individual act, as this is opposed to the theory even of joint ownership (4), and no substitution is possible of another for herself in the supposed co-ownership with her husband in the common estate. No other could take her place in the joint celebration of the family sacrifices, which the family estate or some interest in it must accompany and support (5). Her right to maintenance is connected with the right called co-ownership with her husband, and rests on the same conception of a moral identity arising from the marriage relations (6), but the two are rather co-ordinate rights than one the basis of the other(7). The husband's duty of maintaining [104] his wife is one which he cannot owe to another. Her right as aginst him is one that she cannot transfer to another. Even a widow's right to maintenance against the heirs taking her husband's property cannot be assigned (8). Ordinarily, therefore, a Hindu wife has no property in her husband's estate that she can part with as a consideration for a contract to her, and a right in her maintenance by way of contract cannot rest on such a consideration.

In the present case the release was to her husband, and a release may stand on a different footing from an alienation according to the analogy of the English law of dower (9); but even if she could act independently as to her property in general, which she cannot, except as to her *saudayakam*, a wife's contract with her husband is not to be admitted except under special safeguards. According to the Mayukha (10) indeed, as commonly translated, a document executed by any woman is invalid, but perhaps '*strimatta*" may there be rendered "under female" or "aphrodi siac influence." Narada,however, says(11) that an instrument executed by a woman ranks only with one executed by a child, thus drawing a logical deduction from her recognized state of perpetual pupillage(12). This same condition of entire subordination, however, prevents her having anything in her husband's estate which she can effectually convey or release to him. She has but an inchoate right to a share on partition, should there be a partition; to maintenance, should right in the legal sense have to be asserted against a refusal of sustenance (13). In either case it is not one that can be dealt with in the way of sale or abandonment while it is still unrealized and undefined. A wife's release of al rights to her husband's property when her husband is still alive and undivided from his sons, releases nothing, because it can apply to no

(1) Vyav. May. IV, X.
(2) Cole. Dig., Bk. IV. t. 72, Manu. IX. sec. viii, 416, Steele on Castes, p. 177, Narada, pl. i, ch. iii, para. 27; Viramitrodaya, p. 165.
(3) Colt. Dig., Bk. V, t. 414-15, Comm.
(4) See 11 M.I. A. 515; West and Buhler 289.
(5) Smriti Chandrika, ch. xi, s. i, para. 17; Cole. Dig., Bk. VI, t. 414; West and Buhler, 289.
(6) See West and Buhler (2nd ed.), p. 118 ss. (7) Cole. Dig., Bk. IV, t. 114.
(8) West and Buhler (2nd ed.) 449 : *Bhyrub Chunder* v. *Nubo Chunder*, 5. W. R., 111.
(9) See *Colston* and *Cane*, 1 Rolle's Abr. 30. (10) Ch. i, s. i, pl. 10.
(11 Ch. iv, s. 61 (Jolly's translation).
(12) *Per* Grant J. Fulton's Reports 200; Cole. Dig. Bk. I. t. 8.
(13) See Ellis quoted 2 Strange's H. L. 307; and 2 B. at p. 511.

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definable interest. The engagement to give and to accept a monthly payment for maintenance, defines the right which subsists without any consideration beyond that of the matrimonial [105] relation, and, if entered into fairly, may be effectual without any other consideration to support it.

If, then, the supposed co-ownership of Narbadabai in her husband's property was really an estate which she could transfer or release, the engagement to furnish her with maintenance was not a valuable consideration for her parting with it. To maintenance she was entitled without any bargain at all (1). It is not pretended that the small sum of Rs. 7 a month, allotted to her, was more than the minimum that she required for her subsistence, and thus her release of claims upon the property of her husband was gratuitous as not gaining any advantage for her to which she was not already fully entitled. What was really intended can best be understood from a consideration of the attendant circumstances. Narbadabai having induced her husband to make a will devising his property to her, and having got hold of the title-deeds, had tried to sell the estate. She would thus, she prabably hoped, appropriate what must otherwise be distributed amongst the whole family. Narayan was, not without reason, exasperated at such an attempt. The deeds were recovered with some difficulty, and the release was intended to impose a palpable bar on any further pretensions of Narbadabai to deal with the property as her own. It might be of some use as a declaration, but could not operate as a contract.

It is not made out on the fourth issue that the plaintiff has taken any property of her late husband so as to deprive her of a right to maintenance which she would otherwise have. The engagements between her and her husband are indeed subsequent in date to any misappropriation that has been imputed to her. If there had been any previous misconduct on her part of the kind alleged, it was then condoned; but, apart from that, there is not evidence before me that would sustain the allegation.

The deceased Narayan having given his property to his sons, they contend that it did not descend to them as ancesteal property. He who had himself acquired it having made a present of it to them, they took it free from any accompanying obligations and still hold it on the same terms. Their step-mother, [106] Narbadabai's rights, they say, ended, under the agreement, with their father's life. As to the latter contention, it is plain that if Narbadabai could not part with her inchoate interest in her husband's estate by the contract, which I have already considered, that interest subsisted at his death and attained a certain completeness by his death. As against his sons she could require that her maintenance should be defined and secured. This would be equally the case on the theory that her right first came into existence at all at her husband's death. The only difference in the latter case would be that before that event she could have had absolutely nothing vested in her which she could release to her husband during his life.

A gift to a son by a Hindu parent must ordinarily be sustained (2). But as amongst the sons having a birth-right in the estate, it is not to be grossly unfair (3). Even as to self-acquired property, it is prescribed that the acquirer shall not part with it so as to leave his family destitute (4). These rules do not interfere with the usual dealings of mankind. A father supporting his family may deal with his estate, and

(1) Cole. Dig. Bk. IV, ch. i, t. 42, 43.
(2) Viramitrodaya, p. 250
(3) 2 West and Buhler (2nd ed.), 377.
(4) West and Buhler (2nd ed.), 366.

if he incumbers or sells it to meet his engagements, no one can impeach the transaction (1). It is disposed of to meet family debts, supposing those debts to have arisen in the ordinary pursuit of his calling or the administration of his estate (2). Beyond these limits the interests of the family must not be sacrificed (3), and the right of a wife to a maintenance and possibly to a share on partition, though it may not amount to more than an equity to a settlement, and is not the subject of contract until ripened and defined by events (4), yet is not to be evaded by any arrangement purposely made in fraud of it (5). The matter is one analogous to that discussed in *Lakshman* v. *Satyabhamabai* (6), and similar considerations, I think, apply to it. In a remark in Strange's Hindu Law, Vol. II, p. 7, Colebrooke says: A man may give away ancestral property without the assent of his wife. **[107]** This agrees with what Jaggannatha says: see Cole. Dig., Bk. V, t. 414, Comm.; and if a man is wholly unfettered by the existence of a wife in the disposal of ancestral property, he should, *a fortiori* be free to dispose of his own acquisitions. But Ellis, another high authority, especially on the practical working of the Hindu law, says (see Strange's Hindu Law, Vol. II, p. 427), that the wife's consent, as well as the consent of the sons (7), is necessary to validate a disposal by a man of his estate. The apparent contradiction repeated substantially at p. 15 of Vol. II of Strange's Hindu Law is to be reconciled by supposing that the two authorities had different circumstances in view. An alienation is not generally subject to the control of the wife (8) whose acquisitions are gained for her husband, and whose own special property the husband may take in case of absolute necessity (9); but, supposing that her co-ownership in her husband's estate is really anything more than a right to maintenance taking the form of an allotment of a share when the property by division is placed in danger of being dissipated (10) her recognized, though subordinate, interest (11) makes her free assent necessary in transactions by which that interest would be unfairly extinguished or affected. All transactions in which Hindu women take part to the apparent advantage of their male relatives, call even more than those of English women (12) for close scrutiny (13), and the right of a Hindu female to maintenance is one peculiarly needing protection (14). This does not deprive a woman of the capacity to contract (15), and she is answerable for her dealings along with her husband (16), so that she might apparently on a proper occasion deal with any property strictly her own; but usage as well as the law of the Sastras (17) prescribes her submissive dependence; and a release to her husband, in return for a bare maintenance to which **[108]** she was already entitled, of something going far beyond that maintenance fails to satisfy the essential conditions. Mutual contracts are, indeed, incompatible according to Hindu notions with a true joint ownership (18), and there is no partition between a husband and

(1) 1 B.H.C.R. App. 71; 1 M.H.C. R. 398.
(2) West and Buhler (2nd ed.) 342; 2 B. 666.
(3) West and Buhler (2nd ed.) 370; 1 B.H.C.R. App. 71.
(4) See 2 B. 508, 509.
(5) See 1 B H.C.R. 194 (198).
(6) 2 B. 494, (499, 524).
(7) West and Buhler (2nd ed.) xxxix, 441.
(8) Viramitrodaya, p. 165.
(9) Vyav. May., Bk. IV, 10, 10.
(10) Viramitrodaya, p. 226; 2 B. 511.
(11) Smriti Chandrika, ch. ix, sec. 2, p. i.
(12) See notes to *Huguenin* v. *Basely*, 2 White and Tudor's L. C.
(13) See 13 M I. A., 431, as to a Purdanisheen.
(14) *Per* Seton, J. Fulton's Rep., p. 203; 2 B. at p 505.
(15) 1 B. at p. 123.
(16) Vyav. May., ch. v, pl. 20.
(17) Cole. Dig., Bk. IV, t. 3—6.
(18) West and Buhler (2nd ed.) 312, 313.

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wife (1). Narbadabai's position would thus remain after her release what it was before it. Her right to maintenance might be and had been defined, and that was all. The gift to the sons in this case followed promptly on the release, and was obviously intended to shut out any future claim of the wife. It cannot be regarded as an exercise, in good faith, of the husband's general authority and discretion, but was distinctly an endeavour to place the wife, should she survive her husband, in a state of destitution. She had behaved badly in trying to dispose of the property, but not in such a way as to extinguish her right as a wife to maintenance (2), and the gift made to the sons was subject to that burden. A gift of his estate by a man to his nephews was pronounced defective because of the absence of a provision for his widow and his daughter-in-law (3), a gift by a man leaving his family destitute being strictly forbidden (4). A gift by a *bairagi* of his whole property without reserve of a provision to his wife was pronounced invalid by the Poona Shastri : MS. 707, dated 11th February 1859 ; and in the recent case of *Jamna* v. *Machul Sahu* (5), at Allahabad, the High Court held that an adopted son taking by donation was subject to the maintenance of the donor's widow not otherwise provided for. The right of Narbadabai is not affected by the agreement made by her with her husband, and she is entitled to maintenance out of the estate which he gave to his sons equally as if he made a partition with them, though it is not to be realized in exactly the same way (6). Either the gift was abortive for want of an essential provision, or it passed, along with the right of the donor, the obligation that he was bound to satisfy. **[109]** In the one case as well as in the other the sons as donees are liable. The widow's claim ranks next to the family debts (7).

The property being substantially the same as in the father's life, and the maintenance of the plaintiff having then been estimated on the most frugal scale, it is reasonable that she should now receive the same allowance with arrears from the time of her husband's death. Her husband provided her further with an apartment which she has ever since occupied in the family-house. It is not to be expected, however, that the plaintiff in this case can possibly live on terms of amity with her co-widow and step-sons. The defendants have not offered to support her and provide her with maintenance as a member of their family. The defendants Mahadeo and Keshinath must, therefore, give her a reasonable sum for lodging, which I fix at Rs. 2 a month, from the time of her quitting the family-house within one month of the payment to her of the arrears of maintenance awarded to her by this judgment.

The allowance is, with the arrears awarded, to be a charge on the house during Narbadabai's life. The decree should be registered to afford notice of this to any intending purchaser or mortgagee. The costs of the plaintiff are to be paid by the defendants Mahadeo and Kashinath, the Court-fee being credited to the Government to the amount that the plaintiff would have had to pay if not permitted to sue as a pauper.

Decree for plaintiff.

Attorneys for the plaintiff.—Messrs. *Balcrishna and Bhugwandas.*

(1) West and Buhler (2nd ed.) 119; 1 Vramitrodaya, p. 165 ; 2 B. at p 503.
(2) West and Buhler (2nd ed.), 283, 292, 503, 504 ; Vyav. May., ch. iv, sec xi, par. 12.
(3) Strange's H. L. 16. (4) *Per* Sausse, C.J., 1 B.H.C.R. App. 84.
(5) 2 A. 315.
(6) West and Buhler (2nd ed.), 354; Smriti Chandrika, p. 160.
(7) Vyav. May., ch. i, sec. xi ; 6 M.H. C. R. 93 ; 2 M. 126 ; 1 C. 365 (377) ; 2 B. p. 505.

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PRESENT:

Sir James W. Colvile, Sir B. Peacock, Sir M. E. Smith and Sir R. P. Collier.

[*On appeal from the High Court of Bombay.*]

LALLUBHAI BAPUBHAI AND OTHERS (*Plaintiffs*) *v.* CASSIBAI AND OTHERS (*Defendants*). [27th, 29th and 30th April, 1880.]

Hindu law—Inheritance—Order of succession to inheritance by the Hindu law of Western India—Gotraja sapinda—Right of widow of collateral relation.

By the Hindu law in force in Western India the widow of a collateral relation, although she is not specified in the texts among the heirs to members of her husband's family, may come into the succession as one of the classes of gotraja sapindas of that family.

According to the law of the Mitakshara, as accepted in Western India, the right to inherit in the classes of gotraja sapinda is to be determined by family relationship, or the community of corporal particles, and not only by the capacity of performing funeral rites.

The High Court having affirmed as a right, according to the law actually prevalent in Western India, the claim of a widow of a first cousin, on the father's side, of the deceased to inherit his estate, as a gotraja sapinda, it was held that there was no reason for withholding from that doctrine the force of law; the right of the widow being mainly rested on the ground of positive acceptance and usage. In this case the widow of a first cousin of the deceased, on the father's side, was held to have become by her marriage gotraja sapinda of her husband's cousin's family, and to have a title to succeed to the estate of that cousin on his decease, in priority to male collateral gotraja sapindas, who were seventh in descent from an ancestor common to them and to the deceased, who was sixth from that common ancestor.

[N.F., 37 C. 214 = 11 C.L.J. 588 = 14 C.W.N. 443 = 5 Ind. Cas. 135; 8 M. 107 (127); 100 P.R. 1901; R., 32 B. 499 = 10 Bom. L. R. 692; 33 M. 439 = 5 Ind. Cas. 280 = 20 M.L.J. 275 = 7 M.L.T. 203 = (1910) M.W.N. 44; 5 Ind. Cas. 748 = 6 N.L.R. 39; 7 N.L.R. 116 (121) = 10 M.L.T. 226 (229); 11 Ind. Cas. 885 = 21 M. L. T. 856; 11 Ind. Cas. 907.]

APPEAL from a decree of the High Court of Bombay (April 29th, 1876),* reversing a decree of a Division Court (April 20th, 1872), except as to costs.

This appeal related to the succession to the estate of Mulji Nandlal, a Hindu resident in Bombay, who died in 1840 without male issue, but leaving a widow, Sarasvatibai, and a daughter, Jethibai, to whom he had made certain bequests by his will. The daughter died in 1841, and the widow in 1861.

Mulji Nandlal appointed his nearest male relation, Gangadas Vizbhukandas, his first cousin by the father's side, and one Trikamlal Avechuldas to be the executors of his will. Trikamlal died in 1842, and Gangadas in 1861; the latter having appointed [111] his widow and heiress Mankuvarbai to be his sole executrix, who dying during these proceedings, was then represented by the respondent Cassibai.

The facts of the case are stated, and the will is set forth, in the judgment of the Chief Justice, Sir Michael Westropp, reported, with that of Mr. Justice West, in the second volume of the Indian Law Reports,

* [2 B. 388 ED.]

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Bombay Series, pp. 395 and 435; where also is a pedigree table showing the relationships of the parties. The suit out of which this appeal arose was brought, more than nine years after the death of Sarasvatibai, by the first and second appellants, alleging themselves to be the nearest male heirs of Mulji Nandlal, and next in succession to his widow. The other appellants were joined as assignees from them of part of the estate. They claimed against Mankuvarbai, as widow and executrix of Gangadas that the trusts of the will of Mulji Nandlal should be carried out; that accounts should be taken; and that his estate being administered under an order of Court, the residue thereof should be handed over to them.

Mankuvarbai, among other defences, denied that the first and second plaintiffs were the next heirs to the estate of Mulji Nandlal, alleging her own title as widow of his cousin Gangadas Vizbhukandas. A statement of an adoption by her caused an addition of parties who were, however, afterwards by consent dismissed from the suit. The Court of first instance, having decided the case in favour of the defendant, on the strength of the judgment in *Lakshmibai* v. *Jayram Hari* (1), afterwards, on remand from the High Court in its appellate jurisdiction, decreed for the plaintiffs, recording its opinion as follows:—

"Lallubhai Bapubhai and Casidas Mulchand (the former being the great, great, great grandson of Motilal Casidas, who was the great, great great grandfather of Mulji Nandlal, and the latter being one degree further distant) are now entitled, as the next heirs to Mulji Nandlal, to succeed to his estate from the death of his widow Sarasvatibai, which took place in March 1862." On appeal this last decision was reversed by the High Court, on the ground that by the law and usage of [112] Western India the widow Mankuvarbai, being a gotraja sapinda of a collateral relation, nearer than the two collaterals who claimed, had become entitled. The Court held that the doctrine, that a widow might be a gotraja sapinda in her husband's family for the purpose of inheriting, accorded with the Achara Kanda, the Mitakshara and the Mayukha. That the recognition of the widows of gotraja sapindas as themselves gotraja sapindas, however slender the basis on which originally rested (so far as collaterals were concerned), had become a part of the customary law, wherever the doctrines of the Mitakshara prevailed and the Courts must give effect to it accordingly (2).

On this appeal,

Cowie, Q.C., and *Graham*, Q.C., appeared for the appellants.

Leith, Q.C., *Scoble*, Q.C., and *Mayne*, for the respondents.

For the appellants it was argued that Mankuvarbai did not succeed to the estate of Mulji Nandlal as a gotraja sapinda in the family of Gangadas Vizbhukandas, her deceased husband. No text in Menu, or in the Mitakshara, or the Mayukha, showed affirmatively that the widow of a collateral relation was among the heirs. Although by marriage the wife entered the husband's gotra, the right construction of the relation of sapinda prevented the inference that she became, for all purposes, a gotraja sapinda, and entitled to inherit as an heir, in her husband's family. Even if she became a gotraja sapinda by community of corporal particles, consanguinity (as being one with her husband; Menu, chap. IX, s. 8 and s. 45); she nevertheless remained, save as regarded that husband, without

(1) 6 B.H.C.R.A.C.J. 152.

(2) See judgment of West, J., at p. 444 of 2 Indian Law Reports, Bombay Series.

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that main characteristic of the sapinda relationship which was the basis of the claim to inherit, *viz.*, the capacity to perform with efficacy certain obsequial rites.

The widow could not present the oblations of food at the shradha of any of her husband's family, except at his. She, therefore, could not come into the succession, independently of him, for whom alone she could, with efficacy, perform the requisite funeral rites ; and she could not inherit that which her husband had never inherited.

[113] The right of succession did not depend only on the theory of the community of corporal particles. The word "sapinda" must be read with, and construed in reference to, its surroundings in the texts ; wherein its meaning was connected with the offering made by the surviving relation, regarded as heir of the deceased, for the spiritual benefit of the latter. The meaning of the word sapinda as applied in the rules of affinity, or of the degrees within which marriage was prohibited, was not identical with that applicable in the law of inheritance.

The ancient Hindu law excluded females generally from the succession, admitting them only in the specified cases given by the authorities. And although in Western India the exclusion of women from inheriting was not as general as it was in other parts of Hindustan, nevertheless their capacity to inherit had not been so fully recognized as that a main principle of the law of inheritance could be said to have been long disregarded, and in effect abolished. The main principle was that the right to inherit depended on the capacity to offer oblations for the spiritual benefit of the deceased.

To contest the application of this principle in this case, little, if anything, had been brought forward beyond the authority of the "shastris"; whose "replies," collected in Messrs. West and Buhler's Digest, were not in all cases well founded, and did not always agree. The authority of the shastris was insufficient to warrant the admission of the widow of a collateral relation ; a step far beyond the permitting the widow in the direct line to succeed. Reference was made to Menu, ch. ix, sl. 185, 186, 187, 142 ; ch. v, sl. 60 ; Dattaka Mimamsa, s. 6, sl. 12 ; Annotation 10, sl. 32 ; Dayabhaga, ch. xi, s. 1, sl. 31-43; s. 6, sl. 17, 21 ; Dayakrama Sangraha, ch. i, s. 10, sl. 24, 25 ; s. 3, sl. 4 ; ss. 5 and 8 ; Mitakshara, ch. i, s.10, sl. 1 ; s. 11, sl. 21, 22, 31 ; ch. ii, s. 1, sl. 18 ; s. 2, sl. 6 ; s. 3, sl. 2, 5 ; Vyavahara Mayukha, ch. iv, s. 5, sl. 18, 21, edition by Stokes, p. 64 ; Hindu Law of Inheritance, West and Buhler, Vol. II, s. 2 ; *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (1) ; *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (2) ; *Bai Amrit* v. *Bai Manik* (3) ; **[114]** *Peddamuttu Viramani* v. *Appa Rau and others* (4) ; *Pranshunker* v. *Prankoonvar* (5) ; *Massamat Ayabutee* v. *Rajkissen Sahoo* (6) ; *Soorendronath Roy* v. *Mussamat Heeramonee Burmoneah* (7); *Girdhari* v. *The Bengal Government* (8).

For the respondents it was argued (without any admission that the widow of a first cousin could not, by offering at the shradha, confer spiritual benefit on his relations) that the connection of gotraja sapinda was established, according to the law of Western India, by constructive consanguinity, or the theory of the community of corporal particles. Although the Mitakshara did not expressly include the widow as an heir, its language

(1) 2 M.I.A. 132 (149, 158).
(2) 13 M.I.A. 373 (392).
(3) 12 B.H.C.R. 79.
(4) 2 M.H.C.R. 117.
(5) 1 Borradaile S.D.A. 42. In 2nd ed., p. 471.
(6) 3 Beng. S.D.A. (Sel. Dec.) 23 (I.D.O.S., Vol. VI, p. 708).
(7) 12 M.I.A. 81.
(8) 12 M.I.A. 448.

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was not inconsistent with her being one. On its being conceded that the widow was under no general incapacity;—and this had been affirmed in the law and usage of Western India;—there remained no obstacle in the way of her right to take her place in the order of succession. The questions to be decided were: 1*st*.—What was the gotra of a wife? 2*nd*.—Becoming gotra sapinda of her husband, did she not become also gortaja sapinda in his family? The latter question had been answered in the affirmative in the Bombay Presidency, where the consanguinity of the wife had been recognized by the Courts, as was shown by cases in the Supreme Court as far back as 1813. Upon this question of the widow's right to inherit, the replies of the shastris, collected by Messrs. West and Buhler, were not cited as authority for the purpose of wresting the texts of the Mitakshara or the Mayukha. Those replies, and they were numerous, were cited to show a recognized usage existing among the Hindus governed by the Mitakshara and the Mayukha; and, in fact, received by the particular school prevailing in the district referred to. It was requisite to ascertain the latter, according to the principle expressed in the judgment in *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1), becoming gotraja in her husband's gotra, the wife became sapinda in his family, not in reference to the observance connected with the "pinda," but by a community **[115]** assumed in law to exist, of corporal particles. The wife was "born again" on marriage, and became identified with her husband's family, on whom fell the duty of performing her shradha when she was left a widow. If, however, the widow's right of inheritance must be referred to the efficiency of her funeral oblations, the widow of the first cousin, even then, would inherit before sapindas so distant as the appellants. The widow's performance of the requisite ceremony, at her husband's shradha, would, in theory to the ceremonial law, benefit three generations of his progenitors and she was entitled to a place in the order of succession, even on the ground; although the other was the stronger ground, and the proper reason for her admission. Reference was made to Menu, ch. ix, sl. 2 187, 15; Mitakshara, sh. i, ch. ii; s. 11, sl. 9, 11, 25; ch. ii, te 7; Colebrooke's Digest, V, ch. viii, text 399: Viramitrodaya, ch. i s. 4; Vayavahara Mayukha, ch. iv, s. 8; Dayabhaga, s. 6, sl. Smriti Chandrika, ch. xi, s. 5; Achari Kanda 1 West and Buhle Mayne's Hindu Law and Usage, paras. 430, 436, 453, 455; West a Buhler, Hindu Law of Inheritance, 145; Steele's Law and Custom of Hindu Castes, 27, 34, 225, 231; Stoke's Preface to Hindu Law Books, Goldshuker's illustrations of Hindu Law; Colebrooke's Essays; *Amri Kumari Debi* v. *Lakhinarayan Chackerbutty* (2); *Guru Gobind Sha Mandal* v. *Anand Lal Ghose Mazumdar* (3); *Srimuttu Muttu Vizia Dorasinga Thevar* (4); *Dhoolubh Bace* v. *Jeevee* (5); *Muha Lukmee* v. *Th Grandsons of Kripashookal* (6); *Mussamut Jethee and others* v. *Mussam Sheo Bace* (7); *Roopchand Talukchund* v. *Phoolchand Dhurmchand* (*Bhyah Ram Singh* v. *Bhayah Agur Singh* (9); *Lakshmibai* v. *Jayr Hari* (10).

Cowie, Q.C., replied.

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(1) 12 M. I. A. 397.
(2) 2 B.L.R. F. B. 28.
(3) 5 B.L.R. 15.
(4) 6 M.H.C.R. 310.
(5) 1 Borr. S.D. 67. In 2nd ed., p. 75.
(6) 2 Borradaile, Bom. S.D.A. 510
(7) 2 Borradaile, Bom. S. D. A. 588.
(8) 2 Borradaile, Bom. S. D. A. 616. In 2nd ed., p. 670.
(9) 13 M.I.A. 373 (394).
(10) 6 B.H.C.R.A.C.J. 152.

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JUDGMENT.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH.—The question which arises in this appeal relates to the succession to the estate of Mulji Nandlai **[116]** a Hindu inhabitant of Bombay, which opened on the death of his widow Sarasvatibai. Mulji died in 1840, leaving as his only child a daughter, who died childless in the lifetime of his widow. The widow died in 1862.

At the time of Mulji's death, his paternal first cousin, Gangadas Vizbhukandas, was his nearest male relative. He died in the lifetime of Mulji's widow, leaving no son, but leaving a widow, Mankuvarbai, the original defendant in this suit, and two daughters, who all survived Mulji's widow. Mankuvarbai died during the progress of the suit, and the respondent, Cassibai, is her executrix.

The first and second plaintiffs in the suit claim to be entitled to the estate of Mulji as being his nearest male heirs when the succession opened on the death of his widow.

Their relationship is clearly stated in the following passage of the judgment of Chief Justice Westropp :—

"It has not been denied that, according to the law, which under the Mitakshara and Mayukha prevails in the presidency. Lallubhai and Mulchand (the father of Casidas the second plaintiff) were gotraja sapindas of Mulji ; the common ancestor of them and of Mulji was Motilal who, counting inclusively, was sixth in ascent from Mulji, and the brothers Lallubhai and Mulchand were seventh in descent from Motilal. They are, therefore, on the extreme verge of sapinda relationship."

The other plaintiffs are purchasers from the first two plaintiffs.

Several of the issues raised in the suit have been finally disposed of by the Courts in India, and the single question to be now decided is, whether, by the Hindu law of inheritance prevailing in Western India, Mankuvarbai, the widow of Gangadas, who as paternal first cousin was related in the third degree to Mulji, became by her marriage with Gangadas a gotraja sapinda of Mulji, and, as such, entitled to succeed to his estate in preference to the first and second plaintiffs, who were related to him only in the remote decree above indicated.

Mr. Justice Bayley, sitting as a Judge exercising the original jurisdiction of the High Court, on his first hearing of the cause, **[117]** decided in favour of the right of the widow, following the decision of a Division Bench in the case of *Lakshmibai* v. *Jayram Hari* (1). Upon a remand of the case on other points, Mr. Justice Bayley, acting on his own opinion, came to an opposite conclusion upon the question of the widow's right from that arrived at in the decision he had before followed, and gave a decree in favour of the plaintiffs. On appeal, this last decree was reversed by the unanimous judgment of a Full Bench of the Bombay High Court, and Mr. Justice Bayley's original judgment was restored.

It is fully acknowledged by the learned Judges of the High Court that the law prevailing in Bengal and Southern India is opposed to the right claimed by the widow ; but they arrived at the conclusion that a different interpretation of the law has been accepted in Western India, and the elaborate judgments of the Chief Justice (in which Mr. Justice Sargent concurred) and of Mr. Justice West are directed to elucidate the grounds on which the distinction rests.

(1) 6 B.H.R.A.C.J. 152.

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The books whose authority is principally followed in Western India are Manu, the Mitakshara and the Mayukha. These are stated by the Chief Justice, and, no doubt, correctly, to be "the reigning authorities" in the Presidency of Bombay. The learned Judges have sought to support their decision in favour of the widow from passages found in these works. It is acknowledged that the rule of succession to which they have given effect is but dimly enunciated in these passages, but the Judges have considered that the interpretation which has been given to them in Western India, evidenced by decisions and the opinion of shastris, has fixed and determined the law for that part of India.

A text of Manu was cited, which is supposed to affirm the right of women to inherit :—"To the nearest sapinda, male or famale, after him in the third degree, the inheritance next belongs ; then, on failure of sapindas and their issue, samanodaka or distant kinsmen shall be the heir" (chap. xi, pl. 187). The words "male or famale" appear to have been imported into the text by Sir W. Jones and Mr. Colebrooke on the authority of a commentator, Kalluka Bhatta. Even if it be assumed that these [118] words are rightly introduced, the text, though it sanctions the principle that women may inherit as sapindas, and so is consistent with the right of the widow to inherit as a sapinda of her husband's family, does not affirm that right.

According to the received doctrine of the Bengal and Madras schools, women are held to be incompetent to inherit, unless named and specified as heirs by special texts. This exclusion seems to be founded on a short text of Bhandhayana which declares that "women are devoid of the senses, and incompetent to inherit." The same doctrine prevails in Benares ; the author of the Viramitrodaya yields, though apparently with reluctance, to this text. (Chap. 3, Part 7).

The principle of the general incapacity of women for inheritance founded on the text just referred to, has not been adopted in Western India, where, for example, sisters are competent to inherit. That principle, therefore, does not stand in the way of the widow's claim in the present case. She still, however, has to establish that she is a gotraja sapinda of her husband's family, and as such entitled, by the law prevailing in Bombay, to inherit the estate of one of its members.

It is not disputed that on her marriage the wife enters the gotra of her husband, and it can scarcely be doubted that in some sense she becomes a sapinda of his family. It is not necessary to cite authorities on this point. But a statement of the doctrine in a note by Mr. Borradaile to his reports may be referred to. He says : "Because a woman on her marriage enters the gotra of her husband, so respondents, being sagotras of Pitambar are sagotras of his wife also" (1 Borr. 70, n. 2) (1). Whether the right to inherit follows as a consequence of this sapinda relationship is the question to be considered.

The following passage from the Achara Kanda of the Mitakshara was cited to show that sapinda relationship depends on having the particles of the body of some ancestor in common, and not on the connection derived from the capacity of making [119] funeral offerings. It was also cited for the declaration that husband and wife, brother's wives are sapindas to each other :—

(1) See note 2 to Case No. 15 *Dhoolubh Baee Jeevee*, 1 Borradaile, S.D.A. 67. 2nd ed., p. 75.

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"(He should marry a girl) who is non-sapinda, *i.e.*, (1) a sapinda (with himself). She is called his sapinda who has (particles of the body) (of some ancestor) in common (with him). Non-sapinda means not his sapinda. Such a one (he should marry). Sapinda relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda relationship to his father, because of particles of his father's body having entered (his). In like (manner stands the grandson in sapinda relationship) to his paternal grandfather and the rest, because, through his father, particles of his (grandfather's) body have entered into (his own). Just so is (the son a sapinda relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in sapinda relationship) to his maternal grandfather, and the rest through his mother. So also (is the nephew) a sapinda relation of his maternal aunts and uncles and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise (does he stand in sapinda relationship) with paternal uncles and aunts and the rest. So also the wife and the husband are sapinda relations to each other, because they together beget one body (the son). In like manner brothers' wives also are (sapinda relation to each other) because they produce one body (the son), with those (severally) who have sprung from one body (*i.e.*, because they bring forth sons by their union with the offspring of one person, and thus their husband's father is the common bond which connects them. Therefore, one ought to know that wherever the word sapinda is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent."

A translation of some passages in the Sankara Mayukha to the same effect will be found in the judgment of Chief Justice Westropp, of which following is an extract.

"Therefore (to explain the different parts in the formation of the word 'a sapinda' by dissolving the compound 'a sapinda,') **[120]** she is sapinda who has one and the same pinda (body) (*i.e.*, dehavayava (constituent atoms) *na* (not) *sapinda* is a sapinda. Thus, therefore, the father's constituent atoms, *viz.*, blood, fat, &c., directly enter into the body of the son, and (the constituent atoms) of the paternal grandfather (enter the son's body) through the medium of the father. In the same manner with reference to (the constituent atoms of) the paternal great grandfather, &c., also somehow the transmission of constituent atoms mediately exists. So with the mother, &c., also so the wife has sapindya from the husband, because they are the generators of one body. In some instances, sapindya exists by reason of being the holders of the same constituent atoms. Thus, the wives of brothers are sapindas to each other, for they hold the constituent particles of the same father-in-law through the media of their husbands. In this way somehow the sapindya in other cases also should be inferred."

Vijnyanesvara and Nilakantha were, no doubt, treating in these passages of sapinda relationship in connection with marriage; but no further definition of sapindas is given in those parts of their respective books which treat of inheritance. The learned Judges below have inferred, in the absence of any indication to the contrary, that the above-mentioned definitions were intended by the authors of the Mitakshara and the Mayukha to apply wherever in those books sapindaship was treated of, and consequently where it was treated of in relation to the right to inherit.

(1) Sic.

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In addition to the above-mentioned authorities, the Chief Justice refers to the Dattaka Mimamsa as strongly maintaining the doctrine that sapindaship depends upon community of corporal particles, and not upon the presentation of funeral offerings to the pitris.

It was contended by the learned counsel for the respondents that, even if sapindaship for the purpose of inheritance had to be determined by the efficacy of funeral oblations. the widow would be entitled as a gotraja to succeed, because her offerings would benefit the manes of her husband's grandfather Kissoredass, the common ancestor (in the third degree) of her husband and Mulji. Their Lordships do not think it necessary to consider [121] the authorities on which this contention was supported, though they may observe that a judgment of Mr. Justice Mitter (1) affirming that a sister's son is, under the Mitakshara as interpreted in Benares, entitled to succeed, throws great light on the subject, since they are prepared to assent to the conclusion to which the Judges of the High Court upon consideration of the authorities, arrived, that by the law of the Mitakshara, as interpreted and accepted in Western India, the preferential right to inherit in the classes of sapindas is to be determined by family relationship or the community of corporal particles, and not alone by the capacity of performing funeral rites. It may happen that, in some instances, the same person would be the preferential heir, whichever of these tests was adopted.

If then, as already pointed out, the wife upon her marriage enters the gotra of her husband, and thus becomes constructively in consanguinity or relationship with him, and through him, with his family, there would appear to be nothing incongruous in her being allowed to inherit as a member of that family under a scheme of inheritance which did not adopt the principle of the general incapacity of women to inherit. But, though it may be consistent with this theory of sapinda relationship to admit the widow so to inherit, the existence of the right has still to be established.

It is acknowledged that the widow of a collateral relative is nowhere specified and named as heir to members of her husband's family ; she must therefore come into the succession, if at all as one of the class of gotraja sapindas, and it is in this way that her claim has been put forward at the bar.

The author of the Mitakshara, after discussing in detail the series of heirs first entitled to inherit down to brother's sons, proceeds in cap. 2, s. 5, to treat of the succession of Gentiles. Extracts from this section are given in the judgment of the Chief Justice (2), the translation of Mr. Colebrooke being amended by substituting for the English rendering of the names of the [122] various classes of kindred, the Sanskrit names given in the original.

The first six slokas are thus rendered :—

" ' 1. If there be not brother's sons, gotrajas (3) share the estate. Gotrajas are the paternal grandmother and sapindas(4) and samonodaka(5). '

" 2. In the first place the paternal grandmother takes the inheritance. The paternal grandmother's succession immediately after the

(1) See *Amrita Kumari Devi* v. *Lakhinnarayan Chuckerbutty*, 2 B.L.R. (F.B.) 28.
(2) 2 B. 431.
(3) Trans. by Colebrooke, " Gentiles."
(4) Trans. by Colebrooke, " relation connected by funeral oblations of food."
(5) Trans. by Colebrooke, " relations connected by libations of water."

mother was seemingly suggested by the text before(1) cited. And the mother also being dead, the father's mother shall take the heritage (2). No place, however, is found for her in the compact series of heirs from the father to the nephew, and that text ('the father's mother shall take the heritage') is intended only to indicate her general competency for inheritance; she must, therefore, of course succeed immediately after the nephew, and thus there is no contradiction.

"3. On failure of the paternal grandmother, gotraja sapindas (3)—namely, the paternal grandfather and the rest—inherit the estate.

"For binnagotra sapindas (4) are indicated by the term bundhu (5).

"4. Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

"5. On failure of the paternal grandfather's line, the paternal great grandmother, the great grandfather, his sons and their issue inherit. In this manner must be understood the succession of samangotra sapindas(6).

[123] "6. If there be none such, the succession devolves on samanodakas (7), and they must be understood to reach the seven degrees beyond sapindas(8) or else as far as the limit of knowledge and name extend. Accordingly Vhrat Manu says, 'the relation of the sapindas ceases with the seventh person, and that of samanodakas(9) extends to the fourteenth degree, or, as some affirm, it reaches as far as the memory of birth and name extends. (This is signified by gotra(10)).'"

It cannot be said that these passages contain direct authority for the admission of a widow of a collateral relative to inherit as a sapinda to a member of her husband's family; but they were cited to show that women are entitled to inherit as sapindas, the paternal grandmother being named as the first sapinda for this purpose. There is a passage also to this effect in the Mayukha, c. 4, s. 8, pl. 18.

That the mention of certain members of the family as gotraja sapindas is not exhaustive and that others than those expressly mentioned may be included in the class, may be inferred from the following passage in pl. 3 of c. 2, s. 5 of the Mitakshara cited above :—"On failure of the paternal grandmother, gotraja sapindas, namely, grandfather *and the rest*, inherit the estate." It would seem, also, though the grandmother and great-grandmother are alone expressly mentioned, that the wives of the remoter ancestors in the direct ascending line up to the seventh degree would likewise succeed to their descendants as sapindas. Moreover, it has been decided by this Board that the enumeration of bundhus contained in the Mitakshara is not exhaustive: *Girdhari Lall* v. *The Bengal Government*(11). The reasons for so holding are applicable to the enumeration of sapindas, though, as Mr. Graham observed, the step from the wives of paternal ancestors to the wives of collaterals is a long one.

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(1) Mitak., ch. ii, s. 1, pl. 7. (2) Manu. ch. ix, pl. 217.

(3) Trans. by Colebrooke, "kinsmen sprung from the same family with the deceased, and connected by funeral oblations."

(4) Trans. by Colebrooke, "kinsmen sprung from a different family, but connected by funeral oblations."

(5) Trans. by Colebrooke, "cognate."

(6) Trans. by Colebrooke "kindred belonging to the same general family and connected by funeral oblations of food."

(7) Trans. by Colebrooke, "kindred connected by libations of water."

(8) Trans. by Colebrooke "kindred connected by funeral oblations."

(9) Trans. by Colebrooke "those connected by a common libation of water."

(10) Trans. by Colebrooke "the relation of family name."

(11) 12 M.I.A. 448.

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Mr. Justice West, after discussing the Mitakshara and some of its commentators, came to the conclusion that "upon the [124] whole it would appear more probable than not, upon the text of the Mitakshara and its recognized exponents, that it did intend widows to be included among the gotrajas." Perhaps the most that can be said is, that the text of the Mitakshara is not inconsistent with the claim of the widow, and allows of an interpretation favourable to her right to inherit. The important point for consideration remains, namely, whether such an interpretation has been given to the Mitakshara by its expounders and the lawyers of the Bombay school, and has been so sanctioned by usage and decisions as to have acquired the force of law.

The Mayukha is also very fully discussed in the judgment of Mr. Justice West, and his consideration of it led him to the conclusion that, "if the foundation of the rights of widows of gotrajas under the Mitakshara is slender, under the Mayukha it may be called almost shadowy." After this appreciation of the two leading authorities by a Judge who has much studied them, it is obvious that the right of the widow must be mainly rested on the ground of positive acceptance and usage.

Commentators on the Mitakshara are referred to in the judgments below who have interpreted its text in a sense highly favourable to women. Two of them, whose opinions are closely applicable to the point under discussion, are thus referred to by Mr. Justice West:—

"Visvesvara, the author of the Subodhini, the chief commentary on the Mitakshara, says that 'gotraja' may properly be taken to include both males and females; and *Balambhatta*, insisting on the same view, applies it to the determination of the right of a predeceased son's widow whom he places next after the paternal grandmother."

The author of the Vaijayanti, a commentary on Vishnu, appears to have held that the son's widow would succeed in preference to the daughter. This opinion is referred to in the remarks of Mr. Colebrooke upon a case in the Appendix to Strange's Hindu law (2 Vol., 234). Mr. Colebrooke thinks that it is opposed to the prevalent doctrine of the school of the Mitakshara, which is that the daughter inherits in preference to the son's widow. He does not appear to question the right of the widow to inherit as [125] a sapinda, though no doubt it was unnecessary to do so in discussing the question of preference.

Their Lordships will now pass to the recorded answers of the shastris and the decision of the Courts, bearing on the question.

The answers of the shastris, which have been referred to at the bar, will be found in a digest of the Hindu law of inheritance by Messrs. West and Buhler, compiled from the replies of the shastris recorded in the Courts of the Bombay Presidency. Mr. West is the Judge of the High Court whose judgment has been already adverted to. These replies are in many cases unsatisfactory and in correct, but they are numerous, and the series taken as a whole undoubtedly recognizes and affirms the right of the widow to inherit as a gotraja sapinda to members of her husband's family. It is not necessary to refer to these answers in detail. Many of them are cited and commented upon in the judgment of Mr. Justice West and among these are answers which affirm that a sister-in-law inherits in preference to distant cousins, and even to first cousins, of the propositus.

Some early decisions of the Sadar Adalat, reported by Borradaile, are to the same effect. In the case of *Dhoolubh Bhaee and others* v. *Jeevee*

(A.D. 1813) (1), it was held that Jeevee, the widow of the son of a brother of Pitamber, the propositus, was entitled (on the death of Pitamber's widow) to succeed to his estate, and to hold it for her life in preference to a great grandson of another brother of Pitamber. It is not, however, stated in the report when Jeevee's husband died.

In another of the cases cited from Borradaile (*Mahalukmee* v. *The Grandsons of Kripastrookul* (2),) the Sadar Court held that a predeceased son's widow was entitled to succeed in preference to the sons of a daughter. This case, however, seems to have been decided upon a custom of the caste of Oudeech Brahmins. As a decision on the general law, apart from custom, it may not be capable of support, a sister's son being specially provided for by the Mitakshara (c. 2, s. 3, pl. 6).

In a later case, reported in Borradaile (1824), it was held that the widow of a predeceased son was entitled to inherit in preference [126] to the brother of the propositus: *Roopchund Tilukchund* v. *Phoolchund Dhurmchund and another* (3). This seems to be a direct decision on the right of the widow to inherit, though, whether in the order of heirs, the preference was rightly accorded to her in this case may be questioned.

In the case of *Lakshmibai* v. *Jayram Hari* (4) the High Court of Bombay (Justices Lloyd and Melvill) gave a clear and unqualified judgment in favour of the right of the widow of a predeceased collateral relative to succeed in preference to a more remote coliateral male relative of the propositus. The High Court expressly found that this order of succession was in accordance with the law of inheritance prevailing on the Bombay side of India.

The High Court in the present case, after an exhaustive review of the authorities and precedents bearing on the question, have unanimously arrived at the same conclusion. Great weight is undoubtedly due to this decision, not only from the learning and research displayed in the judgments separately delivered by Chief Justice Westropp and Mr. Justice West, but also from the circumstance that both these learned Judges have had great and peculiar opportunities of becoming acquainted with the law of inheritance prevailing in Western India. The Chief Justice has passed a long judicial career in the Courts of Bombay, and Mr. Justice West is one of the compilers of the digest of the law of inheritance to which reference has already been made. Their Lordships do not find any satisfactory grounds which should induce them to dissent from the conclusion of the High Court that the doctrine which has actually prevailed in Bombay is in favour of the right of the widow; nor any sufficient reason for holding that the doctrine which has so prevailed should not have the force of law. They will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court, with costs.

Solicitors for appellants.—Messrs. *Ashurst, Morris, Crisp & Co.*

Solicitors for respondents.—Messrs. *Gregory, Rowcliffes & Co.*

(1) 1 Borradaile (Case No. 15) 67. In 2nd ed., p. 75.
(2) 2 Borradaile 510.
(3) 2 Borradaile 616. In 2nd ed., p. 670.
(4) 6 B. H. C. R. 152.

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[127] APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice F. D. Melvill.

NARAYAN DESHPANDE (*Original Plaintiff*), *Appellant v.*
RANGUBAI (*Original Defendant*), *Respondent.**
[30th June, 1880.]

Regulation XXVIII of 1827, *s.* 14, *cl.* 1—*Mortgage—Execution—Sale—Purchaser of mortgagor's interest—Third party—Stamp—Interest—Damdupat.*

The purchaser at a Court sale of the right, title and interest of the judgment-debtor is a third party within the meaning of s. 14 Reg. XXVIII of 1827, cl. 1, and therefore as against him a mortgage-deed passed by the latter to a mortgagee is valid—not from the date of its execution, but from that on which it was stamped.

Jagannath v. *Apaji* (1) followed.

THIS was a second appeal against the decision of W. Wedderburn, Judge of Ahmednagar, amending the decree of the Subordinate Judge of Sangamner.

The plaintiff sued to recover possession of a house which he claimed as auction-purchaser at a Court's sale, and to remove the obstruction of the defendant, who claimed to be in possession as mortgagee under two bonds, one dated 7th January 1832, for Rs. 150, and another, dated 15th May 1832, for Belapur Rs. 35. The defendant expressed her willingness to give up possession of the property on payment to her of these sums with compound interest and the expenses of repairs made by her.

The Subordinate Judge held both the bonds proved, but rejected the one of May 1832 as insufficiently stamped. He held that Rs. 250 were due on the other bond and that Rs. 7-12-0 were due on account of repairs, and made a decree accordingly.

The District Judge agreed with the Subordinate Judge in his findings as to the genuineness of the two bonds. On the point of the validity or otherwise of the bond of May 1832, he said: "It appears that originally this bond had a stamp of one anna only, whereas it ought to have borne a stamp of two annas under Sch. D of Reg. XVIII of 1827. But the Subordinate Judge has held that under s. 14 of the Regulation (2) the bond is not valid from its original date as against the plaintiff, **[128]** who is a third party. But I do not think the clause referred to is applicable at all, as the plaintiff, who bought the right, title and interest of the mortgagor, stands in the place of the original grantor and cannot be regarded as a third party.* * * * *
As the Subordinate Judge holds that this bond from its appearance and from the evidence of witness 19 appears to have been executed on the date it bears, I decide that it is proved."

The Judge then discussed the question as to what amount should be allowed for repairs. Finding the oral testimony and the accounts produced unsatisfactory, he decided to allow Rs. 81, being at the rate of Rs. 3 per year for 27 years.

* Second Appeal No. 147 of 1880.

(1) 5 B. H. C. R. A. C. J. 217.

(2) Section 14, clause 1 of Regulation XVIII of 1827 is as follows:—

"A bond or other writing stamped after its original date, if executed within the zillas subordinate to the Presidency of Bombay shall, so far as it is affected by the stamp, become valid against the grantor from its original date; but as to the rights of the third parties, the date of its being stamped shall be held to be its real date."

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5 B. 127.

The Judge accordingly varied the decree of the Subordinate Judge confirming his decision in regard to the bond of January 1832, increasing the amount allowed for repairs from Rs. 7-12-0 to Rs. 81, and further awarding Belapur Rs. 35 with an equal amount as interest upon it. The plaintiff appealed to the High Court.

V. M. Pandit, for the appellant.—The District Judge erred in holding that the auction-purchaser was not a third party within the meaning of Reg. XXVIII of 1827, s. 14, cl. 1, and in giving effect to the bond of May 1832, as against him from the date of execution instead of from the date on which it was adequately stamped: *Jagannath* v. *Apaji*(1). He also erred in applying the rule of "damdupat" to the mortgage transaction in this case. He should have limited the award of interest on both the bonds to six years only: *Vithal* v. *Daud*(2), *Narayan* v. *Satvaji* (3). The sum decreed for repairs is against the provision of the bonds.

Shivshankar Govindram, for the respondent.—Even supposing the District Judge to have been wrong and the Subordinate Judge to have been right in holding that the plaintiff was a third party within the meaning of the Regulation, the decree of the former cannot be disturbed, because a reference to the High Court circulars shows that, allowing for the difference between [129] the British and Belapur rupee, the bond of May 1832 was properly stamped with a stamp of one anna.

JUDGMENT.

The judgment of the Court was delivered by

KEMBALL, J.—The first objection taken is that the lower Court was in error in holding that the appellant was not a third party within the meaning of s. 14 of Reg. XVIII of 1827, and in holding the bond of May 1832 valid as against the appellant from its original date. This appears to be so (*Jagannath* v. *Apaji*(1)); but it is unnecessary for us to interfere with the District Judge's decision on this point, as the stamp of one anna was sufficient under Appendix B., Reg. XVIII of 1827, to cover a sum of Rs. 32, *i.e.*, a sum in excess of Belapur Rs. 35, the amount of the aforesaid bond. The next point is that the lower appellate Court ought to have limited the amount of interest awarded on the sum contained in the bond of May 1832 to six years only, and on this point we must allow the appeal on the authority of the rulings in *Vithal Mahadeb* v. *Daud valad Mahamad Husen* (2) and *Narayan* v. *Satvaji* (3). On the last point, *viz.*, that the lower appellate Court was wrong in awarding anything more for repairs than the Subordinate Judge awarded, we are unable to concur with the Judge in his award of Rs. 3 per annum for 27 years and Rs. 81 in all for probable repairs. The agreement between the parties on the matter of repairs is stated in the post bond, and it was not competent to the District Judge to go outside that instrument. Apparently the mortgagee had failed to give any reliable evidence on the subject of repairs, and the Subordinate Judge made an award which the bond appears to us not to have warranted. However, against this decision the mortgagor made no appeal, so that that sum must stand.

We amend the decree of the District Judge by limiting the interest on the sum contained in Exhibit 7 to six years, and by reversing his award as to repairs, restoring that of the Subordinate Judge. Costs of this appeal to be paid by the respondent.

Decree varied.

(1) 5 B.H.C.R.A.C.J. 217. (2) 6 B.H.C.R.A.C.J. 90. (3) 9 B.H.C.R. 83.

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LATE
CIVIL.

5 B. 130.

5 B. 130.

[130] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

NARAYAN DESHPANDI (*Original Applicant*), *Appellant v.* ANAJI DESHPANDE (*Original Opponent*), *Respondent.** [12th July, 1880.]

Execution—Sale—Purchase by son of decree-holder—The Code of Civil Procedure, Act X of 1877, *s.* 294.

A purchase by the son of a decree-holder, undivided in interest from his father, is a purchase by the decree-holder within the meaning of s. 294 of Act X of 1877 as it stood previously to its amendment by Act XII of 1879, and is absolutely void, if the purchase were made with funds which were the joint property of the father and son.

In the absence of evidence to the contrary, the legal presumption would be that the funds were joint property.

THIS was an appeal from an order made by Rao Bahadur G. G. Phatak, Subordinate Judge (First Class) of Dharwar.

In execution of a decree passed in favour of one Konherrao Deshpande and others, certain immoveable property belonging to the judgment-debtor, Narayan Deshpande, was put up for sale. Anaji, the son of Konherrao, without obtaining the permission of the Court, bid at the sale and purchased the property for Rs. 340 in March 1879. The judgment-debtor applied to the Subordinate Judge of Dharwar to set aside this sale, alleging that it was void under s. 294 of the Civil Procedure Code (X of 1877), as the purchaser was the son of Konherrao, one of the decree-holders, and united in interest with him. He also alleged that there were irregularities in the conduct and publication of the sale. Anaji opposed the application, and the Subordinate Judge refused it. He found that the property sold was worth at least Rs. 1,000. He was of opinion that the son was not a decree-holder as contemplated in the first paragraph of s. 294, and therefore that he was not at liberty to set aside the sale in the conduct of which he found there had been no irregularities. Act XII of 1879 became law on the 29th of July 1879, some months after the sale, and did not apply to the case.

Manekshah Jehangirshah, for the appellant.—The purchase in this case was by a son united with his father, the decree-holder, [131] and presumably with his funds and for the benefit of both. The maxim *qui facit per alium facit per se* therefore applies. Valuable property was sold for a mere trifle.

Shantaram Narayan, for respondent.—Section 294 has no application to the present case. The first paragraph of s. 294 should be read and construed so as to apply to the case where the purchaser is the sole decree-holder. A purchase by a son is not necessarily a purchase by his father. The circumstance that the purchase might eventually result to the benefit of both is quite immaterial. The word "decree-holder" in the section applies only to the person in whose favour the decree is passed. There is no evidence in the case that the son actually acted in this case as the representative of his father, and there is no such legal presumption. This contention receives support from the fact that the Legislature would not permit the son to represent his father in a case in which the son of a decree-holder wishes to apply in his absence to enforce a decree to save it

* Appeal No. 12 of 1880 from order.

from being time-barred. The Legislature could not have intended to throw upon any person the disadvantages of a *status* without its advantages. Even if the son in this case purchased with the family funds, the purchase must remain good so long as no authority could be proved as been having given by the father to the son.

JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—The sale in this case was made before the passing of Act XII of 1879, and is, therefore, governed by the first paragraph of s. 294 of Act X of 1877. Under the law, as contained in that paragraph, a purchase contrary to its provisions would be absolutely void. The question is, whether a purchase by the son of the decree-holder, undivided in interest from his father, is a purchase by the decree-holder within the meaning of the paragraph. We are of opinion that, if the purchase were made with funds, which were the joint property of the father and son (and, in the absence of evidence to the contrary, the legal presumption would be that the funds were joint), the purchase, being for the joint benefit of the decree-holder and the son, would constitute the decree-holder a purchaser within the meaning of the paragraph. We cannot, however, decide the question **[132]** in this case, without giving to the decree-holder an opportunity of showing that the purchase was not made with joint funds, and for the joint benefit of himself and his son. We must remand the case in order that the decree-holder, Konherrao Kashi, may be made a party. The original decree and the proceedings in execution are not before us: but we are informed that there were other decree-holders besides Konherrao, and it may be that they have received portion of the purchase-money, or are otherwise interested in maintaining the sale. If so, they also should be made parties. We think that there is no reliable evidence of any irregularity in publishing or conducting the sale, and that there is, therefore, no reason for setting aside the sale upon this ground. We reverse the order of the Subordinate Judge, and remand the case, in order that the necessary parties may be brought upon the record, and have an opportunity afforded to them of giving evidence on the question at issue; and that thereupon a new decision may be passed, in accordance with the law, as above laid down. Costs to follow the final decision.

Order reversed and case remanded.

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5 B. 132.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.

JECHAND KHUSAL (*Applicant*) *v.* ABA AND BAIKA, (*Opponents*).*

[26th July, 1880.]

Civil Procedure Code, Act X of 1877, s. 266, *cl.* (*j*)—*Labourer—Wages—Execution—Attachment.*

Persons who agree to spin cotton belonging to spinning and weaving company, and to receive a certain amount of money for a certain quantity of cotton spun by them, are labourers within the meaning of s. 266 of the Code of Civil Procedure, Act X of 1877, and, therefore, their remuneration is wages, which, under cl. (*j*) of the section, cannot be attached in execution of a decree.

* Extraordinary Civil Application, No. 31 of 1880.

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5 B. 132.

THIS was an application, under the Court's extraordinary jurisdiction, to set aside the order made by R. S. Ramchandara Banaji, Subordinate Judge of Jalgaon, in the district of Khandesh.

The applicant, Jechand, sued the opponents, Aba and Baika, for the recovery of Rs. 57-10-6, and obtained a decree. He then applied **[133]** to the Subordinate Judge to attach certain moneys due to the opponents by the Khandesh Spinning and Weaving Campany in the hands of the said Company, and the application having been granted, an attachment was placed on the said moneys by the Judge. The opponents applied to have the attachment raised, alleging that the moneys in the hands of the Khandesh Company were wages due to them as labourers, and, therefore, not liable to attachment. Jechand alleged that they were spinners who had entered into an agreement with the Company to receive payment on the number of pounds of cotton spun by them calculated at a certain rate for every 100 pounds, and that the amount attached was the money due to them under the said agreement. He contended that this money was not wages. The Subordinate Judge overruled the contention, and held that the opponents' earnings were wages within the meaning of s. 266 of the Code of Civil Procedure, and were protected from the process of attachment by clause (*j*). He, therefore, removed the attachment.

Gokaldas Kahandas, for the applicant, moved the High Court for a *rule nisi*, on the ground that as the opponents were spinners paid, not by the day, but according to the amount of work done, the sums to which they became entitled for work performed did not fall under the denomination of wages, and were not exempted from attachment.

The rule having been granted,

Thakordas Atmaram, appeared for the opponents to show cause.—The money is wages, and is exempt from attachment. There is no definition of the word "labourer" in any of the enactments of the Indian Legislature. The protection clause enacted in s. 266 of the Code was probably borrowed from "The Wages Attachment Abolition Act, 1870," 33 and 34 Vic., cap. 30. There is no definition of either "labourer" or "wages" in this Act. But in 1 and 2 Will. IV, cap. 37, commonly called the Truck Act, it is laid down in s. 25 that "any money or other thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour done or to be done, whether within a certain time or to a certain **[134]** amount, or for a time or an amount uncertain, shall be deemed and taken to be the 'wages' of such labour."

Mill hands were, therefore, included in the operation of this Act. In *Riley* v. *Warden* (1) Parke, B., thus distinguishes a contractor from an ordinary labourer: He says: "The reward which he (the contractor) is to receive, is not to be paid for his personal labour, but it is the contract price, from which he may derive a profit, by the assistance and labour of others. It seems to me that this Act (the Truck Act) was intended to be applied to those who engage to do a work by their own personal labour, and that the object of it is to protect such men as earn their bread by the sweat of their brow, and who are, for the most part, an unprovided class, and that it was not intended to have any application whatever to persons who take work upon a great scale." In the present case the earnings sought to be attached are undoubtedly of people who work for bread by the sweat of their brow. The cases of *Weaver* v. *Floyd* (2) and *Bowers* v. *Lovekin*(3) were also cited.

(1) 2 Exch. Rep. 59. (2) 21 L. J. Q. B. N. S. 151.
(3) 25 L. J. Q. B. 371.

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JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—We think that those persons are "labourers" within the meaning of s. 266 of Act X of 1877 who earn their daily bread by personal manual labour, or in occupations which require little or no art, skill, or previous education. The defendants, who perform the lowest kind of manual labour in a spinning and weaving mill, and earn thereby Rs. 10 or 12 a month, come within the category. Nor does it appear to us that their remuneration is any the less "wages," because the amount is made to depend upon the number of pounds of cotton spun. The commonest class of labourers in this country, *viz.*, the coolies employed on railways or other similar works, are ordinarily paid, not by the day, but by the number of baskets of earth carried; and it is impossible to suppose that the Legislature did not intend the earnings of this class to be protected.

The rule is discharged with costs.

Rule discharged.

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5 B. 135.

[135] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

ASMAL SALEMAN AND OTHERS (*Original Plaintiffs*), *Appellants v.* THE COLLECTOR OF BROACH, AS MANAGER OF THE KHERWADA THAKOR'S ESTATE (*Original Defendant*), *Respondent.**

[25th August, 1880.]

Broach Talukdar's Relief Act XV of 1871—*Civil Court jurisdiction.*

The Broach Talukdar's Relief Act XV of 1871 does not bar the cognizance, by the Civil Court, of a suit to recover the amount improperly levied as rent of rent-free land, and to obtain a declaration that such land is not subject to the payment of rent, albeit that, under s. 23 of the Act, the Manager of a Thakor's estate is exempt from personal liability for anything done by him *bona fide* pursuant to the Act, and is not subject to an action for damages on account of the attachment of the plaintiff's property.

THIS was a second appeal from the decision of H. Birdwood, Judge of Surat, confirming the decree of H. F. Aston, Assistant Judge.

The plaintiffs sued, *first*, to recover certain moveable property, or its value, the property having been distrained and sold by order of the defendant as manager of the minor Thakor of Khervada, in the Broach Collectorate, for rent of certain *vanta* lands which the plaintiffs claimed to hold rent-free; *secondly*, to set aside the sale of certain houses and to recover possession of them, or their value, the sale having been made for the purpose of realizing rent in respect of these lands; and, *thirdly*, to obtain an injunction restraining the defendant from levying any further rent in respect of them.

The defendant denied that the plaintiffs' lands were *vanta*, or that they had any proprietary title to them, and asserted that the plaintiffs' claim, if any, was time-barred. The Assistant Judge held that a part of the claim was time-barred, and that the rest of it was not proved. The District Judge, in appeal, raised an objection to the cognizance of the suit

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* Second Appeal No. 204 of 1880.

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5 B. 135.

by the Civil Court, and held that the Talukdari Act deprived the Civil Court of the power of hearing a suit of this nature. The plaintiffs appealed to the High Court.

Nagindas Tulsidas, for the appellants.

[136] *Nanabhai Haridas*, Government Pleader, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—We fail to find anything in Act XV of 1871 which can be held to bar a suit like the present, which is to recover the amount said to have been improperly levied as rent of rent-free land, and to obtain a declaration that such land is not subject to the payment of rent. It is impossible to suppose that the Legislature intended to confer upon the manager of a Thakor's estate the power to confiscate the rights of property by treating the private estates of individuals as if they held as tenants of the Thakor. Section 23 no doubt exempts the manager from personal liability for anything done by him *bona fide* pursuant to the Act, and he would not, therefore, be subject to an action for damages on account of the attachment of the plaintiffs' property. But it is certainly open to the plaintiffs to prove that their land is held rent-free, and to recover from the Thakor's estate any moneys which have been improperly levied as rent, and paid into the estate. The decision in S. A. 141 of 1879, to which the District Judge refers, has no bearing on the present case. The only question argued in that appeal, was whether a "*hak*," payable from the Thakor's estate, and which had accrued due before the application of Act XV of 1871 to the estate, was a liability charged upon the estate within the meaning of s. 8 of the Act. This Court held that it was a charge, and that, consequently, the claim in respect thereof ought to have been notified to the manager in the manner prescribed in ss 6 and 7; and on this ground the Court confirmed the decree of the District Judge.

The decree of the District Court is reversed, and the case remanded for a decision of the issues raised by the appeal. Costs to follow final decision.

Decree reversed.

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5 B. 137.

[137] APPELLATE CRIMINAL.

Before Mr. Justice Kemball and Mr. Justice F. D. Melvill.

In re SAVANTA.* [September, 1880.]

Sanction—Mamlatdar's Court—The Code of Criminal Procedure, Act X of 1872, s. 468.

The Mamlatdar's Court constituted by Bombay Act III of 1876, is a Civil Court within the meaning of s. 468 of the Code of Criminal Procedure; therefore a complaint of an offence mentioned in that section, when such offence is committed before or against the Mamlatdar's Court, shall not be entertained in the Criminal Courts except with the sanction of the Mamlatdar's Court, or of the High Court to which it is subordinate.

[F., 2 Bom. Cr. Cas. 9 (11. 12) = 14 Cr.L.J. 80 = 15 Bom. L.R. 53 = 18 Ind. Cas. 416.]

THIS was an application for revision of an order of discharge passed by J. A. Guerin, Magistrate (First Glass) of Belgaum, under s. 215 of the Code of Criminal Procedure in the case of the *Empress* v. *Bhimaji*

* Criminal Application for Revision, No. 122 of 1880.

Govind and others, who were charged with having given false evidence before the Mamlatdar of Chikodi in a possessory suit.

The facts of the case are as follows :—

One Ravji instituted a possessory suit against the applicant Savanta in the Court of the Chikodi Mamlatdar, Mr. Hayavadan. During the trial of the suit he called a number of witnesses, and also produced a lease on his behalf ; but the Mamlatdar disbelieved them all, and pronounced the lease to be a forgery. His claim was, therefore, rejected by the Mamlatdar, who, in his judgment, expressed an opinion that the witnesses should be prosecuted for giving false evidence ; but before giving his formal sanction to such prosecution he died. The successful defendant thereupon applied to the Collector to give the necessary sanction ; but he ruled that the Court of the Mamlatdar was not a Civil Court within the meaning of s. 468 of the Code of Criminal Procedure, and that no sanction was necessary to prosecute witnesses for giving false evidence in the Court of the Mamlatdar constituted by Bombay Act III of 1876. Savanta accordingly preferred complaints before Mr. Guerin, Magistrate (First Class) at Chikodi, who dismissed them, holding that the Court of the Mamlatdar was a Civil Court, and that the complaints could not be proceeded with without a formal sanction of the successor in office of the deceased **[138]** Mamlatdar. The defendant, therefore, applied to the High Court, praying for a reversal of the Magistrate's order, or for a fresh auction by that Court itself.

G. R. Kirloskar, for the applicant.—The Court of the Mamlatdar, as constituted under Bombay Act III of 1876, is not a Civil Court for purposes of s. 468 of the Code of Criminal Procedure. This section renders a sanction necessary only when any offence mentioned in it is committed before or against a Civil or Criminal Court. A comparison of the provisions of Reg. XVII of 1827, ch. viii, Act XVI of 1838, Bombay Act V of 1864, and Bombay Act III of 1876 show that the Mamlatdar's Court cannot be called a Civil Court in the ordinary acceptation of that term. The Mamlatdar's Court is a Revenue Court : see Act XVI of 1838, s. 1. The latest enactment on the subject, *viz.*, Act III of 1876 (Bombay), which directly applies to the present case, supports this view, for by s. 18 of it it draws a distinction between the Court created by it and the Civil Court. It enacts that the possession given by the Mamlatdar's Court is only to continue till a decree is passed by a Civil Court. In *Mahadaji Govind* v. *Sonubin Davlata* (1), a case under Bombay Act V of 1864, and in *Ba Jamna* v. *Bai Jadav* (2), a case under Bombay Act III of 1876 the Mamlatdar's Court was held to be a Civil Court for a limited purpose only, *viz.*, subordination to and superintendence by the High Court. If, then, the Mamlatdar's Court is not a Civil Court certainly not an ordinary Civil Court such as is mentioned in the 2nd proviso of s. 18 of Bombay Act III of 1876, it is a Revenue Court. Whenever the Code of Criminal Procedure deals with that Court, it mentions it specificaliy, as in ss. 435 and 438. Section 468 omits to mention a Revenue Court, and it must be taken that it does so deliberately. No sanction is, therefore, necessary to prosecute witnesses giving false evidence before the Mamlatdar's Court.

Gokaldas Kahandas, for the discharged persons.—In the cases cited it was held that the Mamlatdar's Court was a Civil Court for all purposes. The Civil Courts are subordinate to the High Court and the Revenue Courts to the Collector and the Revenue **[139]** Commissioners. It is

(1) 9 B.H.C.R. 249.

(2) 4 B. 168.

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not pretended that the Mamlatdar's Court is subordinate to the Collector or the Revenue Commissioner for any purpose whatever, and the reverse has been expressly held. But, even if the Mamlatdar's Court be held to be a Revenue Court, still a sanction is necessary : *Empress* v. *Sabsukh* (1).

Nanabhai Haridas, Government Pleader, for the Crown.— A Mamlatdar exercises civil, criminal and revenue jurisdiction ; he is subject, accordingly, to different supervision. As a subordinate Civil Court within the meaning of Reg. II of 1827, s. 5, the Mamlatdar's Court is subject to the supervision of the High Court. The provisions of the various enactments —from Reg. XVI of 1827, ch. viii, down to Bombay Act III of 1876—show that the functions of the Mamlatdar in this respect were purely civil, and distinguished from either criminal or revenue. Moreover, the rulings of the High Court, which have been referred to, are not to be construed in a restricted sense, as has been contended. They decide that the Mamlatdar's Court is a Civil Court for all purposes.

JUDGMENT.

The judgment of the Court was delivered by

KEMBALL, J.—We have now heard this matter fully argued, and are of opinion that the First Class Magistrate was right in holding that he had no jurisdiction to entertain the complaint without sanction of the Court of the Mamlatdar in which the alleged offence was committed. It is contended for the applicant that the Mamlatdar's Court is not a Civil Court within the meaning of the Criminal Procedure Code, and in support of this contention, we have been referred to ss. 435 and 438 of the same Code in which a Revenue Court is spoken of as distinct from a Civil Court, and also to s. 18 of Bombay Act III of 1876, where a distinction is drawn between a Mamlatdar's Court and a Civil Court. To what class of Court the term "Revenue Court" in the Criminal Procedure Code relates, we have no means of knowing; nor, indeed, do we understand why any distinction should have been drawn in the sections above quoted between it and a Civil Court, but that Code applies to the whole of British India, and it has been held in this Presidency in the cases of *Mahadaji* v. *Sonu* (2) and **[140]** *Bai Jamna* v. *Bai Jadav*(3) that a Mamlatdar's Court is a Civil Court, so that the only question we have to consider is whether it is so in the sense of s. 468 of the Criminal Procedure Code. No doubt a distinction is taken in Bombay Act III of 1876 between a Mamlatdar's Court and an ordinary Civil Court : but we are unable to discover any intelligible reason why the term Civil Court should be taken in the restricted sense of an ordinary Civil Court, as distinguished from a Mamlatdar's Court, or why sanction for prosecution should not be as necessary and desirable in the case of an offence committed before or against the Mamlatdar's Court as in one committed against the ordinary Civil Court ; See ss. 468 and 469 respectively. The terms " a Civil Court " and " any Civil Court " seem to us necessarily to include a Mamlatdar's Court ; and we cannot suppose that the Legislature intended to give to suitors in such Courts unlimited powers of prosecution. We understand that the Mamlatdar, who disposed of the particular case out of which this question has arisen, is dead ; but he appears to have been prepared to give the requisite sanction. We are not aware whether any application has been made to his successor ; but, if not, it will rest with him, on application being made, to consider whether or no to grant it now.

Order accordingly.

(1) 2 A. 533. (2) 9 B.H.C.R. 249. (3) 4 B. 168.

5 B. 140.

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APPELLATE CIVIL.

APPELLATE CIVIL.

5 B. 140.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice M. Melvill and Mr. Justice Kemball.

EMPRESS *v.* NANA RAHIM.* [28th October, 1880.]

Indian Penal Code (XLV of 1860), s. 75—Offence—Attempt-Sentence—Conviction of an attempt to commit theft—Previous Conviction of theft.

[MELVILL, J., dissentiente].—If a person, who has been convicted of an offence punishable under chap. 12 or chap. 17 of the Indian Penal Code with imprisonment for a term of three years or upwards, is convicted of an attempt to commit any such offence, he does not thereby become liable to the enhanced punishment allowed by s. 75 of the Code.

[R., 17 A. 120 (123)=15 A.W.N. 22; 10 Bom. L.R. 26=3 M.L.T. 122.]

[141] THE accused in this case was convicted by S. H. Phillpotts, Sessions Judge of Ahmedabad, of an attempt to commit theft, under ss. 379 and 511 of the Indian Penal Code. He had previously been seven times convicted of theft; and the Sessions Judge, on the authority of s. 75 of the Indian Penal Code, sentenced him to transportation for ten years.

The prisoner appealed to the High Court.

There was no appearance on either side.

KEMBALL and F. D. MELVILL, JJ., sent for the record and proceedings in order to determine whether the sentence passed was legal.

The appeal was heard by M. MELVILL and KEMBALL, JJ.

M. MELVILL, J.—I think that the sentence passed in this case is legal. Section 511 of the Penal Code provides that "whoever attempts to commit an offence punishable with transportation or imprisonment ... ... shall ... ... be punished with transportation or imprisonment of any description provided for the offence for a term ... ... which may extend to one-half of the longest term provided for that offence." The longest term provided for the offence of theft is transportation for life, which may be awarded under the circumstances mentioned in s. 75: and under the same circumstances it appears to me that s. 511 authorizes the award of one-half of the same punishment, or transportation for ten years (s. 57). This conclusion seems to me to be not only strictly in accordance with the words of s. 511, but also with what may be presumed to have been the intention of the Legislature in fixing an arithmetical proportion between the punishment to be awarded for an offence and the punishment to be awarded for an attempt to commit such offence. Degrees of punishment are regulated according to degrees of criminality; and it is manifest that an unsuccessful attempt to commit theft, in spite of the deterrent effect of a previous conviction, is as much a sign of a confirmed criminal propensity as if the offence had been actually committed.

KEMBALL, J.—I am unable to concur in thinking the sentence legal, and would, therefore, reduce it to 18 months' rigorous imprisonment[142]. It is only where a person has been convicted a second time of an offence punishable under chap. 12 or chap. 17 of the Indian Penal Code that he can be made to undergo extra punishment under s. 75. I do not, therefore, see what application that section has to an attempt to commit one

* Criminal Appeal, No. 1 of 1880.

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of those offences. Section 511 of the Code is perfectly clear, and however desirable it may be to award enhanced punishment in the case, I am of opinion that we cannot take into consideration the penalty the prisoner might have been subjected to had he been convicted under s. 379.

[In consequence of the difference of opinion the case was laid before the Honourable the Chief Justice, under s. 271-B of the Code of Criminal Procedure, for his opinion.]

OPINION.

WESTROPP, C. J.—The accused, Nana Rahim, comes within the first of the two conditions required by s. 75 of the Penal Code to warrant the enhanced punishment allowed by that section,—that is to say, he has previously been convicted of offences punishable under chap. 17 of the same Code. But his case does not satisfy the second condition required by s. 75. He has not on the present occasion been guilty of any offence punishable under chap. 12 or chap. 17 of the Code, but has been guilty of an offence, *viz.*, an attempt to commit theft punishable under chap. 23 (s. 511). Hence I think the sentence of ten years' transportation, passed by the Sessions Judge, cannot be sustained. The view, which Mr. Justice Kemball and I have adopted of the inapplicability of s. 75 of the Penal Code to such a case as the present, seems to have been taken by Bittlestone in *Reg* v. *Mooneswamy*, mentioned by Mr. Mayne in his note on s. 511 at p. 420 of the ninth edition of his commentaries on the Indian Penal Code.

In accordance with this opinion the Division Bench reduced the sentence to eighteen months' rigorous imprisonment.

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[143] ORIGINAL CIVIL.

Before Mr. Justice West.

BURJORJI CURSETJI PANTHAKI (*Plaintiff*) *v.* MUNCHERJI KUVERJI, (*Defendant.*)* [10th, 13th, 14th, 15th, 17th and 24th, January 1880].

Registration Act III of 1877, *cls.* (*b*) *and* (*h*) *of s.* 17—*Document creating a right to obtain another document—Pleading—Admission—Effect of admission in pleading of execution of contract—Evidence to prove an admitted document not necessary—Evidence.*

By an agreement, dated 2nd August 1880 the defendant agreed to sell to the plaintiff a certain piece of land with a dwelling-house for Rs. 1,900. At the time of the execution of this agreement the plaintiff paid the defendant Rs. 100 earnest-money, and the agreement provided that the remaining Rs. 1,800 should be paid within a month from the date of the agreement when the deed of conveyance of the property should be executed. The material part of the agreement was as follows:—

"I have received from you Rs. 100, namely, rupees one hundred, as earnest (*i. e.*, at the time of the execution of this bargain-paper. And as to the remaining Rs. 1,800, namely, one thousand and eight hundred, the same are duly to be paid to me within one month from this day, when you will get the deed (or) document made in your favour. And all the expenditure in respect of the deed (or) documents and transferring (the property) to your name you are duly to make on your account . . . On these terms this informal bargain-paper having been written, is agreed to and delivered."

The plaintiff sued for specific performance, and tendered the agreement in evidence, although unregistered.

* Suit No. 450 of 1880.

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Held that the document, although unregistered, was admissible in evidence under cl. (*h*) of s. 17 of the Registration Act III of 1877. Being unregistered it could not create or assign the interest intended by the parties to be transferred, and being thus incapable of carrying out the primary intention of the parties, the agreement became one "merely creating a right to obtain another document which would, when executed," effect the desired purpose if the execution were accompanied with registration. The right given by the agreement was merely a right *in personam*, and the agreement was admissible in evidence to show the contract entered into for another conveyanee, though not as a conveyance itself.

Where in a suit for specific performance of an agreement the defendant admitted in his written statement the terms of the agreement and its execution.

Held that the plaintiff was not called upon to prove the execution of the agreement, or to put it in evidence.

[F., 7 B. 310; 36 B. 500 (503) = 14 Bom. L.R. 390 = 15 Ind. Cas. 830 (831); 24 C. 20 (25); R., 21 B. 704 (707); 22 B. 788 (792); 39 C. 284 (295) = 14 C.L.J. 411 = 16 C.W.N. 55 (63) = 12 Ind. Cas. 723; 12 M. 505; 13 M. 308 (312); 12 C.L.J. 25 = 6 Ind. Cas. 346, (349); 13 C.W.N. 326 = 4 Ind. Cas. 85 = 6 M.L.T. 368; 14 C.W.N. 874 (876) = 6 Ind. Cas. 445; 10 C.P.L.R. 107; 1 N.L.R. 147 (148); 3 N.L.R. 72 (77); U. B. R. (1897—1901), 379; D., 20 B. 553.]

SUIT for specific performance. The plaint alleged that by an agreement duly signed and attested, and dated the 2nd August 1880, the defendant agreed to sell to the plaintiff a certain piece **[144]** of land, with a dwelling-house, for the price of Rs. 1,900; that, at the time the said agreement was executed, the plaintiff paid the defendant Rs. 100 earnest-money—the agreement providing that the remaining Rs. 1,800 should be paid within a month from the date of the agreement when the deed of conveyance of the property should be executed. The plaint further alleged that repeated applications had been made, without success, to the defendant to carry out the agreement and for the conveyance of the property, and it prayed that the defendant should be decreed specifically to perform the said agreement and to execute to the plaintiff a proper conveyance of the said property on being paid the said sum of Rs. 1,800.

In his written statement the defendant admitted the execution of the agreement of the 2nd August 1880, and the acceptance of the Rs. 100 earnest-money, but he pleaded (1) that the said agreement had been executed by him under coercion and undue influence; (2) that the agreement had been made subject to the condition of its being ratified aud approved by his wife, who had refused to ratify and approve of the same.

At the hearing the following issues were raised:—

1. Whether the defendant was induced to enter into the contract of the 2nd August 1880 by the coercion or undue influence exercised by the plaintiff.

2. Whether the contract was not subject to a condition that the same should be approved by his wife.

3. Whether the plaintiff was entitled to specific performance of the contract, as in the plaint sought, or to any other or to what relief.

A copy of the agreement of the 2nd August 1880 was annexed to the plaint, and was in the following terms:—

"To Andhiaru (priest) Burjorji Cursetji Panthaki. Written by Muncherji Kuverji. To wit: This day (I have sold) to you my one house and a wood store and the ground appertaining to the same, in which (house) I live, and which is probably (registered) in my name in the books of the Collector. On the east side thereof there is the house of Manekji Beramji, and on the west there is **[145]** the house of Rustomji Merwanji Daruvala, and in the front and at the rear

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there are Government roads. That house I have sold to you for Rs. 1,900, namely, rupees one thousand nine hundred, and on account thereof I have received from you Rs. 100, namely, rupees one hundred, as earnest (*i.e.*) at the time of execution of this bargain-paper. And as to the remaining Rs. 1,800, namely, one thousand eight hundred, the same are duly to be paid to me within one month from this day, when you will get the deed (or) document made in your favour. And all the expenditure in respect of deed (or) documents and transferring (the property) to your name you are duly to make on your account. With regard to these premises, there is now a dispute (on the part) of Manekji Beramji: you are duly to get the same settled. Besides that, if there should be any other dispute, I am to get the same cleared off. The risk in respect thereof is on my head. On these terms this informal (*kucha*) bargain-paper having been written, is agreed to and delivered. And if you or I should swerve from this agreement, then Rs. 300, namely, rupees three hundred, are duly to be paid as a penalty."

The defendant was called upon to begin, and he was examined as to the circumstances under which the alleged agreement was executed by him. During his cross-examination, counsel for the plaintiff tendered the agreement of the 2nd August 1880 in evidence.

Starling (*Kirkpatrick* with him) objected to its admission.—This document is not registered. It gives an immediate interest in land. It does more than "merely create a right to obtain another document," and, therefore, it does not fall within cl. (*h*) of s. 17 of the Registration Act III of 1877. It also acknowledges receipt of earnest money. Counsel referred to *Valaji* v. *Thomas*(1); *Lewis* v. *Brass*(2); *Bonnewell* v. *Jenkins*, (3) *Rosseter* v. *Miller* (4); *Branton* v. *Griffiths* (5).

Latham (*Lang* with him) *contra*.—This document falls strictly within cl. (*h*) of s. 17. It is not a conveyance, and gives [146] no right or interest in the property. It creates an equitable interest in the plaintiff, but that is not such a right as is contemplated by the Registration Act. It gives a right against the defendant recognized and enforced in equity, but the ownership of the property remains unchanged until equity enforces a conveyance. The right given to the plaintiff by this document, which contemplates a further conveyance, is only a right *in personam* which by this suit the plaintiff is asserting. The conveyance, which we pray for, will give the interest in the property. Counsel referred to *Jusab Haji Jafar* v. *Haji Gul Mahomed* (6) and *Waman Ramchandra* v. *Dhondiba Krishnaji* (7).

Starling in reply.—The case of *Jusab Haji Jafar* v. *Haji Gul Mahomed* (6) is distinguishable. That was a suit by a vendor against a vendee upon an agreement by the vendee to take an estate when the vendor would give it. There was no estate conveyed, for the defendant had none to convey, and there was no acknowledgment, by the defendant, of any payment, for no payment was made to him. It was by him as purchaser that money was to be paid. The ground of the decision in *Waman* v. *Dhondiba*(7) is stated at pp. 136-7 of the report, and the statement shows that the decision is no authority upon the present case. *Valaji* v. *Thomas* (1) is directly in point.

WEST, J.—At present I am inclined to think that the agreement, which has been tendered, does declare an interest in the property, and is,

(1) 1 B. 190. (2) 3 Q.B.D 667. (3) 8 Ch. Div. 70.
(4) L. R. 3 Ap. Ca. 1124. (5) 2 C.P.D 212 (214). (6) 12 B.H. C. R. 175.
(7) 4 B. 126.

therefore, inadmissible, not being registered. It is conceded that there was a complete contract—*i.e.*, a concurrence of two persons—that property belonging to one of them should pass to the other. Unless there is some special law which requires the observance of some ceremony in order to effect the intended transfer such a concurrence of will appears to be sufficient. That is my present impression, and I must, therefore, refuse to admit the document in evidence ; but I will consider the matter more carefully, and deal with it in giving my judgment in this case.

The document which contained the ageeement between the plaintiff and the defendant being thus excluded, the question arose as to whether the [147] admission of the execution of the agreement, contained in the defendant's written statement, was sufficient, or whether the plaintiff was bound to prove the agreement in order to obtain a decree for specific performance.

Starling, for defendant.—The defendant, while no doubt admitting in his written statement the execution of the agreement mentioned in the plaint, submits to the Court whether he is bound by it. That is a very qualified admission. In India parties are not kept with strictness to the pleadings. Reference was made to *McGowan* v. *Smith* (1) ; Taylor on Evidence, para. 759 ; Civil Procedure Code ; Act X of 1877, ss. 59, 63, 147.

Latham, *contra*, referred to *Lett* v. *Morris* (2), *Huddleston* v. *Briscoe* (3) *Shankar* v. *Vishnu* (4).

JUDGMENT.

WEST, J.—Two questions, which arose in the hearing of this case, are of such importance that it is desirable I should consider them before going on to dispose of the formal issues stated between the parties. The first is as to whether the document executed by the defendant Muncherji to the plaintiff Burjorji is one that requires registration under s. 17 of Act III of 1877 and what are the consequences of its non-registration. The second is, whether the document is sufficiently admitted by the defendant Muncherji to make its production in evidence unnecessary.

The language of s. 17, cl. (*b*) of Act III of 1877 is the same in its effect as that of the corresponding enactment in the previous Registration Acts, VIII of 1871 and XX of 1866. But by cl. (*h*) of that section it is provided that "nothing in cls. (*b*) and (*c*) of this section applies to any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest."

We have, therefore, to consider whether the document now in question, is of a kind included in cl. (*b*), and, if not, then what is the operation on it of cl. (*h*).

[148] It is contended by the learned counsel for the plaintiff that the document is meant to do, and is in its nature calculated to do, no more than create a right to obtain another document, which second document will, when executed, create or declare a right to the property specified. That a contract has been made is conceded. It is admitted that an equitable interest, so called, has been constituted by the transaction embodied in the paper signed by Muncherji ; but this, it is said, is not a right or

(1) 26 L. J. Ch. 8. (2) 4 Sim. 607. (3) 11 Ves, 583. (4) 1 B. 67,

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interest of the kind intended. It is merely a right *in personam* against Muncherji. By the contract, Burjorji has acquired a secondary right of action to insist on Muncherji's making his engagement good by executing an effectual conveyance, but no more. The document stipulates for a formal conveyance, but is not itself a conveyance. The ownership remains vested in Muncherji until his specific performance of the existing obligation is sought by the plaintiff Burjorji by executing an actual and effectual conveyance whereby the ownership shall be transferred from the one to the other. The real right, as distinguished from the obligation, will then have passed, but not till then, nor then without a registration of the final instrument. The one now executed, giving a right to that, is of exactly the kind contemplated by s. 17, art. (*h*) of Act III of 1877.

The document in question, of which a copy is annexed to the plaint, engages Muncherji, at least by implication, to execute a further assurance.

"I have received from you Rs. 100, namely, rupees one hundred, as earnest (*i.e.*,) at the time of the execution of this bargain-paper. And as to the remaining Rs. 1,800, namely, one thousand and eight hundred, the same are duly to be paid to me within one month from this day, when you will get the deed (or) document made in your favour. And all the expenditure in respect of the deed (or) documents and transferring (the property) to your name you are duly to make on your account." And, again, "On these terms this informal bargain-paper having been written, is agreed to and delivered." It was plainly a term of the act or expression of will that Burjorji, paying the remainder of the purchase-money, should obtain execution by Muncherji of a more formal conveyance. **[149]** But in cases of contract if the parties intend to be bound forthwith, and say so, the fact that a more formal expression of their intention is to be drawn up afterwards does not deprive the mutual consent of its proper effect (1). It is only when the assent is suspended, being dependent, or conditional on the acceptance in a particular form, and the execution of a further document, that the obligation is not contracted (2). The principle applies generally to manifestations of volition. When the parties have agreed to commit their oral agreement to writing, a presumption was raised by the Roman law and is raised by the Prussian codes and other modern laws (3) that the right or obligation is dependent on an execution of the instrument; but this is only a presumption. Where the parties themselves had agreed upon certain formalities, it was requisite to seek in the contents of their agreement what had been their intention, for it was that which must serve as a guide (4). The presumption which reason at once recognizes of the merely tentative character of an oral declaration, meant to be superseded by a written one, hardly arises at all as between two writings. The earlier of these is capable of giving expression to the joint will in unmistakeable language and of excluding contradictions of memory. Except where a particular form is prescribed by law it may in such a case be said of the later and now formal instrument; *fiunt scripturæ ut quod actum est per eas facilius probari possit et sine his autem valet quod actum est si habeat probationem* (5).

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(1) *Bonnewell* v. *Jenkins*, 8 Ch. D. 70; *Crossley* v. *Maycock*, L. R., 18 Eq. 180; *Rosseter* v. *Miller*, L. R. 3 Ap. Cas. 1124.

(2) See case already cited, and *Boyd* v. *Hind*, 25 L. J. Ex. 246; *Branton* v. *Griffiths*, 3 C.P.D. 212 (214).

(3) Part I, Ti. 4, S. 117. (4) Gondsmit. Pand. 147.

(5) Di. Li. 22, T. 4, Lex. 4: see vi, *ad Inst. Emp ad Vend.* 10.

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If, then, there has been an expression of will in itself effective, the effect is not defeated or suspended by a provision for a more formal declaration. That the act is unilateral in the sense of being onerous to but one of the parties, makes no difference; it is in every case his own desire and will that the declarant, even in a bilateral obligation, expresses, whether as dependant or as absolute and immediately operative.

[150] As it is a general characteristic of property that it may be transferred, so it is generally true that this may be accomplished by the volition, openly manifested, of the intending transferor and transferee. The relation of ownership of immoveable property has in most legal systems been deemed to affect the public so materially that various forms have been prescribed as essential to its transfer, but the necessity of feoffment with livery of seisin is not a part of the English law that obtained a place in India, through its suitableness to local circumstances; and even a provision of the Statute of Frauds, which required that a document relating to the sale of lands should be in writing. has been repealed by the Indian Contract Act. According to the Hindu law, a change of possession or something equivalent is necessary to the completion of a transfer, and it has been contended by some distinguished jurists that such a change ought, according to a sound philosophy of the law, to be made essential in every case (1). But the English law has not adopted such a theory, and, except by way of caution against fraud, there is no convincing reason why more should be required than a mutual assent for replacing one member of the community as an owner of property by another equally qualified for the functions of a proprietor. Thus, in the absence of any special law as to the forms to be observed, one Parsi may well transfer his ownership to another by a mere open assent of both to that effect. A real ownership may pass, though the public policy of the Registration Act may make the ownership subject to defeasance if it has not been secured by registration. But the same policy may impress the intended transfer with an original defect, and deprive it of all operation, unless authenticated in the way prescribed. Such appears to be the effect of s. 49 of the Registration Act III of 1877. "No document required by s. 17 to be registered shall affect any immoveable property comprised therein . . . . . unless it has been registered in accordance with the provisions of this Act." The property or ownership in the cases contemplated cannot pass without a registration of the instrument, nor can an instrument unregistered be received as evidence of a transaction directly affecting the property comprised in it.

[151] In the present instance, then, the document in question cannot, as being unregistered, create or assign the intended interest. On its face it "declares" an interest, and what it declares is a matter of mere intention of the parties independent of any law. But at the same time a "declaration" so taken has no legal effect. What is intended is a declaration apt in itself to bind the parties and to constitute a particular right. As the instrument cannot affect the property to which it relates, the document, though certainly made, is purely abortive in a legal point of view.

Were the instrument itself capable of transferring the ownership, as under the Registration Act it is not, the further conveyance promised by it could do no more. In that case it could not properly be described as "merely creating a right to obtain another document." The right having passed, that second document would merely record the transaction in a

(1) See Maynz Dr. Rom. Purchase and Sale.

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particular form. But the right to the further instrument is at least created, and this alone subsists where the primary expression of will as to immediate change of ownership fails. It was intended to be accessory, but it can subsist separately. The first document is thus reduced to one "merely creating a right to obtain another document, which will, when executed," effect the desired purpose if the execution be accompanied by registration. The right is a right *in personam*, and subsists as between the parties, though, as directly affecting the property and creating a real right, the document is quite ineffective.

Now what the plaintiff in the present suit seeks, is, specific performance by the execution of the conveyance which will convert his contractual right into a right of ownership. I think that for such a purpose the document A is admissible to show the contract entered into for another conveyance, though not as a conveyance itself. It is, in terms, a conveyance, *i.e.*, an instrument translative of ownership, and on the argument that this was not its character, I thought it not admissible. I could not consider it as in its purport nothing more than an agreement to convey; it purports itself to convey. But that principal purpose failing, the secondary one becomes the principal, and the document might, I think, be used to ascertain what the formal and final conveyance ought to be.

[152] It is because it is made inoperative for its primary purpose, that it becomes admissible for the secondary purpose—admissible, not to prove a transaction itself changing ownership (1), but one giving a right to such a transaction by way of conveyance. In this way only, so far as I can see, can effect be given to s. 17, cl. (*h*); for an equitable interest being at once created by the contract, the contract, fails through its own completeness, unless the additional contract for a separate conveyance is allowed an independent effect. In one sense a contract to convey does convey, *i.e.*, transfer the intended interest; but this consequence was not, it is certain, intended to make the provision in s. 17, cl. (*h*), purely illusory

The second question is that of whether the proof of the document is superseded by its admission in the pleading. On this point the case of *McGowan* v. *Smith*(2) and the onus there referred to, seem conclusive. A Court, in general, has to try the questions on which the parties are at issue, not those on which they are agreed(3); and "admissions which have been deliberately made for the purposes of the suit, whether in the pleading or by agreement, will act as an estoppel to the admission of any evidence contradicting them. This includes.....any document that is by reference incorporated in the bill or answers (4).' The point is not in issue; and as to the counter-statements of the parties, "a plea or a special replication admits every point that it does not directly put in issue. The same rule applies to an answer when it assumes the form of a demurrer or plea by submitting a point of law or by introducing new facts. Thus a submission that the defendants would not be in anyway affected by the notice set forth in the bill, precluded them from disputing the validity of this notice" (5). Such rules are to be applied with discretion in this country, where a strict system of pleading is not followed; but here, as I suppose everywhere, the language of Lord Cairns holds true, "that the first object of pleading is to inform the persons, against whom the suit is directed, what the charge is **[153]** that is laid

(1) Act III of 1877, s. 49.
(2) 26 L. J. Ch. 8.
(3) Civil Procedure Code, Act X of 1877, S. 146.
(4) Gresley's Law of Evidence, 457.
(5) Op. Cit. p. 22.

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against them (1)." The principle is equally valid as applied to either party in the cause. The Court (2) is to frame the issues according to allegations made in the plaint or in the written statements tendered in the suit, which here contain a full assertion and admission of the execution of the document A by the defendant Muncherji. But the issues, as they stand, were suggested by the defendant's counsel. They waive controversy as to the actual execution of the document, assume it to have been executed, and raise questions only that depend for their pertinence on that assumption. Under such circumstances the plaintiff is not, I think, called on to prove the execution of the document or to put it in evidence. If the document being pronounced absolutely invalid for some purpose on considerations of public policy, it were sought to defeat the law through the effect usually given to an admission in pleading, such an attempt could not be allowed to succeed, but for its proposed purpose in this case it is not invalid. It may serve as a ground for claiming the conveyance it promises, though unregistered; while as unregistered it is not itself an operative conveyance. It is embodied by reference in the plaint and admitted in the answer. It remains to be seen whether the objections, raised on behalf of the defendant to the fulfilment of the contract thus ascertained, are supported by the evidence. [His Lordship then commented upon the evidence, and passed a decree for the plaintiff, with costs.]

Decree for the plaintiff.

Attorneys for the plaintiff.—Messrs. *Shapurji and Thakurdas.*
Attorneys for the defendant.—Messrs. *Payne and Gilbert.*

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5 B. 154=5 Ind. Jur. 589.

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Before Mr. Justice West.

IN THE MATTER OF THE PETITION OF KAHANDAS NARRANDAS.

[20th December, 1880 and 11th January, 1881.]

Indian Trustee Act (XXVII of 1866), *ss.* 3, 35, 53—*Equitable jurisdiction of High Court —Trusts—Appointment of new trustee—Letters Patent*, 1823, *Cls.* 29, 33, 41.

The High Court may exercise the summary powers conferred upon it by the Indian Trustee Act (XXVII of 1866) in the case of Hindu trusts.

Section 3 of the Indian Trustee Act, which provides that the power and authority given, by the Act to the High Court shall be exercised only "in cases to which English law is applicable," cannot be intended to limit the operation of the Act only to cases to which, in their whole extent, the law prevailing in England applies without qualification or reserve, as this would virtually exclude the Act in any case on which an Act of the Indian Legislature has any bearing. The cases referred to in the section must be cases to which the English law is *in some measure* applicable, but in what measure is not indicated in the Act. English law must be regarded as applicable in the sense intended if the principles recognized by the English Equity Courts are applicable.

At the date of the grant of the charter to the Supreme Court of Bombay in the year 1823, English equity had become a system which would deal with a body of *quasi*, common law in a scientific manner and in obedience to known and uniform rules. When it applied its method to the determination or the constitution of a right, even based on the Hindu or Mahomedan law, it administered English law. In this sense "English law was applicable" at the

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(1) *Brawne* v. *Mc Clintock*, 6 Eng. & Ir Ap. at p. 453.
(2) Civil Procedure Code, Act X of 1877, s. 147.

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date of the passing of the Indian Trustee Act of 1866 to all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants of Bombay. Those doctrines could not be employed to subvert the native substantive laws, but they afforded a means of ameliorating them by a system of rules borrowed from the English Court of Equity.

Trusts are recognized in the Hindu as well as in the English system of law. But while the substantive Hindu law insists strongly on the suppression of fraud and the fulfilment of promises, it fails to furnish the detailed rules by which effect is to be given to its principles in cases of trust. If the Court is called on to give effect to a trust in any given case, it looks to the Hindu law of property to determine the estate of the trustee, but with reference to the duties of trustee and the rights of beneficiaries it is governed by the rules of English equity. There are no others that it can apply. In meeting an exigency, or in taking cognizance of a form of right not directly provided for in the Sastras, the Court in exercising its jurisdiction under s. 41 of the charter of 1823 may apply Hindu Law. But, taking Hindu law as one of its *data*, it applies "English law" also in the form of equity to all or nearly all the questions that arise.

[N.F., 37 C. 870 (873) = 7 Ind. Cas. 33 ; R., 11 B. 666 (676) ; 21 B. 48 (52) ; 36 B. 214 (223) = 13 Bom. L.R 717 = 12 Ind. Cas. 225 ; 3 Bom. L.R. 905 (909) ; 9 C. W.N. 79 (80) ; 6 O.C. 305 (311, 319).]

PETITION for the appointment of a new trustee.

[155] In the year 1863 the petitioner set apart certain lands and a large sum of money to be applied to religious and charitable purposes duly set forth in a Gujarati writing bearing date the 15th December 1863.

The first clause of the said writing appointed two trustees, and was in the following words :—

"To Sha Premchand Raichand and Sha Tulsidas Ramdas written by Sha Kahandas Narrandas. To wit : This day I, of my own free will and pleasure, having set aside the undermentioned estate and money, have been made over the same to you in trust to be applied to good objects. You are to execute this (trust) according to the undermentioned conditions and arrangements. Out of you (two) Sha Premchand Raichand is appointed managing trustee, and Sha Tulsidas Ramdas is appointed trustee during my lifetime ; and in the event of my decease, my wife Bai Gulalvahu is appointed trustee in place of Sha Tulsidas Ramdas. Should it be necessary during my lifetime to appoint another trustee in place of Sha Tulsidas Ramdas, Sha Premchand Raichand may duly appoint a trustee with my consent."

The document then set out the various purposes to which the trust funds were to be applied, and the concluding clause was as follows :—

"No one of my heirs shall have any right whatever thereto, save the only rights to go on a pilgrimage as far as Shri Jaggannathji according to the above-mentioned particulars, and with the exception of that should any of my heirs, after my decease, raise a dispute, it is all null and void. I myself of my own free will and pleasure, having made this above-named determination, have made over the said estate and money to Shet Premchand Raichand, the managing trustee of this fund. He and Sha Tulsidas Ramdas are appointed as aforesaid managing trustees ; therefore no one of my heirs has any claim or right to this trust (property). However, my heirs have a right to go on a pilgrimage as far as Shri Jaggannathji according to the above-mentioned arrangement. Further be it known as follows :—The whole authority to carry out the said works is given to Shet Premchand Raichand, and after his decease to such person as he may during his lifetime appoint and [156] entrust to. Further, if the amount of my fund from amongst the sums (set apart) for the said good works, shall be found deficient while being expended, it may be supplied out of the surplus,

if there be any, of any of the sums for the other expenses. The whole authority in regard to all these things belongs to my said trustees who are now existing, and to the trustee or trustees who may be hereafter appointed. Further, having affixed to this writing my signature and seal, that is '*mohor*' I have delivered it, Bombay, in the Samvat 1920, Magsar Sud the 6th, at and the day of the week Wednesday, 16th December, in the Christian year 1863."

The petition stated that after the execution of the said trust deed the said Premchand Raichand and Tulsidas Ramdas entered into possession and management of the trust premises and trust funds; that the said Tulsidas Ramdas died on the 11th November 1879 intestate, leaving him surviving a widow named Dewalibai; that during the lifetime of the said Tulsidas Ramdas some portion of the said trust funds remained in his custody and the other portions remained in the custody of the said Premchand Raichand; that the said Tulsidas Ramdas during his lifetime sometimes deposited with the petitioner, for safe custody, some portions of the said trust funds, and some time previous to his death the said Tulsidas Ramdas deposited with the petitioner Government promissory notes of the value of Rs. 29,000, belonging to the said trust funds.

The petition further stated that Government paper belonging to the said trust funds, of the value of Rs. 42,000 or thereabouts, then was or should be in the possession of the said Premchand Raichand in addition to a large sum of money consisting of cash or Government paper belonging to the said trust fund; that the petitioner had repeatedly called upon the said Premchand Raichand to join with the petitioner in appointing a new trustee in the room of the said Tulsidas Ramdas, deceased, pursuant to the provisions of the writing of the 15th December 1863 but he from time to time put off the petitioner with excuses; that the petitioner had lately, through his solicitors, called upon the said Premchand Raichand to appoint a new trustee, but he alleged that it [157] was not necessary then to appoint a new trustee, and had called upon the petitioner to hand over the said Government promissory notes for Rs. 29,000 to him as the sole continuing trustee; that the petitioner had informed him, in reply, that he was willing to hand over the said notes to the said Premchand Raichand and a new trustee when appointed, and had expressed his willingness to appoint one, but the said Premchand Raichand was not willing to have a new trustee appointed as his co-trustee, and wished to remain alone as sole trustee, and to have all the funds in his sole possession and control; that the petitioner was not willing to allow the said Premchand Raichand to manage the said trust premises alone. The petition prayed that some fit and proper person might be appointed as trustee in the place of the said Tulsidas Ramdas, deceased. Such new trustee to be selected with the consent of the petitioner.

Latham appeared for the petitioner.

Farran, for Premchand Raichand.

Inverarity, for Narrandas Kahandas.

The Advocate-General (Honourable *J. Marriott*) appeared on behalf of the charity.

Latham, for the petitioner.—The Court will never, if possible, allow one trustee to have possession of trust property: Lewin on Trusts (6th ed., 1875), p. 38, pl. 9; *Ibid.*, p. 690 (ch. 28, pl. 1). It is clear that before the Trustee Act this application would have been granted. The

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difficulty now arises for the Indian Trustee Act XXVII of 1866, which is declared by s. III to be applicable only " in cases to which English law is applicable." This application is made under s. 35 of the Act.

The position of those who deny the jurisdiction of this Court in a case of this kind, must be that English law is only exceptionally applicable, —that is applicable only to class, *e.g.*, to those domiciled in England, the law generally administered by this Court being some other law. We submit that the law generally administered by Courts in India is English law, and that other law is only applied in particular cases. This question is discussed at length by Markby, J., in *The Secretary of State* v. *The Administrator-General of Bengal* (1).

[158] The Hindu in India must resort to English law in all matters relating to trusts. The Hindu law has provided no machinery for dealing with such cases. In *Haridas Purshotum* v. *Henry Gamble* (2), which was a case of insurance, it was held that, in the absence of Hindu law upon the question, English law applied.

The Letters Patent, 1823, are still in force as to the equitable jurisdiction of the Courts, and it is clear from cl. 41 that this equitable jurisdiction is to be applied to natives

It is not disputed that, if we filed a suit, the Court could appoint a trustee. The only question is whether the summary jurisdiction given by the Trustee Act is applicable to natives. The equitable jurisdiction exercised in a case of a suit, would be derived from cl. 41 of the Letters Patent, 1823. If that is so, it is only reasonable to hold that the powers given by the Trustee Act of 1866, which were given for the purpose of simplifying the procedure, are exercisable in all the cases in which that procedure was adopted. To hold otherwise would be to render the Act nugatory which was passed to enable Courts to exercise summarily and inexpensively the jurisdiction they already possessed.

It may be urged that this case comes within s. 29 of the Charter of 1823. If Hindus had a law and usage relating to trusts, this section would preserve these, but not having them the section does not apply. That section would apply to suits as well as to an application like the present. English law has always been applied to suits filed for this purpose. It would be a hardship to refuse to apply English law in its improved form, while no objection is made to applying it in the more lengthy and expensive proceeding of a suit.

Farran for the surviving trustee.—There are two questions to be decided: 1st, assuming the Indian Trustee Act to be applicable, is this a case in which it should be applied; 2nd, is the Act applicable at all? As to the first point, I contend the Court ought not to interfere. This is an attempt to oust Premchand Raichand from the right of appointing a co-trustee which is conferred on him by the deed. He is willing to exercise that power. The **[159]** Court, therefore, cannot interfere: *Hodsons settlement* (3). The mere fact that he has allowed a year to elapse without making an appointment, is not material.

The second question is, whether the Court can exercise the powers given by the Act in the case of a charity created by a Hindu and by a deed in the Hindu form. I admit that in a suit the Court can appoint trustees in a case of Hindu trust. But it has not as yet exercised its summary jurisdiction in cases not under Hindu law. The Act which governs proceedings like the present is adjective law. Adjective law is applicable

(1) 1 B. L.R. O.C.J. 87. (2) 12 B.H.C.R. 23 (32). (3) 9 Hare 118.

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to all classes, unless it is limited in its application by some express provision. But s. 3 of the Indian Trustee Act clearly excludes some classes of the community from the operation of the Act. It may be taken to enact that this part of the adjective law is not to apply except in those cases in which the substantive law to which it refers is applicable. The question, then, is narrowed to this—what is the law to be applied to this trust created between Hindus? I contend that the law must be Hindu law.

Some of the exceptions referred to in cl. 41 of the charter of 1823 are those already indicated in cl. 29.

In the *Tagore Will Case* (1) it was laid down that trusts are not unknown to Hindu law. [WEST, J.—Is a case of trust to be regarded as a contract within cl. 29 of the charter of 1823 ?] It would appear so, for this section was applied in the *Tagore Will Case*, so that the Court must have considered the trusts there to come within the section. Rights arising under a written instrument may be taken to fall within the term contract.

The only reason suggested for applying English law is, that the Hindu law has no specific rules applying to the particular case. That is not sufficient to justify in saying that English law applies. The law applicable is the Hindu law, and where it is defective in special rules required in any branch, we may take such rules as may be approved of from English law or some **[160]** other system of law, and modify them so as to suit the case. It is not, however, as English law that they are so made applicable.

Latham in reply.—The *Tagore Case* is not in point. There an endeavour was made to alter the Hindu law of succession. The Court prevented that, but it did not apply the law of trusts. It applied the law of succession. The law of trusts is a law of machinery, and if so, s. 29 of the charter does not apply.

11th January, 1881. WEST, J.—In the present case Kahandas Narrandas in December 1863 executed an instrument whereby he transferred to Premchand Raichand and Tulsidas Ramdas property worth about two lakhs of rupees on trusts chiefly of a religious character. The validity of the trusts is not in question. Premchand was assigned the principal authority as managing trustee, though the language of the document on this point is not altogether self-consistent. In the event of Tulsidas's death during Kahandas's life the direction given by Kahandas is that Premchand is in his stead " duly to appoint a trustee with my consent." Tulsidas died in October or November 1879, and a correspondence followed in which Premchand, demanding certain moneys or securities left with Kahandas, was met by a declaration that Kahandas was willing to appoint a new trustee and then hand over the money. Premchand thought that the nomination rested not only in his power but in his discretion as to an appointment being made or not. He has not proposed a new trustee for Kahandas's approval, and apparently does not intend to do so, unless there is an opinion expressed by this Court to that effect.

Under these circumstances I am asked to appoint a trustee in the place of Tulsidas. That the jurisdiction to make such an appointment exists, requiring only to be invoked in the proper way, is admitted on behalf of Premchand. But that way and the only way, it is contended, is by a suit, and at present the Court is moved only by an application. For Kahandas, reference is made to s. 35 of the Indian

(1) *Ganendra Mohan Tagore* v. *Jatindra Mohan Tagore*, 9 B. L. R. 377 ; 1 I.A. 387.

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Trustee Act XXVII of 1866, and by s. 53 of that Act, any order made, under its provisions has the same effect as a decree, and is to be executed in the same way as a decree. Whether the conclusion of the Court should be arrived at by means of a suit or an application would seem, therefore, to be [161] immaterial as regards the substance of the case; but the parties are Hindus, the trusts are for objects of a kind that are regarded as calling for protection by the Hindu law, but not by the English law, except so far as that law may in this country embrace and effectuate the Hindu law.

Now, s. 3 of the Act says that "the powers and authorities given by the Act to the High Court shall and may be exercised only in cases to which English law is applicable, and may be exercised with respect to property within the local limits of the extraordinary original civil jurisdiction of the said Courts respectively." The present, it is said, is not a case "to which English law is applicable." The Court has not jurisdiction to deal with it under the Act, and the application ought to be rejected.

On the question thus raised, the learned counsel on the one side and the other have referred by memory or tradition to decisions said to have been given in opposite senses by different Judges of this Court. The judgments, however, are not forthcoming, and in the absence of them I am not on mere conjecture to suppose that the one or the other was supported by the more conclusive reasoning. The authorities being evenly balanced, my mind, as affected by them, must be balanced too.

In support of the proposition that the case is one to which English law is applicable, Mr. Latham relied much on the case of *The Secretary of State* v. *The Administrator General of Bengal* (1). That case was one in which a declaration was sought that the estate of one H. T. Dodsworth, deceased, had escheated for want of heirs, though he had left several children by two concubines. The deceased and his father did "in a general way profess the Christian religion," but this was thought "unimportant" by the learned Judge, Markby, J., who disposed of the case. After an elaborate discussion of several theories he arrived at the conclusion (p. 112 of the report) "that there exists in this country English law which is not due to the charters creating the Supreme Court, and which is not personal law. Nor is it possible to suggest, as far as I am aware, any ground for the existence of that law, except [162] that when this country was brought under English rule the English law became the territorial law of the country, applicable, it is true, in very few instances, because of the very large number of persons who had a personal law of their own and only in the same modified form in which it is applicable within the city of Calcutta, but still a territorial law." By English law, however, the learned Judge did not mean English law pure and simple, but "that modified form of English law which is usually applied in this Court, and which, I think, Mr. Justice Phear in *Hogg* v. *Greenway* (2) has aptly described as Indo-English law."

In answer, then, to the question "whether the right of the Crown as *ultimus hæres* is part of the Indo-English law," he says (p. 113): "I think it is. The Privy Council certainly so consider it in the case of *The Collector of Musulipatam* v. *Cavaly Venkata Narainapah* (3); and though the Succession Act of 1865 is not directly applicable to this case, it can hardly be contended that this part of the English law is by its very nature inapplicable to this country, since s. 28 of that Act provides that

(1) 1 B.L.R O.C.J. 87. (2) Coryton 97. (3) 8 M.I.A. 500 (524).

if a person has left none who are of kindred to him his estate shall go to the Crown."

On this reference to the case of *The Collector of Masulipatam* v. *Cavaly Venkata Narainapah* (1) I have to observe that, if Indo-English law is taken according to the learned Judge's definition, the ground of the decision of the Privy Council seems to have been mistaken. After determining that, even according to Hindu law, there was an escheat to the State, the judgment of the Judicial Committee proceeds (1): "Their Lordships, however, are not satisfied that the Sadar Court was not in error when it treated the appellant's claim as wholly and merely determinable by Hindu law. They conceive that the title which he sets up may rest on grounds of general or universal law." A decision grounded on "general or universal law" is not grounded on such a very special compound as the Indo-English law.

In the case of *Barlow* v. *Orde* (2) the *status* of the parties seem to have been of the same description as in *The Secretary of State* **[163]** v. *The Administrator-General of Bengal* (3). Colonel Skinner, like Dodsworth, was an illegitimate son and the father of illegitimate children. He devised his estates to his children and their children, and the Courts in India applied the English law to the determination of what was meant by "children." Before the Judicial Committee, counsel for the respondent asked "if the English law is not to govern the rule of construction, what law is?" To this the judgment delivered by Lord Westbury (p. 307 of the report) answers: "The construction and effect of the will, therefore, must depend on the law of the domicile, if that can be ascertained. At the time of the colonel's death there was no *lex loci* of the province in which he was domiciled, and the law applicable to the succession of any individual depended on his personal *status*, which again mainly depended on his religion. Thus the succession of a Hindu would, as a general rule, fall to be regulated by Hindu law and of a Mahomedan by Mahomedan law, and of an East Indian Christian by English law; but in every case, for the purpose of determining the *status personalis*, regard was to be had to the mode of life and habits of the individual and to the usages of the class or family to which he belonged . . . . . There is nothing to indicate the religious belief or profession of the colonel or his family, or what were their habits or usages."

"His origin is unknown; being illegitimate he belonged to no family, and all that can be collected is that he was probably a soldier of fortune, who rose by his courage and military skill to a certain rank and distinction in the service of the East India Company."

"It is impossible, under these circumstances, to affirm that any particular law is applicable to the construction of the colonel's will or the regulation of his succession. Any questions that may arise respecting them must, therefore, be determined by the principles of natural justice."

This is the law of justice, equity and good conscience (4) which in *The Secretary of State* v. *The Administrator-General of Bengal* is expressly refused recognition (3). Of the English law, which as **[164]** a territorial law Markby, J., thought must govern all cases not covered by a special personal law (5), the Judicial Committee say it "has no application" (6).

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(1) 8 M.I.A. 500 (524).
(2) 13 M I. A. 277.
(3) 1 B.L.R. O.C.J. 87 (93).
(4) *Per* Lord Westbury, 13 M.I.A. at p. 307.
(5) 1 B.L.R.O.C.J. 112 (113).
(6) 13 M. I. A., at p. 317.

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The case of *Abraham* v. *Abraham* (1), which is referred to in both the cases that I have been considering, seems to have been differently understood in each. In the Calcutta case (2) it is said "all that I understand the Privy Council to have done in *Abraham* v. *Abraham* is to affirm this mixim," namely, that "*in pactionibus et conventionibus unusquisque se sua lege defenbere potest.*" In the Privy Council "the Regulations as explained in the Abraham case" go, it is determined, to support the proposition as to personal *status* as subjecting to one or another system of law which I have already quoted. In the Calcutta case it is said that the relations, *inter se*, of a joint Hindu family are "a matter *quod ad voluntatem spectat* (2). The Judicial Committee do not hint at such a doctrine as a ground for their decision. Savigny, whose history of the Roman law in the Middle Ages established the correction of Raynonard and others (3) as to the free choice of a personal law (4), to which the learned Judge refers, points out in the same work that the laws of inheritance are specially of a public character removed from the domain of individual will (5). In the Introduction to his Law of Obligations Savigny specifies the laws of the family and of succession as those allowing the least scope to free action, and in his system (s. 105) he says expressly that these laws are not modifiable by the disposition of any person. This is, indeed, the main principle of the *Tagore Case* (6). The *dicta* of the Judicial Committee as to the voluntary character of customs in *Abraham* v. *Abraham* (1) imply a multiplicity of persons as well as of acts, and though they allow a man to transfer himself from the **[165]** class to which he has hitherto belonged to another class, do not in either class permit him to make a law for himself different from that which governs his fellows. Such a permission would, in fact, be inconsistent with any rational notion of a law.

I should not, therefore, on the authority of *The Secretary of State* v. *The Administrator-General of Bengal* (7) feel warranted in saying even that the English law or the Indo-English law is the territorial law of India in the sense intended in that case. But the judgment itself seems (8) to recognize that after our acquisition of this country the general Mahomedan law as the personal law of Mahomedans and the general Hindu law as the personal law of Hindus was still in existence. In the present case the parties are Hindus, and if the general proposition could be accepted it would as to them be excluded by the exception.

The parties are, moreover, residents within the original jurisdiction of this Court. It may well be that English settlers allowed expressly or tacitly to use their own laws within the limits of a factory become as members of the distinct community thus marked off subject generally to the English law apart from any special legislation to that effect. Even Christian foreigners who become members of such a community, as they have a common basis of sentiment with it must, by association, share its legal consciousness and may properly be subjected to identical rules. But this principle as ruled in *The Administrator-General of Bengal* v. *Ranee Surnomoyee Dosee* (9), does not extend to the natives assembled

(1) 9 M.I.A. 195. (2) 1 B.L.R. O.C.J. 87 (103).
(3) Hist. duDroit Municipal, T. I., p. 274.
(4) Guizot, Civilisation en France, Leg. II. 25; Hallam's Middle Ages, Ch. II, notes 4. 5 and the references.
(5) Geschichte, &c., pp. 128, 130, 138. (6) 1 I. A. 387.
(7) 1 B. L. R. O. C. J. 87. (8) See p. 110. (9) 9 M. I. A. 387.

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within the same limits. Between the two classes there are such essential and fundamental divergences of opinion that their thoughts and desires cannot unite on the main points of a legal system. This has been recognized by the British Legislature. The jurisdiction of the Supreme Court of Judicature at Fort William, established by Statute 13, G. III, cap. 63, was controlled by ss. 17—20 of Statute 21, G. III, cap. 70. These provide for the preservation of the Mahomedan and Hindu laws of succession and contract and, in a measure, of family relations. The Court, too, is to frame process and make rules for execution [166] which will guard, as far as possible, against outrages on the religious and social sensibilities of the natives. The Statute 4, G. IV, cap. 71, under ss. 7 and 17 of which the Supreme Court of Bombay was constituted, while enabling the same jurisdiction to be given to it as that enjoyed by the Supreme Court of Bengal subjected the jurisdiction to the same restrictions. On this rests the charter of the late Supreme Court which, in the points we have now to consider, reproduces the terms of the Statute 21, G. III, cap. 70, s. 17.

For a full comprehension of the later charter and the statute authorizing it, we are thus thrown back on the earlier legislation, which itself has to be construed by the light of the history of the Supreme Court of Bengal. The Statute 21, G. III, cap. 70, s. 17, was intended to provide against specific mischiefs which had arisen in the exercise of the Supreme Court's jurisdiction. Like the Bill of Rights and similar statutes it is to be interpreted not as exhausting by enumeration the classes of rights which it specifically guards, but rather as thus recognizing the larger general principles on which these rights stand, by forbidding any such encroachments on them for the future as actual experience had in the past shown to be possible. In *The Secretary of State* v. *The Administrator-General of Bengal* it is shown that though the Bengal regulations provide in terms for the preservation of the Hindu and Mahomedan laws only as to some particular subjects, yet the Courts have given to those laws a distinctly wider operation. The Judges saw, in fact, that the intention was to allow the population to retain their own laws and customs throughout the sphere of which particular portions only had been expressly indicated, so far, at least, as this retention was compatible with the public law involved in the sovereignty of the British Crown and with the principles of natural justice brought as far as possible into harmonious working with the settled rules of personal law (1), from which divergence was legally impossible. So in the charter of the late Supreme Court the specification of matters of succession and matters of contract as matters to be governed by native laws and usages might be construed as [167] an indication of a wider operation of those laws and usages intended to be secured by the statute. In the minds of some lawyers the principles of inheritance and of contract, as they are connected with every institution of the private law, occupy almost the whole of that province. Domat, in his great work on the Civil law, has contrived to bring all private legal relations under the two heads of Successions and Engagements. The provision, too, in favour of the native laws is introduced in the charter, though not by the words "provided that," yet strictly as a proviso on the preceding affirmative grant of jurisdiction. The Court it is said "shall have full power to hear and determine all suits and actions that may be brought against the inhabitants of Bombay." This judicial authority is as consistent with the prevalence

(1) Personal law is here used in a sense somewhat different from that usual amongst jurist. See Bruge. Com. I, 12.

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of any one system of substantive law as of another. Judgment is to be given "according to justice and right (1), not according to the peculiar rules of the English law, except where that law may on independent grounds be properly applicable. But it being perceived almost intutively that the law of actions and of procedure reacts in the absence of precaution most powerfully on the substance of the rights submitted to adjudication, this consequence is guarded against by the proviso in the classes of cases in which it was most likely to arise. It would, however, be opposed to all sound principles of construction to make out of a mere limitation on a rule of jurisdiction a positive primary law and then to apply to the substantive rule thus arrived at the principle of *expressum facit cessare tacitum*. The intention as to be gathered from the mere language of the charter was not at all to codify the native laws of the Island of Bombay in six lines, but merely to guard against a possible overriding, in particular classes of cases, of the substantive law of Hindus and Mahomedans by the law of actions, as this might, it was apprehended, be put in force by the new Court. The general rule that the private law of a community is not affected by a change of rulers, is too well established to need any illustration. There are points in which it comes into contact with the public law, and there it has to yield, but the establishment of a Court to administer the law "according to justice and right" does not of itself imply any [168] change in the law to be thus administered. The substantive law of Bombay, so far as affected by s. 29 of the charter of 1823, remained, after the institution of the Supreme Court, what it had been before it.

Section 41 of the same charter referring to s. 29 says that "the said Supreme Court of Judicature at Bombay shall also be a Court of Equity and have equitable jurisdiction over the person or persons hereinbefore described and specified or limited for its ordinary civil jurisdiction as aforesaid subject to the restrictions and exceptions hereinbefore in that behalf expressed and contained and not otherwise, and shall and may have full power and authority to administer justice in a summary manner, according or as near as may be to the rules or proceeding of our High Court of Chancery in Great Britain; and upon a bill filed to issue subpœnas and other process under the seal of the said Court to compel the appearance and answer upon oath of the parties therein complained against and obedience to the decree and orders of the said Court of Equity in such manner and form and to such effect as the High Chancellor of Great Britain doth or lawfully may under our great seal of our United Kingdom or as near the same as the circumstances and conditions of the places and persons under their jurisdiction and the laws, manners, customs and usages of the native inhabitants will admit."

This is a rule like that in s. 29 conferring jurisdiction, not in any way constituting or declaring the substantive law. The same safeguard is provided as in the earlier section against dangerous aberrations, but the original legal relations of all persons are left to be governed by their pre-existing substantive law. The safeguard might indeed have been omitted had it been certain that particular doctrines of jurisprudence would be applied to the interpretation of the charter; but this, it may perhaps be said, was not quite certain. A temptation which constantly arises, in its most conspicuous forms expressly counteracted and in a charter equally as in a contract *quæ dubitationis tollendæ causa inseruntur jus commune non lædunt.*

(1) Section 33,

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As to what the law of the Hindu and Mahomedan inhabitants of Bombay was in 1823, there is room for much argument. In the [169] case of *Naoroji Beramji* v. *Rogers*, Westropp, J., points out(1) that the charter to the London East India Company provides "that the laws to be administered in these Courts, as well to the persons belonging to Company as to persons who live under them, should be the laws of this kingdom, *i.e.*, England." His Lordship thought that the language of the treaty ceding Bombay to the British Crown was framed with reference to this charter (2)—The charter relating in terms only to "factories or places of trade," a question might be raised of whether it was not meant to be conferred on those living within places assigned to the Company in foreign territory. By the charter of 1668 the Company were empowered to establish laws "like into those established and used in England," and the Governor being granted jurisdiction was to administer such laws, but still "so always as the said laws, ordinances and proceedings be reasonable and not repugnant or contrary, but as near as may be agreeable to the laws, statutes, Government and policy of this our kingdom of England, and subject to the provisos and savings herein"(3), and then the jurisdiction given by the earlier charter is expressly extended to Bombay. There are thus strong reasons for holding that the English law applied to all inhabitants of Bombay down to the establishment of the Recorder's Court under the Statute 37, G. III, c. 142, and that this being so, the exceptions made in favour of the Hindu and Mahomedan laws and usages should be strictly construed. If, however, those laws and usages had been legally extinguished in Bombay more than a century before, it is not easy to suppose that it was intended to revive them. The provision seems rather to recognize that these laws and usages had always subsisted of right, though in fact infringed upon. The customary law of the classes of Gentus or Mussalmans might admit of recognition and enforcement equally with that of the class of merchants, and could not in practice be recognized in the cases already provided for without the recognition extending still further, except at the cost of endless complications and inconsistencies. An indulgence of the kind in question, as it affects the native communities themselves, should [170] receive, as in fact it has received (4), a benignant construction (5), and in order to give full effect to it, the general laws of property must for natives be native laws, so far at least as is consistent with rules immediately perceived to be just and necessary, and so far as is not repugnant to the public law of the dominant country. On the principle of the English private law being operative amongst Englishmen settled abroad only so far as it is suited to their situation, the same private law could hardly be introduced amongst natives at all; and the two communities have remained as separate in their primary legal ideas as if they had been under different Governments.

Amongst Hindus, then, within the Island of Bombay I think, though not without some hesitation, that private legal relations must in their whole range be taken to rest still on the basis of the Hindu law, except where the public law or the direct commands of the Legislature have abolished or modified it; and starting from this principle Mr. Farran has contended that the Court can exercise no jurisdiction over the present case

(1) 4 B.H. C. R. O. C. J. 28 (29). (2) 4 B.H. C. R. O. C. J. 31.
(3) See 4 B. H. C. R. 37.
(4) *The Advocate-General* v. *Vishvanath Atmaram*, 1 B. H. C. R. IX, App.
(5) See *Voet ad Pand*, Lib. I, Tit. 3, Sec. 44; Tit. 44, Sec. 19; Poth. Pand. Lib. I, Tit. 3, Sec. 1, 24; Secs. 8, 16.

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under the provisions of Act XXVII of 1866. "The power and authority given by this Act to the High Court shall and may be exercised only in cases to which English law is applicable." To a Hindu's gift for religious and charitable purposes the English law is not applicable. The appointment of a new trustee may then be sought, as it has on previous occasions been successfully sought, by a bill or a suit of the nature of a bill in equity, but cannot be made on an application under the Act.

In weighing this argument the first consideration is, what is the meaning of the phrase "cases to which English law is applicable." It does not, I apprehend, mean cases to which, in their whole extent,—the original constitution of the right as to the persons and the legal acts or events, the infringement of the right alleged as a ground of complaint, the suit and the procedure, and the legal consequences of the judgment,—the law prevailing in England applies without qualification or reserve. This would virtually exclude the act in any case on which an Act of the [171] Indian Legislature had any bearing. It must mean cases to which English law is in some measure applicable,—in what measure, is not indicated. Mr. Farran argues that the proper measure is to be found in the English substantive law. Where the legal relations brought before the Court rest on that, there only, the Act, he contends, may be made use of. This, however, raises the question of whether any modification, even the slightest, of the English by the local law makes the Act inoperative, and, if not, at what point are we to say that the substantive law applicable ceases to be English law? No criterion is laid down, nor, so far as I see, can any, except a purely arbitrary one, be devised, whereby to distinguish cases in this country in which the English substantive law is from those in which it is not that which is to be regarded as constituting the legal relations which are made a matter of forensic dispute. If, however, we have to say that "English law is applicable" wherever the English law of actions, or the English substantive law in any material degree governs the Court in dealing with a case, and that this was the view of the Legislature in 1866, then, I think, that the authority given by Act XXVII of that year does enable me to deal with the present application. "English law is applicable," I think, in the sense intended, if the principles recognized as by the English Equity Courts are applicable. Now under s. 41 of the charter of 1823 this Court has authority "to administer justice in a summary manner according or as near as may be to the rules and proceedings of our High Court of Chancery in Great Britain." The distinctive equitable jurisdiction of the Court of Chancery has been the theme of many learned disquisitions, of which no two perhaps lead to exactly the same conclusions. The reason for this may be that the problem proposed for solution is in its nature indeterminate. Equity follows the law, but it is when it approves the law, and then, as Lord Hardwicke said (1), it goes sometimes beyond it. The doctrine of "no wrong without a remedy" became under the English common law, as under the strict civil law of Rome, a mere lawyer's version of the rule that when the approved formula failed to meet the wrong, the Courts would not take notice of it. The Chancellors learned in the *jus gentium* and the Canon law found duties [172] recognized there as obligations, which the common law Courts could not or would not enforce. They found in those sources suggestions, too, of a freer method of pleading, a more searching procedure, a more pliant and complete adjudication, and enforcement of the Courts' decrees. This

(1) *Paget* v. *Gee*, Amb. App. X 810 : Spence's Eq. Jur. II, 149.

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assumed jurisdiction, in part supplementary and corrective, was, in the main, an extension of principles recognized by the common law Courts to consequences and details in which those Courts would not give them effect. There is no more striking instance of the way in which the law of actions and the machinery at the disposal of the Courts re-act upon the substance of the law then in the growth of the large body of specially equitable doctrines in England. These are now developed by a purely logical process without the conscious addition of new principles; but as equity is an intellectual energy, it is influenced by the gradual changes in the mental standpoint taken by successive generations. It thus moulds its deductions from one set of *data* as the common law from another into continued adaptation to the growing needs of society. Under the new constitution of the High Court of Justice in England it may be expected that the requisite adaptations will be made by a resort to either set of principles, as either may be best fitted to further what at any particular time is conceived by society as material and moral progress.

In India and in the Island of Bombay the introduction, at all, of a system of equity in the English sense bearing on the native community, implied on the part of the Parliament and the Crown an intention that equity should perform its characteristic functions. It was not intended that the substantive native laws should in their essence be changed, but it was, I think, intended that unprincipled men should be prevented from taking an unconscientious advantage of those laws for purposes of fraud or oppression. When I say unconscientious, I mean offensive to a conscience admitting the influence of Indian notions in framing its scheme of morality. It must have been intended that a remedy should be found by equity for a wrong recognized as such by the native law, or a feeling, in the main, consonant to that underlying the native law in cases wherein that law failed to provide a remedy which the Court could apply. It must have been intended **[173]** that the native laws should receive a consistent logical development which, without involving any grating discordances, should allow of a freely growing complexity of affairs as the consequence and the sign of advancing liberty and civilization. The machinery and method of procedure were to follow the English pattern as far as practicable, and it must have been foreseen that this would gradually educe from the materials of the native law a system collateral to it in its earlier and ruder form, and attaining by degrees a growth and character of its own in obedience to the impulses of the societies amongst whom it prevailed. We may see now that this would eventually modify the usages and the ideas which had formed its original platform, but I am not sure that this inference from modern investigation was present to the mind of His Majesty George IV, or of the draftsman of the charter.

It is certain, however, that, by the year 1823, English equity had become a system which would deal with a body of *quasi* common law in a scientific manner and in obedience to known and uniform rules. In checking abuses, expanding formulas, embracing all rational considerations, devising varied remedies, it would follow the course prescribed by its own principles and precedents. Its method was in all or most respects peculiarly its own. When it applied that method to the determination or the constitution of a right, even based on the Hindu or Mahomedan law, it administered English law. That the lower root of the obligation it dealt with, was in another law, did not prevent this: the plastic force, determining the special growth and form was no part of that law, but was brought to bear upon it from without.

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In this sense I think that "the English law was applicable" in 1866 to all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants of Bombay. Those doctrines could not, consistently with the statutes and the charter, be employed to subvert the native substantive laws, but they afforded a means of continually ameliorating them, and so preventing their desuetude by a system of rules borrowed from the English Courts of Equity.

Trusts, as is said in the *Tagore Case* (1) are no more strange to the Hindu than to the English system." The anomalous law, which [174] has grown up in England, of a legal estate which is paramount in one set of Courts and an equitable ownership which is paramount in Courts of Equity, does not exist in and ought not to be introduced into Hindu law. But it is obvious that property, whether moveable or immoveable, must for many purposes be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases. Implied trusts were recognized and established here in the case of a *benami* purchase in *Gopeekrist Gosain* v. *Gungapersaud Gosain* (2); and in cases of a provision for charity or for other beneficent objects, such as the professorship provided for by the will under consideration where no estate is conferred upon the beneficiaries and their interest is in the proceeds of the property (to which no objection has been raised), the creation of a trust is practically necessary (3)." But while the substantive Hindu law insists as strongly as any on the suppression of fraud and the fulfilment of promises, it fails to furnish the detailed rules by which effect is to be given to its principles in cases of trust. It contemplates no such power and flexibility in the legal machinery as are an integral element of the English equity system. If the Court is called on to give effect to a trust in any given case, it looks, indeed, to the Hindu law of property to determine the estate of the trustee; but in many of the duties it annexes to that estate, the rights it recognizes as arising from the position of beneficiaries, the means by which those rights are made effectual, it is governed by the rules of English equity. There are no others that it can apply. It has to take care, in applying them, not to violate the "laws, manners, customs and usages" of the native community as these may subsist. It must not allow a trust to be made a means of conferring a gift either *inter vivos* or by testamentary disposition upon a person not in existence at the moment when the donation is declared. It must not allow it to effect a course of devolution opposed to the Hindu law of property and succession. Thus the operation of the native laws is preserved as to the estates that may be taken in property and the purposes to which they may be applied, while it gains a flexible adaptation, to new circumstances from the English system. In meeting an [175] exigency, or taking cognizance of a form of right not provided for in the Shastras, the Court, in exercising its jurisdiction under s. 41 of the charter, may certainly apply the Hindu law. It must be careful not to overlook it, but taking the Hindu law as one of its *data* it applies "English law" also in the form of equity to all or nearly all the questions that arise.

It is conceded that on a proceeding by a bill in equity the late Supreme Court could and would appoint a trustee in such a case as the present.

(1) *Ganendra* v *Jatindra*, 9 B.L.R. 377.
(2) 6 M.I.A. 53.
(3) 9 B.L.R. 401-2.

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By what law could it do so, and by what law would it be guided in dealing with the case? Not by the Hindu law, but by the law of the Court of Chancery. It would recognize and give effect to the Hindu law as the Chancellor would give effect to an English custom, or the law imposed by its founder on a charitable trust, but having thus got its materials it would deal with them according to equitable principles. In other words, English law, in the sense intended by the Act, would be applied to the case. This was the law, as I understand it, immediately before Act XXVII of 1866 was passed, and this being so, the "powers and authorities" given by the Act may, I think, be exercised in the case of a Hindu trust as well as of any trust whatever.

The applicant Kahandas Narrandas, even without resort to the doctrine of a resulting trust, has an immediate interest in the due execution of the trust in this case. One of its purposes is the maintenance of a reader of the Puranas to Kahandas's household. He may on a proper occasion claim to have this spiritual nurture of himself and his family duly protected.

There can be no reasonable doubt, on an unprejudiced reading of the instrument of trust, that it intends and requires two trustees. On the death of his co-trustee it requires Premchand to appoint another, and, Kahandas being alive, with his assent. This being so, Premchand ought not to have allowed a year to pass, after the death of Tulsidas, without a proposal to replace him. It is said that he thought that the matter rested entirely in his discretion, and that this, if not a correct construction of the deed, is, at least, a reasonable one, such as an unprofessional person might honestly adopt. How that may be, it is hardly possible to say; but **[176]** Premchand could have obtained professional advice if he had sought it, and a trustee who acts without advice is not on that ground to be excused for any failure or omission in the discharge of his duty.

Kahandas, on the other hand, by proposing to name a trustee himself and endeavouring to make the acceptance of this proposal a condition of his handing over the Government papers in his possession and forming part of the trust property, took up an indefensible position. He was aware, as his solicitor's letter of the 25th November 1880 shows, of what the trust-deed really prescribed. To this he ought to have cut down his demand before coming to this Court to supersede Premchand in the performance of a duty which he has not simply called on him to discharge. Premchand Raichand is now willing to appoint a trustee. His prior disinclination does not deprive him of that power, and I cannot say, that it is "inexpedient, difficult or impracticable" to make an appointment without the assistance of the High Court. A proper occasion for the Court to supersede the trustee has not yet arisen. See *In re Hadley* (1); *In re Hodson* (2). The latter was a stronger case than the present, but the Court refused to take the appointment out of the hands to which it was committed by the trust-deed. The nomination and its approval or disapproval by Kahandas Narrandas are to be governed by considerations of what will be beneficial to the trust, not of what will be distasteful to the other party.

I dismiss the petition.

Counsel for the several parties assenting to the nomination of a co-trustee with Premchand Raichand by the Advocate-General, and the Advocate-General undertaking to appoint, the Court directed that the

(1) 5 De G. & Sm. 67.

(2) 9 Hare, 118.

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nomination be embodied in the order. And the Advocate-General assenting the Court directed that the costs of the several parties be paid out of the trust-fund, and those of the Advocate-General as between attorney and client.

Attorneys for the petitioner.—Messrs. *Hearn, Cleveland and Little.*
Attorneys for surviving trustee.—Messrs. *Smith and Frere.*
Attorneys for Narotamdas Kahandas.—Messrs. *Ardesir and Hormusji.*

5 B. 177.

[177] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice.

LUCKUMSEY OOKERDA (*Plaintiff*) *v.* FAZULLA CASSUMBHOY AND OTHERS (*Defendants*).* [20th December, 1880.]

Specific performance—Misjoinder—Civil Procedure Code (Act X of 1877), ss. 28 and 45—Specific Relief Act I of 1877, s. 42, Illustration (a).

A stranger to a contract, of which specific performance is sought, cannot be a party to the suit.

Where, therefore the plaintiff sued as against one defendant for specific performance of a contract to sell land and as against another for a declaration that he was not entitled to any charge upon the said lands, *held*, that the latter defendant was improperly made a party to the suit.

[R., 19 M. 211 (216) = 4 M.L.J. 288; 11 Bom. L.R. 545 (563) and 366 = 6 M.L.T. 200 = 3 Ind. Cas. 124; **Expl. & D.**, 10 C. 1061 (1068); **D.**, 18 M. 415 = 5 M.L.J. 164.]

SUIT for specific performance.

The plaint stated that on 12th February 1876 the plaintiff contracted to purchase certain lands from the first defendant, Fazulla Cassumbhoy; that at the date of the contract he had paid Rs. 2,000 earnest-money, and that the remainder of the purchase-money, *viz*, Rs. 10,500, were to be paid when the said defendant should execute the conveyance and effect the registration thereof; that the said defendant was willing to carry out the contract and to execute the conveyance, but that he was unable to do so, inasmuch as the second and third defendants, *viz*, the New Dhurumsey Spinning and Weaving Company and Cassumbhoy Dhurumsey, held possession of the title-deeds and refused to deliver them up, alleging that they had an equitable lien upon the said lands.

The plaintiff prayed for a declaration that neither the second nor the third defendant was entitled to any charge upon the premises, and that they might be ordered to deliver up the title deeds, and that the first defendant should be ordered to specifically perform the contract of the 12th February 1876, and to convey the premises to the plaintiff.

The second defendant put in a disclaimer.

Inverarity (with *Lang*), for the third defendant, objected that the plaintiff could not obtain the relief he sought against the **[178]** third defendant in a suit for specific performance against the first defendant. He relied on *Tasker* v. *Small* (1) and *De Hoghton* v. *Money* (2) and ss. 44 and 45 of the Civil Procedure Code, Act X of 1877.

Farran (*Jardine* with him), for the plaintiff.—I admit that, unless this case can be distinguished from the cases of *Tasker* v. *Small*(1) and *De Hoghton* v. *Money* (2), the suit as against the third defendant cannot proceed. The objection now taken is, that the plaintiff cannot sue the

* Suit No. 208 of 1879.

(1) 3 My. & Cr. 63.

(2) L. R. 2 Ch. Ap. 164.

third defendant, because he has not yet got the legal title to the lands. That objection is based on the decisions in the two cases cited. But in these cases the plaintiff was seeking to get possession, while in this case the plaintiff has had possession since February 1879 and has paid part of the purchase-money. Section 42 of the Specific Relief Act I of 1877, illustration (3), seems to show that in this country possession by the plaintiff entitles him to sue, thus going further than the English cases, which require the conveyance of the legal estate. See also the section itself. The parties here are not subject to English law; the vendor (*i.e.*, the first defendant) being a Mahomedan and the vendee (the plaintiff) a Hindu. By Mahomedan and Hindu law possession is the important point. No conveyance is required.

The Court can, under s. 44 of the Civil Procedure Code, Act X of 1877, give permission to the plaintiff to join the two causes of action in one suit. The question here relates to the same land, and could not properly be heard and decided at the same hearing.

JUDGMENT.

SARGENT, J.—I do not think that this suit can proceed against the third defendant. It has long been an established rule of the Court of Chancery, as stated by Lord Justice Turner in *De Hoghton* v. *Money*, that a mere stranger cannot be a party to a suit for specific performance, and the same rule has always been followed in this Court, as appears from the observations of the Chief Justice in *Naoroji* v. *Rogers* (1). In the present suit the plantiff **[179]** seeks specific performance of a contract against the first defendant, and also asks for a declaration that the third defendant is not entitled to a certain equitable charge claimed by him against the estate which is the subject-matter of that contract.

But Mr. Farran has contended that the plaintiff being in possession he was entitled under the Specific Relief Act I of 1877, s. 42, illustration (*a*), by virtue of his possession, to a declaratory decree as against the third defendant independently of his established right to a specific performance of the contract with the first defendant.

I do not express any opinion as to the effect of that section of the Specific Relief Act, as I think that the plaintiff is precluded by s. 45 of the Civil Procedure Code, Act X of 1877, from joining two distinct causes of action against the first and third defendants in the same suit. It was said, indeed, that these two sections must be read with s. 28, which provides that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative in respect of the same matter." But it cannot, I think, be said that in this case the relief claimed against the first defendant and the declaration sought against the third defendant, are in respect of the same matter. The right to the relief prayed for against the first defendant is in respect of the non-fulfilment of the contract. The right to the declaration sought against the latter must be deemed to be in respect of a threatened disturbance of his possession.

I am, therefore, of opinion that the third defendant is not a proper party to this suit. I will, however, allow the plaintiff to withdraw the suit against him, with liberty to bring a fresh suit under s. 373 of the Civil Procedure Code, but the plaintiff must pay the third defendant's costs.

Attorneys for the plaintiff.—Messrs. *Crawford and Boevey*.

Attorney for the third defendant. —Mr. *H.W. Payne*.

(1) 4 B. H. C. R. 9.

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5 B. 180.

[180] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

VITHAL RAMCHANDRA (*Plaintiff*) *v.* GANGARAM VITHOJI, DECEASED, HIS SON AND HEIR DARKU (*Defendant*).*

[25th August, 1880.]

The Dekkhan Agriculturists Relief Act, No. XVII of 1879- *Suit for rent--Village Munsif —Jurisdiction.*

A village munsif has no jurisdiction to try a suit for rent under the Dekkhan Agriculturists Relief Act, No. XVII of 1879.

THIS case was referred to the High Court under s. 622 of Act X of 1877 and s. 36 of the Dekkhan Agriculturists Relief Act, XVII of 1879, by Dr. A. D. Pollen, Special Judge, under the Dekkhan Agriculturists Relief Act, with the following remarks:—

"The suit was brought to recover Rs. 9-12-0 for rent of a house, and was decided by the Village Munsif of Pabal, in the Sirur Taluka of the Poona District, under s. 35 of the Dekkhan Agriculturists Relief Act, and the claim was awarded. The defendant has complained to me against the decision on the merits. I do not think that I have power to interfere, but I am of opinion that the Village Munsif had no jurisdiction to try a rent suit. From the reference in s. 36 of the Act to s. 622 of the Civil Procedure Code, the High Court apparently has power to set aside the decision. Similar cases have before happened; but as there was no dispute between the parties, I contented myself with warning the Village Munsifs that they must not receive such cases in future. In the present instance the defendant is dissatisfied. I, therefore, think that the proper course is for me to bring the case to the notice of the High Court. It is improbable that the parties will ever themselves have the means or the courage to invoke the aid of the Court's extraordinary jurisdiction."

There was no appearance of parties in the High Court.

The following is the judgment of the Court:—

JUDGMENT.

WESTROPP, C. J.—The Court sets aside the decree of the Village Munsif of Pabal, without costs, as he had no jurisdiction to [181] entertain a suit for rent, and it directs the plaint to be returned to the plaintiff by the Village Munsif, in order that the plaintiff may, if such be his desire, present it to the Court having primary jurisdiction to hear such a suit.†

Order accordingly.

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* Civil Reference, No. 14 of 1880.

† *Note.*—In Civil Reference No. 29 of 1880, a similar decision was made on the 23rd November 1880 by the same Bench.

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5 B. 181.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

ANNAPPA (*Original Defendant*), *Appellant v.* GANPATI AND VISHNU (*Original Plaintiffs*), *Respondents.**

[15th September, 1880.]

Evidence—Registration—Act III of 1877, *s.* 17, *cl.* (c)—*Mortgage—Receipts by mortgagee —Suit on mortgage payable on demand – Amendment of plaint.*

Unregistered receipts given by a mortgagee to a mortgagor for sums paid on account of the mortgage debt are not inadmissible in evidence under cl. (*c*), s. 17, of the Registration Act III of 1877.

Shidlingappa v. *Chanbasapa* (1) concurred in.

Where a mortgage debt is payable on demand, the mortgagee ought to sue, not for interest only, but for an account and payment of what remains due on the mortgage for principal and interest up to the filing of the plaint.

[F., 19 B. 36 (42); R., 24 B. 609 (614) = 2 Bom. L.R 422; 28 P.R. 1907 = 93 P.L.R. 1908 = 140 P.W.R. 1907.]

THIS was a second appeal from the decision of A. L. Spens, Judge of Kanara, reversing the decree of the Subordinate Judge of Kumta.

This suit was brought by the plaintiffs for Rs. 35, being interest for three years due on a mortgage bond for Rs. 100, executed to their father by defendant No. 2 with the consent of his father, defendant No. 1. The bond was dated the 7th February 1866, and registered under Act XX of 1866. The plaintiffs prayed that their claim should be ordered to be satisfied out of the mortgaged property, or, in default, by the defendants themselves. Defendants 3 and 4 were joined in the suit as members of an undivided family for whose benefit the mortgage debt had been contracted.

[182] The defendants admitted the mortgage, but stated that it was cancelled by a subsequent oral agreement under which the plaintiff's father had agreed to receive Rs. 166 in liquidation of the mortgage bond in question, and another bond for Rs. 50; that the sum of Rs. 140 had already been paid to him in pursuance of the said agreement, and that only Rs. 26 remained due. The defendants produced three receipts (Exs. 67, 68 and 69) showing payments in the aggregate to the extent of Rs. 140. They were each for a sum less than Rs. 100, and not registered.

The Subordinate Judge held the oral agreement proved; also that the payments alleged by the defendants had been made, and that the plaintiffs were not entitled to the interest claimed. He dismissed the suit.

In appeal the District Judge reversed the decree of the first Court, on the ground that under the Registration Act, XX of 1866, s. 48, and the Indian Evidence Act, I of 1872, s. 92, proviso 4, the registered mortgage bond could not be cancelled by any subsequent oral agreement, such as that set up by the defendants. He, accordingly, allowed the plaintiff's claim.

On the 7th June 1880 one of the defendants filed a second appeal in the High Court on behalf of himself and the other defendants.

Shamrav Vithal, for the appellant, abandoned the oral agreement set up by the defendants in the Courts below, and submitted that the

* Second Appeal No. 261 of 1880.

(1) 4 B. 235.

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5 B. 181.

District Judge was wrong in not giving them credit for the amount of the three receipts, which required no registration, as held in *Shidlingapa* v. *Chanbasapa* (1).

[WESTROPP, C. J.—The plaintiffs were not right in bringing their suit for interest only. They ought to have sued for an account and for the balance due on the mortgage.]

Ghanasham Nilkanth Nadkarni, for the respondents, prayed for permission to amend the plaint, as it would save the parties from further litigation, and offered to pay the necessary additional stamp.

The following is the judgment of the Court:—

JUDGMENT.

[183] WESTROPP, C. J.—Concurring in the decision of a Division Bench of this Court in *Shidlingapa* v. *Chanbasapa* (1) we think that the three receipts (Exs. 67, 68 and 69) were admissible in evidence for the purpose of proving payments in respect of the mortgage of the 7th February 1866 for Rs. 100. Those receipts purport to have been given for payments partly in respect of that debt and partly in respect of another debt for Rs. 50. So far as those payments were made towards satisfaction of the mortgage of the 7th February 1866 the defendant is entitled to credit as regards that mortgage to that extent. The defendant's pleader does not contend that the three receipts show a new agreement substituted for the mortgage of the 7th February 1866. He simply asks for credit for the payments in taking the account of what is due on the mortgage.

In bringing this suit in its present form, *i.e.*, for three years' interest ending in 1877, we are inclined to think that the plaintiffs were endeavouring to embarrass the defendant and to evade giving credit for the proportion of the payments mentioned in the three receipts (Exs. 67, 68 and 69), which are to be credited in respect of that mortgage.

It was not a mortgage in which it was stipulated that the payment of the principal should be deferred for any specified time. The principal would seem to have been payable on demand, and we think that this suit ought to have been brought, not for interest only, but for an account and payment of what remained due on the mortgage for principal and interest up to the filing of the plaint. The plaintiff's learned pleader has wisely asked for leave to amend his plaint by seeking for such an account and payment of the balance which may be found due. We think it desirable, in order to render further litigation than the present suit, on the mortgage of the 7th February 1866, unnecessary, to grant that request, but the plaintiff must pay the additional Court fees requisite to cover the amount of the balance which he may claim by such amendment of his plaint.

The three receipts show payments to the extent of Rs. 140 in all. The Subordinate Judge should ascertain how much of that sum **[184]** is to be credited to the mortgage of the 7th February 1866. In default of any satisfactory specific evidence of the apportionment made by the party who made the payments, the proper course for the Subordinate Judge will be to treat the payments as made in the same proportion as the principal moneys secured by the mortgage of the 7th February 1866 for Rs. 100, and the bond for Rs. 50 mentioned in Ex. 67.

The Subordinate Judge should also ascertain whether any other payments of interest have been made in respect of the mortgage of the 7th February 1866. In doing so, he should make such inferences from admissions of the plaintiff already made in this suit as those admissions

(1) 4 B. 235.

may justify, and should consider such other evidence as there may already be in this suit, and such further evidence (if any) as may be tendered to him by the parties on the question of payments of interest.

We reverse the decree of the District Judge and remand the cause for amendment of the plaint in the manner above mentioned, and then for a new trial. The plaintiff must pay the costs of the regular and second appeals to the defendant. The costs of the suit must be disposed of on the new trial in such manner as the Subordinate Judge may deem to be just.

Decree reversed and case remanded.

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5 B. 184.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice M. Melvill.

DULICHAND (*Plaintiff*) *v.* DHONDI (*Defendant*).* [5th October, 1880.]

The Dekkhan Ryots Act, No. XVII of 1879, *ss.* 7, 12, 74—*Practice—Procedure—Right of defendant to call witnesses—Act X of* 1877, *ss.* 100, 101.

The plaintiff sued, under s. 3, cl. (*w*) of Act XVII of 1879, for money due on a bond dated the 8th September 1877. The defendant, though duly summoned, did not appear on the day fixed in the summons, which was for the final disposal of the suit. The Court, therefore, proceeded with it *ex parte*. The defendant, being subsequently summoned and examined as a witness under s. 7 of the Act admitted the bond sued upon, but pleaded part-payment of the plaintiff's claim. He then applied to the Court that his witnesses should be summoned, **[185]** and that their evidence be taken in support of his allegation. The Subordinate Judge was of opinion that he (defendant) was not entitled to offer the evidence. On his referring the case to the High Court,

Held that it was his duty to summon the witnesses named by the defendant.

THIS case was referred for the opinion of the High Court by Rao Saheb G. V. Limaye, Joint Subordinate Judge of Ahmednagar, under s. 617 of the Civil Procedure Code, Act X of 1877. He stated it as follows :—

"This is a suit under s. 3, cl. (*w*) of Act XVII of 1879 to recover the sum of Rs. 44-2-0, principal and interest, due on a bond dated 8th September 1877.

"The defendant, though duly served, did not appear on the day (28th July 1880) fixed for the final disposal of the suit. The suit was therefore proceeded with in his absence under s. 100, cl. (*a*) of the Code of Civil Procedure, X of 1877. The defendant was, however, summoned and examined as a *witness* under s. 7, para. 2 of Act XVII of 1879 on 16th August 1880. In his deposition he admitted the bond, but, in answer to questions put to him by the Court, he stated that he had paid plaintiff Rs. 4 in part satisfaction of the debt. On the same day he submitted an application to the Court, praying that the witnesses named in the list presented along with the application be summoned.

"He has neither (as was obligatory on him under s. 101 of the Civil Procedure Code, if he had been desirous of answering the claim) satisfied the Court that there had been a sufficient cause for his non-appearance in obedience to the summons to attend and answer the suit, nor even attempted so to do.

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* Civil Reference No. 18 of 1880.

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"Hence arises the question, whether the defendant, under the circumstances stated above, can, as of right, be allowed to adduce evidence to prove his allegation of part-payment?

"I am humbly of opinion that the defendant cannot be permitted to produce evidence under the circumstances.

"Section 101 of the Code of Civil Procedure is, I humbly submit, too clear to leave any room for doubting the correctness of the view I have taken; but the doubtful nature of the wording of [186] para. 2 of s. 7 of Act XVII of 1879 has necessitated this reference.

"Chapter IX of the Code of Civil Procedure authorizes the Court to examine the parties, but the scope of the whole chapter indicates a procedure after the defendant has appeared in obedience to the summons to appear and answer, and therefore the examination of the defendant as a witness, as contemplated by cl. 2 of s. 7 of the Act of 1879, cannot be treated as identical with the examination under ch. IX of the said Code, and cannot legally serve as a material for framing issues, in the absence of which the defendant is not, I submit, entitled to adduce any evidence.

"The right to claim issues and produce evidence to prove his allegations, is enjoyed by the defendant when he appears and answers the suit. In the present case, if the application of the defendant be granted, it would restore him to a position which he would have occupied had he appeared in obedience to the summons to appear and answer the suit, and entitle him to claim an issue as to the alleged part-payment. It is, therefore, necessary to determine whether the statements made by the defendant in his examination as a *witness*, in answer to questions put to him whilst under examination, can be treated as an answer to the claim, having the same effect which would follow his appearance and defence when summoned as the defendant, and I am humbly of opinion that his evidence under s. 7 of the Act of 1879 cannot be viewed in the light of defence. * * *

"The form of the summons to the defendant, as prescribed by the Code of Civil Procedure, has not been altered by the Act of 1879. According to s. 159 of the said Code, and with a view to give effect to the provisions of the 1st para. of s. 7 of the Act of 1879, the witnesses of the plaintiff are summoned on the day fixed for the appearance of the defendant. If he does not appear, the suit is proceeded with *ex parte*. If in such a case the examination of the defendant, summoned and examined as a witness after that date, under s. 7 of the Act of 1879, be taken to be his answer to the suit, his denial, for instance, in his examination, of the execution of the bond sued on, would necessitate [187] the resummoning of witnesses and the retrial of the suit. And such a procedure will also unnecessarily increase the costs of the suit.

It would be clear from this instance that had it been the intention of the Legislature to impart to the examination of the defendant, as a witness, the character and effect of an answer to the suit, the Act of 1879 would have provided for the staying of the trial of the suit until the defendant had appeared and been examined.

"Again, para. 2 of s 7 of Act XVII of 1879 having provided that in every suit the Court shall examine the defendant as a witness, if such examination be interpreted as an answer to the suit, defendants who may have a good defence to make will be encouraged to disobey the summons to appear and answer.

"Moreover in cases, the subject-matter whereof exceeds one hundred rupees but does not exceed Rs. 500 in amount or value, the plaintiff, in

anticipation of the difficulties which the defendant will have the ability to throw in his way, if para. 2 of s. 7 be interpreted in the manner above suggested, will never consent to any Second Class Subordinate Judge trying his case under the provisions of Chap. II of Act XVII of 1879, and thus the object of the said Act would, to a great extent, be frustrated.

"In conclusion, I would respectfully submit that the examination of the defendant, contemplated in para. 2 of s. 7 of Act XVII of 1879, is not an answer to the suit, and unless therefore the defendant satisfies the requirements of s. 101 of the Code of Civil Procedure, his position as a witness will not be changed to that of the defendant appearing and answering to the suit. It, therefore, follows that in the present case, he is not entitled to produce evidence in support of his allegation of part-payment."

The parties did not appear in the High Court.

The following is the judgment of the Court :—

JUDGMENT.

WESTROPP, C. J.—The view stated is very technical, and certainly opposed to the spirit of the Dekkhan Ryots Act.

By s. 74, the Civil Procedure Code is only to be applied so far as it is consistent with the Act. By s. 12, the Court is [188] bound to inquire into the merits of the case whenever the amount of the claim is disputed. In the present case it is disputed, and the Subordinate Judge cannot ascertain the merits of the case, unless he examines the persons who are acquainted with them. It seems, therefore, to be his duty to summon the witnesses named by the defendant.

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5 B. 188 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice M. Melvill Mr. Justice E. D. Melvill and Mr. Justice Nanabhai Haridas.

DOWLATRAM HARJI AND ANOTHER (*Plaintiffs*) *v.* VITHO RADHOJI AND ANOTHER (*Defendants*).*

[30th November, 1880.]

The Indian Stamp Act, No I of 1879, *ss.* 7, 12, 13 *and* 14—*Stamp—Contract by principal and surety on same stamp paper, but separately written—Writing on the reverse of a stamp paper—Whether Government Notifications under the Stamp Act are not* ultra vires *when more stringent than the Act itself.*

In a bond engrossed on a stamp paper of sufficient value, and dated the 19th April 1879, the contract of the principal was written first, and after his signature followed the contract of the surety, signed by the latter. The document commenced on the side other than that on which the stamp was impressed and terminated on the side impressed with the stamp. The stamp was not in any way defaced, nor was the paper so written as to admit of the stamp being used again. *Held*, that the bond constituted only one instrument, and was properly stamped, not being open to objection under ss. 7, 12, 13 and 14 of the Indian Stamp Act, No. I of 1879.

The construction of the words "on the face of the instrument," used in s. 12 of Act I of 1879, considered.

Quære, whether certain Government Notifications—to the effect that an instrument, commenced on the side of the paper other than that on which the stamp

* Civil Reference No. 23 of 1880.

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is impressed and completed on the side on which the stamp is impressed is, under s. 12 of Act I of 1879, to be treated as unstamped; and prohibiting, writing on the reverse of an impressed stamped paper—are *ultra vires* as being more stringent than and, therefore, inconsistent with that Act?

[R., 13 A. 66 (75); 13 C.W.N. 815 (821)=1 Ind. Cas. 670; 5 Ind. Cas. 812 (813)=15 P.R. 1910=4 P.L.R. 1910=16 P.W.R. 1910.]

THIS case was referred for the opinion of the High Court by Rao Saheb V. V. Wagle, Subordinate Judge of Shevgaon, in the district of Ahmednagar, under s. 617 of Act X of 1877, and s. 43 of Act I of 1879. He stated the case as follows:—

[189] "The plaintiffs in this suit claim to recover the amount, being principal and interest due on a bond executed in their (plaintiffs') favour by defendant No. 1 with the security of defendant No. 2 on the 19th April 1879.

"The bond in question, together with the guarantee, is written on one stamp paper. It begins on the side other than that on which the stamp (2 annas) is impressed, and closes on the other.

"The points for decision are:—

"1st.—Whether the agreement made by the principal debtor and the guarantee given by the surety at one and the same time form one instrument or two for the purposes of the Stamp Act?

"2nd.—Whether the bond is duly stamped according to Act I of 1879?

"My opinion on the first point is that both the agreements form one instrument for the purposes of the Stamp Act, and on the second that the bond in question is duly stamped according to Act I of 1879.

"As to the first point, though the two agreements in question are separately written on one and the same stamp paper, the bond is to be given effect to as if it were executed by two persons with joint and several liability. Therefore, if in the latter case one stamp duty is sufficient, there is no reason why it should not be so in the former. There is the same community of interests in one case as in the other. I can see no substantial difference between the two cases. The practice of the Civil Courts, so far as I know, is to consider the two agreements as one instrument, and to admit such bonds as duly stamped. Moreover, in the new as well as in the old Stamp Act no express provision seems to be made for such agreements of guarantee. But, on the other hand, such agreements do not appear in the list of exempted documents. I, therefore, entertain a doubt on this point, and submit it for an authoritative decision of the High Court one way or the other. As such bonds are of common occurrence, a definite opinion of the High Court on the subject is desirable.

"As to the second point, Act I of 1879, which came in force on the 1st April 1879, applies to the bond in question, which is dated the 19th April 1879. Section 12 of this Act provides that every **[190]** instrument written upon an impressed stamp paper should be so written that the stamp may appear on the face of the instrument and cannot be used for, or applied to, any other instrument; and s. 14 provides that every instrument written in contravention of s. 12 or 13 shall be deemed to be unstamped. Now, this point hinges upon the construction to be put on the phrase 'on the face of the instrument' used in the aforesaid s. 12. By this expression I understand the Legislature to have meant that an instrument shall be so written that the stamp thereof may appear at once without any difficulty,—that is to say, nothing should be written on the stamp itself so as to render the

impression unintelligible. But the Government of Bombay in their Resolution No. 4242 of 15th August 1879, Revenue Department, issued for the guidance of the Registrars, seem to have put a different construction on the same expression, namely, that every instrument should be commenced on that side of the paper on which the stamp is impressed ; whereas the bond in question is commenced, as I have stated above, on the other side. If this construction be correct, the bond will have to be considered as unstamped according to s. 14 of the Stamp Act. As it is the general practice in this district to write the instruments in the manner in which the bond in question is written, it is very important that the point be once for all decided by the High Court.

"I therefore humbly and respectfully beg to submit, of my own accord, the above points for the decision of Her Majesty's High Court, under s. 617 of Act X of 1877, and s. 49 of Act I of 1879,—the decree that I have to pass in the suit in question being unappealable under Chap. II of the Dekkhan Agriculturists Relief Act."

There was no appearance of parties.

The following is the judgment of the Court :—

JUDGMENT.

WESTROPP, C. J.—This is a suit instituted in the Court of the Subordinate Judge of Shevgaon, in the district of Ahmednagar, on a bond of the 19th April 1879, given by a principal and his surety. The bond is written upon one piece of stamped paper, but, in the manner common in this Presidency, the contract of the principal comes first and is signed by him, and next after that signature **[191]** follows the contract of the surety, signed by the latter. The first question, referred to us, is whether this paper is to be regarded as one or two instruments in relation to the present Stamp Act I of 1879, which came into force on the 1st of April in that year. The uniform practice of the Civil Courts of this Presidency has been, we believe, to treat such a document as one instrument, and we see nothing in the new Act to lead us to depart from that practice. The word "bond" is defined by s. 4 to mean (*inter alia*) "any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void, if a specified act is performed or is not performed, as the case may be." The word "person" in the singular includes "persons" in the plural (Act I of 1868, s. 2), and we consider that the definition of 'bond,' just mentioned, may be regarded as including such a document as that now submitted for our opinion, executed by a principal and surety, notwithstanding the apparent separation of the clauses respectively relating to the principal's contract and that of the surety ; the contract of the surety being incidental and accessory to that of the principal and in respect of one and the same sum or consideration—the leading object or character of the document being the securing of that sum.

In *Price* v. *Thomas* (1), by an instrument, in the form and containing the usual covenants of a lease, A demised premises to B., and B. and C. covenanted to pay the rent, but C. was not otherwise referred to in the instrument. In an action against C. on the covenant to pay rent, it was held that the instrument was available against him, though stamped as a lease only and that a deed stamp was unnecessary. Lord Tenterden, C. J., said : "If this covenant had introduced matter no way connected with

(1) 2 B. & Ad. 218.

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the demise, but wholly distinct and independent, it might then have been said that the plaintiff could not benefit by such a stamp as was affixed to this indenture. But that was not the case; the objection, therefore, cannot prevail." Littledale, J., said: "The lease was the principal, to which this covenant was an accessory." And Park, J., said: "This covenant was part of the consideration for granting the lease." A similar ruling had been previously made by Patteson, J., at *nisi prius*, on the **[192]** same document, *Pratt* v. *Thomas* (1). He said: "I think this stamp is sufficient. This deed is a lease, and this covenant is only ancillary to it. The question is, what is the leading character of the instrument?"

Annandale v. *Pattison* (2) was a stronger case than *Price* v. *Thomas*, or than the present case. A., as principal, and B., as surety, were jointly and severally, by bond, bound to pay to the creditors of C. fourteen shillings in the pound on the amount of their debts, and, by the same bond A. was bound to indemnify B. against all loss by reason of his becoming surety. It was held, by the King's Bench, that a stamp of £ 1-15 was sufficient in amount for that instrument, and that it did not require a second stamp on account of A.'s obligation to indemnify B.—the whole appearing to have been one transaction—and A.'s agreement to indemnify B. being, "no doubt, the consideration which induced the latter to become surety for A.'s performance of the agreement with the creditors of C." That decision has been questioned by Mr. Tilsley (Assistant Solicitor of Inland Revenue) in his treatise on the Law of Stamps (3) on the ground that the contract by A. to indemnify B. amounted to a counterbond, and was, therefore, liable to a specific duty. He also argued that it would be a contradiction in terms to say that the counter-obligation of the principal was the leading object of the instrument. On the other hand, it should be remembered that even if that document had been completely silent as to the recouping, by the principal, of the surety to the extent of any loss to which the latter might be liable in respect of his suretyship, a contract by the principal to indemnify the surety against any such loss would, both at law and equity, be implied (4). It, therefore, seems difficult to maintain that the counter-obligation was not incidental and ancillary to the contract of suretyship. We have not found that, in subsequent cases, the decision of the King's Bench in that case has been **[193]** unfavourably criticized by the Courts. However, whether it be right or wrong, it goes a step further than it is necessary for us to go in the present case.

Stead v. *Liddard* (5) shows that the fact that the contract of the principal appears separately on the instrument from the contract of the surety does not render two stamps necessary. In that case a letter was written proposing certain terms of agreement, and the person, to whom it was sent, wrote, at the foot of it, a memorandum consenting to those terms. On the back of the letter, the father of the latter wrote a guarantee of the performance of the agreement by his son. It was held by the Court of Common Pleas that one stamp was sufficient, and that the letter, the memorandum accepting its terms and the guarantee—all formed but one transaction. In that case, as well as in the present case, the guarantee expressly refers to the agreement by the principal—a circumstance which

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(1) 4 C. & P. 554. (2) 9 B. & C. 919. (3) 1st ed., p. 348; 3rd ed., p. 291.
(4) 2 T. R. 104 *per* Ashurst, J.; 8 T. R. 310. *per* Lord Kenyon, C.J.; *Warington* v. *Furbor*, 8 East 242; *Alexander* v. *Vane*, 1 M. & W. 511; 1 Spence Eq. Jur., p. 639; 1 Story Eq. Jur., pl. 499 *et seq.* and pl. 730; Theobald on P. and S., 226 *et seq.*, Ind. Contract Act (IX of 1872), s. 145.
(5) 8 J. B. Moore, 2.

distinguishes those cases from *Richards* v. *Franco* (1). The limitation of the guarantee in *Wharton* v. *Walton* (2) to a sum less than that which might become payable under the agreement of the principal, and the circumstance that the guarantee applied not only to the principal covenant, but also to the payment of penalties to which the covenantor might, under the agreement, become liable, sufficiently distinguish that case from the present case and from *Price* v. *Thomas* and *Stead* v. *Liddard* above cited.

For these reasons we think that the bond and guarantee, submitted for our opinion, form but one transaction, and do not fall within s. 7 or s. 13 of the Stamp Act I of 1879. This view is, we believe, consistent with that which has heretofore prevailed in our Courts on the point, and we do not, in that enactment, perceive any indication of an intention on the part of the Legislature to lay down a new rule in that respect. The reluctance of Courts of Justice to break through an established practice on such a point to the disadvantage of the subject, and to the advantage of the Crown, is illustrated by the decision of Lord Mansfield [194] and his observations in an anonymous case on stamps reported in Lofft, p. 155.

We now come to the second question. In amount the stamp is sufficient, but the document commences on the side other than that on which the stamp is impressed, and is continued and terminates upon the side on which the stamp is impressed. The stamp is not in anywise defaced, nor is the writing so placed upon the paper as to admit of the stamp being used again. The point referred to us is whether, under such circumstances, the instrument is duly stamped—having regard to s. 12 of Act I of 1879, which enacts that "every instrument written upon paper, stamped with an impressed stamp, shall be written in such a manner that the stamp may appear on the face of the instrument, and cannot be used for, or applied to, any other instrument." That section (which is substantially similar to s. 7, clause I of the Statute 33 and 34 Vic., c. 97), seems, like s. 11, to contemplate two objects—1, that the stamp should not be defaced or made illegible; 2, that the writing should not be so distant from the stamp as to admit of its being used again for another instrument—for instance, by cutting off the part of the paper previously written upon, and writing a fresh instrument upon the portion left blank. The case of *Rex* v. *Reeks*, as reported by Strange (3) and viewed by Mr. Tilsley (4), perhaps partly illustrates what the Legislature may have intended to guard against by enacting that the instrument shall be written in such a manner that the stamp may appear on the face of the instrument. As reported in Strange, and described by Mr. Tilsley, that case was as follows:—"Upon a trial at bar in the nature of a *quo warranto* for the Office of Burgess (of the Corporation) of Christ Church, the admission of the defendant was produced, and it appeared to be a parchment that had only one stamp, and yet had five admissions entered upon it. And in order to make it good, they had annexed four other parchments, each of which was stamped. And the Court held that would not make it good, and that the proper way would have been to have paid the four penalties, aud had four new stamps *on the first parchment*, as was done in the Bishop of Chester's case (5). And,

(1) Mentioned in Tilsley on Stamps, 3rd ed., p. 302, and Chitty on Stamps, 2nd ed. p. 28.
(2) 7 Q. B. 474, S. C. 9 Jur. 638.
(3) 2 Stra. 716.
(4) Tilsley (1st ed.) 337; (3rd ed.) 275.
(5) 1 Stra. 624.

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[195] for want of this, there was a verdict against this and the other four defendants. The next day they moved for a new trial. And the Court would not hear anything of the motion, unless they produced the admission and showed that they had paid the penalty. And the defendants not caring to be at that certain expense for the uncertainty of gaining a new trial afterwards, they submitted to judgment of ouster." The aspect of the same case, as presented in Lord Raymond's Reports(1), is somewhat different. Thence it would appear that the admission of the defendant stood third in order upon the original stamped parchment, which contained the admissions of four other persons as burgesses also, and was dated 19th December 1721. The four additional stamped parchments bore the same date, and upon them were respectively entered the four latter in order (including the admission of the defendant) of the five admissions. Those four admissions had not, in fact, been entered upon the four parchments, nor had the latter been stamped until two months after the 19th December 1721, whereas the Statute 9 and 10 William III, c. 25, ss. 27 and 59, applicable to the case, required that the admission should appear on paper stamped at the time, otherwise it could not be given in evidence until the penalty had been paid and a certificate thereof produced. The same case is, *nomine The King* v. *Rich* reported in Barnardiston's Reports (2) more curtly than by Lord Raymond, but nearly to the same effect.

[In ordinary legal parlance, when the face of a deed or document is mentioned, no particular side or sheet of the parchment or paper, on which the deed or document is written, is thereby indicated.] The last line on the second side, or, if the deed or document consist of more sheets than one, the last line on the last side or sheet, if part of the text or body of the instrument, is deemed to be as much upon the face of it as the first line on the first side or sheet. [Ordinarily, if the instrument be of sufficient length, both sides of the paper are written upon. [The 12th section of Act I of 1879 does not say that the instrument must commence on the side on which the stamp is impressed, or that only one side may be written upon]. [The imposition of such excessive and minute details would be pitfalls to the unwary, and **[196]** would, by frequently invalidating documents, press harshly upon the illiterate classes, and overthrow thousands of honest transactions without producing any such advantageous result in the form of revenue to the State as would compensate it for the discontent which would be occasioned. The Legislature has avoided such stringent details, and seems to us to have satisfied itself by legislating against defacement of the impressed stamp, and against such a mode of penning the document as would admit of that stamp being used for, or applied to, any other instrument. Although the similar provision in Statute 33 and 34 Vic., c. 97, s. 7, has been in force in England for the last ten years, we have not been able to discover any decision of the English Courts to the effect that the expression "face of the instrument" is to be interpreted as requiring that the document should commence on the side on which the stamp is impressed, or that both sides of the paper or parchment may not be written upon, or as having any different meaning than it was previously understood to have. Where such a state of facts, as that suggested by the above-mentioned case of *Rex* v. *Reeks* as reported by Strange only, exists, *viz.*, where five distinct instruments are written on one parchment, stamped sufficiently for only one of those instruments,

(1) Vol. 2, 1445.

(2) Vol. 1, p. 8.

and several other stamped parchments are annexed to the first parchment sufficient to cover the other four instruments, but no part of them is engrossed upon the additional parchments, the stamps on the latter could not be said, in ordinary legal parlance, to appear on the face of any of the four instruments, and those stamps could, with facility, be used for other instruments, and in fraud of the revenue.

The Subordinate Judge has referred to a Resolution of the Government of Bombay, No. 4242 (dated 15th August 1879, in the Revenue Department) in relation to a practice at Nasik of writing on the side of the paper other than the side on which the stamp is impressed, which Resolution contains an opinion of the Remembrancer of Legal Affairs to the effect that "if a stamp appears on the back of an instrument it cannot be said to be on its face, and that every instrument written, since the 1st of April last, upon paper stamped with an impressed stamp, is therefore liable to be impounded if the stamp does not appear on the face of it." In connection with that opinion and the Nasik practice, **[197]** the Under-Secretary of the Government of India, in his letter No. 1857 to the Government of Bombay, dated 26th July 1879, says (*inter alia*): "You inquire 'whether an instrument begun on the back of the paper and completed on the front is to be treated as unstamped under s. 12.' It is clearly laid down in s. 12 that the instrument must be so written that the stamp shall appear on the face of it, and this condition would not be fulfilled in the case described." The same letter directed that such cases should be dealt with under s. 12 of Act I of 1879. We, as will be seen from what has already been said, do not concur in the opinion that the mere circumstance, that the instrument has been commenced on the side of the paper other than that on which the stamp is impressed, and is continued on the side on which the stamp is impressed, would warrant either the Courts of Justice or the officers of Government in treating the instrument as unstamped.

The Registrar (Mr. Hosking) has also directed our attention to a notification, dated from Bombay Castle, 23rd November 1880, and published in the *Bombay Government Gazette* of the 24th November 1880, which is as follows:—"No. 6197. It is hereby notified for general information that, under the stamp rules, writing on the reverse of an impressed stamp paper is prohibited." Although this may be intended to signify that a general rule has been made by the Governor-General in Council under s. 56 of Act I of 1879 to the effect that writing on the reverse of an impressed stamp paper is prohibited, the notification does not expressly say that such a rule has been made by the Governor-General in Council. Under s. 55, the Local Government could not make such a rule. Assuming, however, that it has been made under s. 56 by the Governor-General in Council, it does not appear to have been notified until the 23rd November 1880, *i.e.*, long subsequently to the 19th of April 1879, the date of the bond under our consideration, and, therefore, cannot affect that document. Had the bond been of a date subsequent to the notification of the 23rd of November 1880, it would have been necessary for us to consider whether such a rule is, as required by s. 56, consistent with the Act (1)—that Act being fiscal in character, **[198]** and the rule having the tendency to add to s, 12 a more stringent provision than the construction of that section seems to warrant. It not being absolutely necessary in this case to express any positive opinion whether

(1) See as to rules or bye-laws, *Reg.* v. *Yenku Bapuji*, 8 B.H.C.R.Cr. Cas. 39 (47) *et seq.*

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or not the rule is *ultra vires*, we defer doing so until the question directly arises in some other case.

We reply to the Subordinate Judge that we regard the bond as constituting but one instrument, and as properly stamped, and not open to objection under ss. 7, 12, 13 or 14 of the Indian Stamp Act I of 1879.

5 B. 198.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

KRISHNASHANKAR (*Decree-holder*) *v.* CHANDRASHANKAR (*Judgment-debtor*).* [23rd November, 1880.]

Decree—Execution—Rateable distribution of assets—Civil Procedure Code (Act X of 1877), s. 295.

The salary of a karkun, who was employed in the Second Class Subordinate Judge's Court of Anklesvar, was attached, in execution of a decree of the First Class Subordinate Judge's Court of Surat, by an order issued by the Surat Court, directing the Anklesvar Court to stop and remit, every month, a moiety of the said karkun's salary to itself (the Surat Court), until satisfaction of the decree. While the decree of the Surat Court was thus in course of execution, another judgment-creditor of the karkun, who had obtained a decree in the Anklesvar Court, applied to it for a rateable distribution of the moiety between himself and the Surat decree-holder, under s. 295 of the Civil Procedure Code, Act X of 1877.

Held that the application was not sustainable, inasmuch as the decree of the Surat Court was being executed by itself and not by the Anklesvar Court to which the order of attachment was sent as the head of a department or as "the officer whose duty it was to disburse the salary," and not as a Court executing the decree of another Court.

Jetha Madhavji v. *Nujarali Abramji* (1) followed.

[F., 18 B. 456 ; 6 M. 357 (359) ; R., L.B.R. (1893—1900), 161 (167).]

THIS case was referred for the opinion of the High Court by Rao Saheb Ranchorlal Desai, Second Class Subordinate Judge of Anklesvar, under s. 617 of Act X of 1877. He stated the case as follows :—

[199] "A decree in suit No. 664 of 1861 was passed in the Court of the First Class Subordinate Judge of Surat against one Chandrashankar Sudashankar, who is now a karkun on the establishment of this Court. The decree-holder, Maneklal Jeychand, having applied for execution in the Court of the First Class Subordinate Judge against one-half of the salary of the judgment-debtor, an order, dated 10th February 1880, has been sent to this Court, directing that one-half of the salary of the said karkun be withheld every month until the sum of Rs. 181-4-3, *i.e.*, the amount of the decree with costs, is paid up. Accordingly, one-half of the said karkun's salary for the months of February, March and April was withheld and remitted to the First Class Subordinate Judge; but before the pay of the said karkun for the months of May and June was received from the treasury, *i.e.*, on the 24th June 1880, the *darkhast* now under consideration was filed in this Court, wherein the decree-holder has prayed that his decree should be executed against the salary of the said karkun. Hence the question arises whether a decree-holder, who has

* Civil Reference No. 24 of 1880.

(1) 4 B. 472.

applied for execution of his decree to the Civil Court which has, under s. 268 of the Civil Procedure Code (Act X of 1877) received an order from another Civil Court to withhold every month one-half of the salary of its karkun until further orders, can, the judgment-debtor being one and the same person, claim under s. 295, Civil Procedure Code, a proportionate share in the portion of the salary so withheld?

"The decision of this question depends upon the construction that may be placed upon the words of s. 295 of the Code of Civil Procedure.

* * * *

The intention of the Legislature in enacting s. 295, Civil Procedure Code, so far as I can gather, is to allow all the decree-holders against one and the same judgment-debtor, who are vigilant enough to come to the Court, to get a proportionate share out of the assets that may be realized by the execution of one of the decrees, and not to give a preferential right to an execution-creditor who fortunately happens to be first, as it was the case under the old Code (s. 270).

"The words 'applied to the Court, by which such assets are held for execution of decrees for money against the same judgment-[200] debtor,' which occur in the s. 295, Civil Procedure Code, are, I humbly submit, wide enough to include a case like the present, so as to extend to it the benefits provided thereby to subsequent execution-creditors, and this construction seems to be in furtherance of the intention of the Legislature.

"If the words of the said section be taken to mean that only the decree-holders who have applied for execution of their decrees to the Court, which issued the prohibitory order to another Court to withhold payment of the salary to its karkun, can claim the benefits provided thereby, and not those who have applied for execution of their decrees to the Court, which has withheld the payment, a holder of a decree of another Court will acquire a prior right to satisfy his decree, by his simply moving that Court to attach the salary of a karkun of another Court, while the persons who have obtained their decrees in the Court where the karkun is employed, will have to wait for some years. This construction thus seems to be inconsistent with the intention of the Legislature.

"The practice of this Court in such cases has hitherto been to divide rateably the salary withheld among the decree-holders who have applied for execution of their decrees to either of the two Courts. As to this practice, though I am not sanguine about its correctness, I am not prepared to say that it is not warranted by the provisions of s. 295 of the Civil Procedure Code.....

"Considering that the practice of the several subordinate Courts differs on this point, and that it is of general importance, I deem this reference necessary.

"My opinion on the question hereby referred is in the affirmative."

The parties did not appear in the High Court, either in person or by pleader.

The following is the judgment of the Court :—

JUDGMENT.

WESTROPP, C. J.—The decree in suit No. 664 of 1861 in the Court of the First Class Subordinate Judge of Surat, is being executed by that Court, and not by the Second Class Subordinate Judge of Anklesvar, to whom the order of the 10th February [201] 1880, by the Surat Court, to stop and remit to the Surat Court a moiety of the salary of a karkun in the Anklesvar Court has been sent—not as a Court executing the decree of another Court—but as the head of a

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department, or, to adopt the language of s. 268 of Act X of 1877 (as amended by Act XII of 1879), as "the officer whose duty it is to disburse the salary." We, therefore, think that the application of certain persons who have recovered decrees in the Anklesvar Court to that Court to divide such moiety rateably between them and the Surat decree-holder, is not sustainable. That view is in accordance with the decision in *Jetha Madhavji* v. *Nujarali Abramji* (1), which was a civil reference from the Court of Small Causes at Ahmedabad. The portion of the reasoning of the learned Judge of that Court which this Court adopted, and on which it acted, is not stated in the report, but it was as follows:—"The words in s. 295 'more persons than one' must, I think, be taken to mean more decree-holders than one of the same Court, and do not include outsiders or decree-holders of other Courts, except, perhaps, those appearing on certificates under the provisions of chap. XIX (Act X of 1877 as amended by Act XII of 1879). This construction, I submit, is warranted by the words of s. 295, 'have, prior to the realization, applied to the Court by which such assets are held, for execution of decrees for money against the same judgment-debtor.' These words clearly indicate that those decree-holders only could share in the rateable distribution who have actually applied for execution of their decrees to the Court holding the assets." In the present case we, for the reason already above given, deem the Surat Court to be the Court holding the assets, and, prior to the realization thereof, there has not been any application to that Court by the Anklesvar decree-holders, who, therefore, are not entitled to share in the assets hitherto realized.

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5 B. 202.

[202] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

In re KHAJA PATTHANJI, *Applicant.** [7th September, 1880.]

Certificate of sale, application for—Limitation—Act XV of 1877, *Sch. I, Art.* 178—*Civil Procedure Codes—Act VIII of* 1859, *ss.* 256, 257, 259—*Act X of* 1877, *s.* 316—*Purchaser's right to certificate of sale.*

The applicant purchased certain land at a Court sale on 17th February 1876. The sale was confirmed on the 20th March of the same year The purchaser did not apply for a certificate of sale until the 10th March 1880.

Held, that the application was barred by the Limitation Act, XV of 1877, sch. I, art. 178.

Held, also, that the purchaser's right to a certificate of sale accrued to him under Ss. 256, 257 and 259 of the Civil Procedure Code, Act VIII of 1859, on the 10th March 1876, when the sale was confirmed.

[**Diss.**, 6 B. 586; 8 B. 377; **Appl.**, 5 B. 206; **R.**, 8 C. 367 = 10 C.L.R. 441.]

THIS case was referred for the opinion of the High Court by Rao Saheb Venkatrav Luxmaya, Second Class Subordinate Judge of Muddebihal, in the district of Kaladgi, under s. 617 of Act X of 1877. He stated the case as follows:—

"In original suit No. 214 of 1875 of this Court, one Andanepa obtained a money decree against one Balapa and another, and, in execution

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* Civil Reference No. 11 of 1880.

(1) 4 B. 472.

thereof, caused Balapa's land to be sold in auction. At such auction sale, one Khaja Patthan purchased the land for Rs. 11, and he now makes an application for a certificate of sale. The auction sale was held on the 17th February 1876, and was confirmed on the 20th March 1876. The purchaser Khaja makes the application for certificate on the 10th March 1880, *i.e.*, nearly four years after the confirmation of the sale by the Court. Section 316 of the Civil Procedure Code provides that 'when the sale of immoveable property has become absolute * * * * the Courts shall grant a certificate, &c.,' and therefore it is clear that to obtain such certificate the purchaser need not make an application. But in practice an application is always made by him in such cases. In the Indian Limitation Act, XV of 1877, no such application is specifically mentioned, but a general provision is made in art. 178, sch. II thereof, allowing three years for presenting all other applications not **[203]** specifically mentioned therein. An application for sale certificate, therefore, comes under this provision, and, consequently, it must be made within three years from the date of the confirmation of sale. Now, the question is—whether the present application, or, in other words, the purchaser's right to obtain a sale certificate, is barred, as he makes the application nearly four years after the confirmation of the sale.

"My own opinion is that the same is barred for the following reasons, namely, though it appears from s. 316 of the Civil Procedure Code, that the purchaser need make no application in such cases, yet it would not seem proper to grant him an important document of title on his mere appearance without any record of his prayer, particularly as he invariably appears before the Court for it a long time after the execution case is disposed of and sent to the District Court for record. The practice of making such applications is, I believe, followed in all Courts, and when they are so made, the limitation law must apply to them.

"There are at present three such cases, including the one under reference, pending in this Court, and I believe such cases frequently occur in the Subordinate Courts. Besides, this is the very question raised, but not decided, in the last sentence of the Honourable F. D. Melvill's opinion in *Basapa* v. *Marya* (1). I, therefore, respectfully request the Honourable the Chief Justice and Judges of Her Majesty's High Court to favour me with their decision thereon.

Ghanasham Nilkanth, as *amicus curiæ*, argued in support of the decision of the lower Court.—As the sale was confirmed on the 20th March 1876 the purchaser was entitled to a certificate on that day under s. 259 of the former Civil Procedure Code, Act VIII of 1859. Both that section and s. 316 of Act X of 1877 require the Court to grant a certificate to the purchaser after the confirmation of the sale. Neither of them, however, expressly says whether he is to have it on application or without it. The question then arises, whether the Court is bound to give it to him without an application, or only when **[204]** he applies for it. It is unreasonable to suppose that the Court should seek for him and furnish him with a certificate. He should apply to the Court for it. A certificate of sale is an important title-deed, and, as ruled in *Mulji Bechar* v. *Anupram Bechar* (2), the fact of a sale cannot be proved without the production of it. A purchaser has no right of action for possession of the property purchased by him at a Court sale before he obtains a proper

(1) 3 B. 433 (436).

(2) 7 B.H.C.R.A.C.J. 136.

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certificate: *Lalbhai Lakhmidas* v. *Navab Mir Kamaludin* (1), *Harkisandas Narayandas* v. *Bai Ichha* (2). His *right to possession* under ss. 263 and 264 of the Civil Procedure Code, Act VIII of 1859, and 318 and 319 of the new Code, X of 1877, does not accrue till a certificate is granted to him: *Basapa* v. *Marya* (3). A certificate is an instrument subject to the provisions of the Registration Act, and an unregistered certificate where its registration is compulsory is inadmissible in evidence and invalid, no other evidence being admissible to prove the sale. *Padu Malhari* v. *Rakhmai* (4): *Lalbhai Lakhmidas* v. *Navab Mir Kamaludin* (1). Certificates of sale are also subject to the stamp laws. Thus it is evident that certificates of sale are important documents, and ought not to be granted unless applied for. The omission, in s. 259 of the old Civil Procedure Code and s. 316 of the new Code, of any words requiring such application, is no ground for supposing that it is not necessary. If, therefore, it is necessary, it must be made within a certain fixed period. The Limitation Act which applies to this case is Act XV of 1877. Art. 178 of sch. II of of that Act requires all applications, not otherwise provided for, to be made within three years from the time when the right to apply accrues. As the application was not made until after the expiration of three years from the date of the confirmation of sale, it is barred, as held by the Subordinate Judge. If a person obtains a decree for possession or for sale of immoveable property, he cannot execute it after the lapse of three years. It is but reasonable that a purchaser who stands in a similar position should not be permitted to be free from the operation of the limitation law.

[205] *Pandurang Balibhadra, contra.*—In the Civil Procedure Code, whether old or new, whenever an application is necessary, the Code expressly says so. Neither s. 259 of Act VIII of 1859 nor s. 316 of Act X of 1877 requires the purchaser to make any such application, while they expressly provide that the Court shall grant a certificate to the purchaser on the confirmation of sale. The cases cited on the other side only show that the purchaser is not entitled to possession, unless he obtains a proper certificate, and that a Court sale cannot be proved otherwise than by the production of it. Under the Stamp Act, all that the purchaser has to do is to furnish the Court with a stamp of the proper value. It is not necessary that the stamp should be accompanied with an application for a certificate. In *Basapa* v. *Marya* (3) the application was made long after the expiration of three years from the date of the confirmation of sale, and yet a certificate was granted without objection.

The following is the judgment of the Court:—

JUDGMENT.

WESTROPP, C.J.—The auction sale of immoveable property took place on the 17th February 1876, and was confirmed on the 20th March 1876. The purchaser Khaja did not apply for a certificate of sale until the 10th March 1880, *i.e.*, not until four years *minus* ten days had elapsed since his right to such a certificate accrued to him under ss. 256, 257 and 259 of Act VIII of 1859. The question is, whether his application is barred by art. 178 of sch. I of the Limitation Act XV of 1877, which provides that "applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, s. 230," must

(1) 12 B.H.C.R. 247.
(2) 4 B. 155.
(3) 3 B. 433.
(4) 10 B.H.C.R. 435.

be made within three years from the time "when the right to apply accrues." That article involves the further question, whether any application, by the purchaser, for the certificate of sale was necessary under s. 259 of Act VIII of 1859. That section does not say, in terms that the purchaser must apply, and does say that " after a sale of immoveable property shall have become absolute," *i.e.*, after it has been confirmed under s. 257, " the Court shall grant a certificate" to the purchaser. Act XVIII of 1869 rendered it [206] necessary that certificates of sale should be stamped ; but the Governor-General in Council, by order of the 24th of October 1873—see *Bombay Government Gazette* of the 6th of November 1873—dispensed (as he lawfully might under s. 16 of the Act) with such duty, so that, at the date at which the plaintiff's right to a certificate of sale accrued, no stamp duty was necessary, and the purchaser need not present a stamped paper to the Court in order that the certificate of sale might be engrossed upon it. However, albeit that no stamped paper was then necessary, yet the invariable practice of our Civil Courts, so far as we know it, has been to wait for an application for a certificate of sale before they grant one to the purchaser. We think that this was a proper and the necessary practice, for the Court could not be reasonably expected and was not bound to seek out the purchaser in order to grant to him a certificate. Since the new stamp Act I of 1879 came into force, certificates of sale must be stamped as other ordinary conveyances are (*vide* sch. I, art. 16), and the purchaser, before he can get a certificate of sale, must present to the Court a properly stamped paper for it. And under s. 316 of the Civil Procedure Code, X of 1877, that certificate must bear the date of the confirmation of the sale.

We concur with the Subordinate Judge in thinking that the application in this case for the certificate of sale is barred by Act XV of 1877, sch. I, art. 178.

Note.—This case was followed in Civil Reference No. 1 of 1881 decided by Westropp, C. J. and Birdwood, J., on the 15th February 1881. See Printed Judgments for 1881, p. 39.

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5 B. 206.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Birdwood.

TUKARAM (*Plaintiff*) *v.* SATVAJI KHANDUJI (*Defendant*).*

[23rd March, 1881.]

Application for certificate of sale—Limitation—Act XV of 1877, *sch.* II, *art.* 178—*Civil Procedure Code* (*Act VIII of* 1859), *s.* 264—*Possession without certificate.*

Where an application for a certificate of sale was made five years and a half after the confirmation of the sale.

Held that it was barred by art. 178 of sch. II of Act XV of 1877.

[207] It was not incumbent on the Court, under the Civil Procedure Code Act (VIII of 1859), s. 264, to put a purchaser into possession until he had his certificate of sale.

Quære, whether a purchaser who without a certificate of sale has been put into possession, could be lawfully ejected because he has not such a certificate.

[N.F., 8 B. 377; R., 6 B. 139 (142); 7 B. 254; 12 B. 589 (594) ; 8 C. 367 = 10 C.L.R. 441.]

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* Civil Reference No. 10 of 1881.

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UNDER s. 617 of Act X of 1877 this case was referred for the decision of the High Court by Rao Saheb D. A. Dalvi, Joint Subordinate Judge of Ahmednagar. The following is his statement of the facts of the case :—

"This is an application, by the plaintiff, to obtain a certificate of sale which took place on the 7th June, 1875, and which was confirmed on the 9th July following. Certain fields situated at the village of Koledara, within the jurisdiction of the late Ahmednagar Small Cause Court, were attached and sold in execution of decree, No. 927 of 1869, passed by J. L. Warden, Esq., Judge of the said Court, on the 29th April, 1869, on a transfer of the said decree to the First Class Subordinate Judge's Court of Ahmednagar. The *darkhast* proceedings were disposed of on the 27th August, 1875. The plaintiff purchased the said fields in the auction sale in execution of the above decree, but omitted to apply for a certificate of sale till the date of his present petition, *viz.*, 22nd January, 1881. It is noteworthy that a period of more than five years and a half has clearly elapsed from the date of the confirmation of sale—9th July, 1875, when plaintiff's right to apply for such a certificate of sale accrued to him—up to date of his present application. It is also well to note here that all the proceedings have been taken under the old Civil Procedure Act (VIII of 1859). Now the question arises, is the plaintiff's application barred by the law of limitation ?" . . . .

JUDGMENT.

WESTROPP, C.J.—The application for certificate of sale having been made five years and a half after the confirmation of the sale, is barred by art. 178 of sch II of Act XV of 1877. For the reasons for so holding, see the decision in the case of *Khaja Patthanji* (1).

It is not stated in the present case whether or not the applicant (the purchaser) has been put into possession. This Court **[208]** is not to be understood by its present decision as expressing any opinion whether or not a purchaser, who, without a certificate of sale, has been put into possession, could be lawfully ejected, because he has not such a certificate. It was not incumbent on the Court, under Act VIII of 1859, s. 264, to put a purchaser into possession until he had his certificate of sale (see the judgment in *Basapa* v. *Marya*(2)).; but, if he has been put into possession, it has yet to be decided that he would not be entitled to retain it.

(1) 5 B. 202.

(2) 3 B. 433 (436).

5 B. 208.

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ORIGINAL CIVIL.

Before Mr. Justice West.

VIRJIVANDAS MADHAVDAS AND NAROTAMDAS MADHAVDAS (*Plaintiffs*) *v.* MAHOMED ALI KHAN, IBRAHIM KHAN, FAKRU MIYA, ANTONIO RODRIGUES AND OTHERS (*Defendants*).*

[27th, 29th, 30th, and 31st July and 2nd, 3rd, 5th, and 7th August, 1880.]

Ejectment—Possession—Suit to recover possession under the Specific Relief Act (I of 1877), s. 9—Proper parties in such suit—Mis-statement in pleading of area of land sued for—Interest in land—Disclaimer—Estoppel.

The plaintiffs sued, under s. 9 of the Specific Relief Act (I of 1877) to recover possession of certain lands which they alleged had been in their possession since 1856. They alleged that while retaining possession of the said land through caretakers appointed by them, they had been in the habit of yearly selling the grass of the land to purchasers who themselves cut the grass so purchased; that in 1878 the grass of the land for the ensuing year was sold to T; that in the month of August, 1879, the defendants forcibly dispossessed the plaintiffs of said land and prevented them and their servants and T from entering the same. Defendant No. 2 denied the dispossession, and disclaimed any interest in the land. Defendants Nos. 1 and 3 denied that the land in question belonged to the plaintiffs, and alleged that it was the property of A, of whom defendant No. 1 was manager, and No. 3 the lessee of the said land. They also alleged that the plaintiffs had tried to take forcible possession of the said land, and that defendant No. 1, acting on A's behalf, prevented them. They submitted that A was a necessary party to the suit.

Held that the three defendants were properly made parties to the suit, and that A was not a necessary party. Defendant No. 1 (the lessee) had the physical **[209]** occupation of the land sued for; but all three defendants not having made any declaration, in taking possession, that it was taken for one or two of their number, acquired it jointly, and handed on a derivative possession to the actual occupant, which as against third parties ranked as their own. If it was properly assumed, they all had a right to defend it; if not, they might all be called on for restitution. As to A, he was not actually in possession, and had taken no personal part in the dispossession. He was said to be owner, but that did not imply that he committed the alleged acts of defendants, or insisted on his ownership. As he had not the physical possession of the land, it could not be assumed that he had the jural possession merely on the assertion of the defendants. He, therefore, having done no palpable wrong, was not a necessary party.

Held, also, that defendant No. 2 was properly made a defendant, and that, in case the dispossession should be established, he should be retained as a defendant notwithstanding his disclaimer. It was possible that No. 3 held the land on terms beneficial to No. 2, and the disclaimer in the present suit would not estop No. 2 from enforcing these terms in a subsequent suit against No. 3.

Where, under a contract between A and B, an exclusive occupation of immovable property is given to A, he is the proper plaintiff in a suit for possession brought under s. 9 of the Specific Relief Act (I of 1877). If B desires to sue immediately on the possessory right, he should sue in A's name, though for an injury to the reversion he (B) may properly sue in his own name.

The intention of the Specific Relief Act (I of 1877), s. 9, is not to be frustrated by any private arrangement under which the ejector has acted, or by which he may consent to hold on behalf of some other person. As between him and that person, his possession may be that of an agent, but to the former holder he is the dispossessor; possession derived from him cannot be superior to his, and (the right of suit being given in general terms) is equally subject, as his, to the result of proceedings taken within the prescribed six months.

A person who has been ejected from his property, in suing to recover it under s. 9 of the Specific Relief Act (I of 1877), may sue the actual ejector or the person under whose orders or by whose authority the actual ejector has acted, or he

* Suit No. 698 of 1879.

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may sue both ; but the wrong-doer who has taken possession is the one from whom primarily it is to be reclaimed. If a third party desire to maintain the expulsion as an act done on his behalf, it is for him to come forward and avow it. He may claim to be admitted as a defendant ; but if he had himself a right to do what his agent has done, his right and his authority may be pleaded by the agent, and will be an effectual answer. The alleged owner or principal, therefore, is not a necessary party for the protection of the agent. The suit against the latter will fail if he acted on due authority where that authority is shown.

In a suit for ejectment a mere mis-statement of the area of the land sought to be recovered ought not to be regarded as anything more than a "false demonstration." If the space is precisely defined by other description, the statement of its measurement in square yards may be treated as surplusage, and of no consequence.

[R., 15 B. 635 ; 12 C.P.L.R. 52 ; 16 C.P.L.R. 154 ; 7 Ind. Cas. 574 (575) ; 8 Ind. Cas. 941 (942) = 4 S.L.R. 184.]

PLAINTIFFS sued, under s. 9 of the Specific Relief Act (I of 1877), to recover possession of a piece of land, comprising ten **[210]** thousand square yards, situated at Warli, in the island of Bombay, and numbered 3228 in the Revenue Survey map.

The plaint stated that the land had been in the possession of the plaintiffs' family for more than fifty years, and that by an order made in a partition suit instituted between the members of the plaintiffs' family it had been sold and had been purchased by the plaintiffs in the year 1847 ; that the said land was duly conveyed to the plaintiffs by a deed dated 13th March, 1856, and had ever since been in their possession ; that they yearly sold the grass of the land to purchasers, who themselves cut the grass so purchased by them, the land remaining in the plaintiffs' possession through caretakers appointed by them, and that in 1878 the grass of the land for the ensuing year was sold to one Tukaram Rowji ; that in the month of August, 1879, the defendants forcibly dispossessed the plaintiffs of the said land, and prevented them and their servants and Tukaram Rowji from entering the same.

The plaintiffs prayed that the defendants might be ordered, under the provisions of Chapter I of the Specific Relief Act (I of 1877), to deliver up possession of the said land to the plaintiffs.

Defendants Nos. 1 and 3 in their written statement denied that they had forcibly dispossessed the plaintiffs of any land belonging to them or in their possession. They alleged that the piece of land mentioned in the plaint as numbered 3228 in the Revenue Survey map contained 16,371 square yards, of which only 8,900 belonged to the plaintiffs, and the remainder was the property of one Abdulla to whom it had been conveyed by his father Ally Saheb in 1871. Ally Saheb had acquired the said land in 1848, and since that year he and Abdulla had been in possession, and had let the land for grazing. The written statement alleged that defendant No. 3 was lessee of the said land from Abdulla, and defendant No. 1 was Abdulla's manager; that on the 5th August, 1879, the plaintiffs tried to take forcible possession of the said land, and to cut the grass thereon, and that defendant No. 1, acting on Abdulla's behalf, prevented them. The written statement submitted that Abdulla was a necessary party to the suit.

The second defendant denied the dispossession, and disclaimed all interest in the land.

[211] The following issues were raised :—

1. Whether the defendants Mahomed Ali Khan (defendant No. 1) and Antonio Rodrigues (defendant No. 3) are proper parties to this suit.

2. Whether the said Abdulla, referred to in the written statement, is a necessary party to this suit.

3. Whether Fakru Miya (defendant No. 2) is a proper party to the suit.

4. Whether the defendants, or either of them, at the time specified in the plaint dispossessed the plaintiffs of the land or any portion of the land mentioned in the plaint.

5. Whether defendant, or any of them, were in possession of the said land, or any portion thereof, at the time when the plaint was filed.

The Hon. *J. Mariott* (Advocate-General) and *Farran*, for plaintiffs.

Lang and *Inverarity*, for defendants.

The following authorities were referred to :—Cole on Ejectment, p. 67 ; *Dadabhai Narsidas* v. *The Sub-Collector of Broach* (1) ; *Gulliver* v. *Swift* (2); *Deo* v. *Stanton* (3) ; *Mayhew* v. *Suttle* (4) ; *Bertie* v. *Beaumont* (5).

JUDGMENT.

WEST, J.—The first three issues in this case may conveniently be dealt with together. No question has been raised as to the competency of this suit to the plaintiffs. Their contract with Tukaram might, according to the most generally received notions, be deemed to have conferred on him an interest in the land which according to the evidence for the plaintiffs, he proceeded to realize by entering on an exclusive possession. The older cases under the English law would in such circumstances restrict the right of suit resting on possession, to the contractor regarded as a tenant ; Vin. Abr. Trespass (H.) 2, 5 ; *Rex* v. *Inhabitants of Under Barrow* (6) ; *Burt* v. *Moore* (7). In *Crosby* v. *Wadsworth* (8) the purchaser of a growing crop of hay was held to acquire an interest in **[212]** the land and an exclusive right on which he could have maintained an action of trespass, but for the discharge or rescission of the contract while still executory on the part of the vendor. Other cases are mentioned in Sugden's Vendors and Purchasers, ch. 4, s. 2 (9), and the action of ejectment is specially the remedy of a lessee. It might seem more proper, therefore, that in this case Tukaram should have been the plaintiff, and that the owners should if they desired to sue immediately on the possessory right, have made use of his name (*Baxter* v. *Taylor* (10)), though for an injury to their reversion they might properly sue in their own names. In *Jones* v. *Flint* (11), however, it was said that the nature of the interest conferred, depends on " the consideration whether to effectuate the intentions of the parties it be necessary to give the vendee an interest in the land." In *Harper* v. *Charlesworth* (12) Bayley, J., says that " a license to cut and take grass does not vest the possession in the licensee. He takes the grass as representative of the licensor." And in an Irish case it was thought that an interest in land would not be created when the intention was that the contractor should have only the grazing *Mulligan* v. *Adams* (13).

Circumstances are set forth in the plaint which might limit Tukaram's right in this way, and prevent his being really the possessor of the field. A mere sale of the grass of a field, with permission to enter and cut it during the monsoon, has been held, I think, in some mofussil cases not to convey to the vendee an interest in immovable property under the

(1) 7 B.H.C.R. A.C.J. 82. (2) 2 Ld. Keny. 511. (3) 2 B. & A. 371.
(4) 4 E. & B. 347. (5) 16 East 33. (6) 3 Burr. 1824.
(7) 5 T.R. 329. (8) 6 East 602. (9) 13th ed., p. 100.
(10) 4 B. & Ad. 72. (11) 10 Ad. & E. 753. (12) 4 B. & C. 584.
(13) 3 Irish L. R. 132.

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Registration Act, or a possession of the land whereon the grass is growing, and here the plaintiffs aver that they kept possession by their own caretakers; but where an exclusive occupation is given, it should be borne in mind that the possession is what a suit like the present is intended to guard, and that the possessor is the proper actor. He may sue and, therefore, should sue in order that the defendant may not be exposed to two suits for the same cause.

The plaintiffs, then,as owners of the land in dispute complain that they were forcibly deprived of possession of it by the defendants **[213]** on the 5th August, 1879. The defendant Fakru Miya denies that he took anv part in dispossessing the plaintiffs, and disclaims all rights in the land. Of the other two defendants, Mahomed Ali Khan is, he says, the manager of Abdulla Saheb Khor; the other Rodrigues is the lessee, under Abdulla, of a portion of the field (survey No. 3223) claimed by the plaintiffs. In their joint statement they say that this field contains, not 10,000 square yards as alleged by plaintiffs, but 16,371 square yards, of which 8,973, belonging to the plaintiffs, are in their possession, and have not been trespassed on. The remainder of the field, they urge, belongs to Abdulla, and has long been in his possession. There has been no dispossession of the plaintiffs, though an attempt on their behalf to take possession of Abdulla's portion was defeated.

The plaint, by setting forth survey No. 3223 with its boundaries as the land claimed, makes it perfectly clear what the plaintiffs sought; but as it is described as containing about 10,000 square yards it has been contended that no more can in any case be recovered out of the survey No. 3228, leaving the defendants, if in possession, still in possession of the remainder. From the notes to Savil's Case(1) in Thomas and Fraser's edition of Coke's Reports, it seems that this question was formerly much debated in the English Courts. It was sometimes held that a close, though named, must be demanded by the number of acres (2); but the opinion seems to have prevailed that a description by name, even with a mis-statement of the area, would suffice, as on that the sheriff could give possession(3). Where, as in the present case, all possibility of errors as to the plaintiffs' claim is shut out; a mere mis-statement of the area ought not to be regarded as anything more than a "false demonstration," which cannot reasonably be applied by way of limitation. The space being precisely defined by other description the statement of its measurement in square yards may be treated, as surplusage and of no consequence.

[214] Of this land the plaintiffs say they were forcibly dispossessed by the defendants. The first defendant, Mahomed, says he is manager or steward for Abdulla; but he does not set forth anv authority given to him by Abdulla to dispossess the plaintiffs of lands held by them, and asserted by him in doing so. His allegation is that he did not, in fact, dispossess them of anything at all. They say, he did, and if he did, he is primarily liable, albeit some one else may have profited by his act. Rodrigues, too, denies any dispossession. He holds part of the land claimed as lessee from Abdulla. He, then, is in possession and the plaintiffs may on that ground properly sue him supposing, as we must for the present do, that they were actully dispossessed. As to Fakru Miya, who is a

(1) 6 Rep.; page 105 (Part XI, 55 a).
(2) *Owen Joans* v. *Elizabeth Hoel*, Croke. Eliz. 235; *Jordan* v. *Cleabourne*, *Ibid* 339.
(3) *Wykes* v. *Sparrow*, Cro. Jac. 435; *Royston* v. *Eccleston*, *Ibid*, 654; *Goodtitle* v. *Alker*, 1 Burr. 133; and comp. 1 Wms., s. 347. (*e*) 5.

brother of Abdulla, it is said that he took part in the act of dispossession along with Mahomed Ali and Rodrigues. If he did he is primarily answerable for it. When three persons join in ousting a fourth, they all by that act become co-possessors of the property from which they have expelled him (1). He has no means of knowing which of the three is principal and which are assistants, so as to acquire possession not for themselves but for their employer. If we take the case of a single person ejecting another, and a suit brought to recover possession, it is not to be contended that the intention of the Specific Relief Act (I of 1887), s. 9, may be frustrated by any private arrangement under which the ejector has acted, or consents to hold on behalf of some other person. As between him and that person, his possession may be that of an agent, but to the former holder he is the dispossessor; possession derived from him cannot be superior to his, and (the right of suit being given in general terms) is equally subject as his to the result of proceedings taken within the prescribed six months. A declaration, even made by the ejector at the time of ouster, may not affect the case (2). He may name some person beyond the reach of the Court's process: or some one who, in fact, has given him no authority. The person ejected is not compelled to take the risk of suing such a defendant, much less of abandoning his suit against the immediate trespasser. If, indeed, he is satisfied that the active agent in ejecting him has been impelled by some one else, he may sue the latter. He may sue both: "*unum propter* **[215]** *factum alterum propter auctoritatem*;" but the wrong-doer who has taken possession is the one from whom primarily it is to be reclaimed. If a third party desire to maintain the expulsion as an act done on his behalf, it is for him to come forward and avow it. He may claim to be admitted as a defendant; but if he had himself a right to do what his agent has done, his right and his authority may be pleaded by the agent, and will be an effectual answer (3). The alleged owner or principal, therefore, is not a necessary party for the protection of the agent. The suit against the latter will fail if he acted on due authority where that authority is shown. It might, no doubt, fail even in a case of obvious wrong-doing, but for the principle that to the injury of a true-possessor with right, or a colour of right (4), the employer could not take the law into his own hands, or give any real authority to his agent. The latter taking possession illegally, does not hold that possession legally for the principal who has impelled him to violence. Such a transaction recognized in that character, generates no legal obligation except that of restitution and recompense to the person ousted, none whatever between the co-trespassers (5). There is, then already a *lis mota* between them and the person dispossessed, and the principal taking possession with notice of what has been done, takes subject to any suit that may be brought in consequence of it. If he is conspicuously in actual possession of the land he should be made a party defendant, as having by that very circumstance ratified the dispossession, and to prevent any repudiation of the agency with a view to defeat a decree against the agent; but the plaintiff is not to be deprived of his remedy by a shuffling about of the apparent possession from one person to another, all deriving their occupation from the same defective source. The doctrine *omnisratihabitio retohabitur* applies

(1) Co. Lit. 180, b.
(2) Comp. Co. Lit, 476 *ad fin.*
(3) See (Hilliard on Torts, I, 588, 597); 4 B. & Cr. 485 *per* Bayley, J.
(4) See *per* Archibald, J., in *Cape* v. *Scott*, L. R. 9 Q. B. 269 at p. 277.
(5) Ortolan 1st, III, s. 1187 Ind. Contract Act, ss. 10, 23. 188, 185 Evans's Pothier I, 25 : II, 10, 11. Domat C. L., Pt. I, Bk, tit 1. sec. 5 Puff L. N. 3, 7, 10.

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specially to this class of cases, and he who takes the advantage must bear or share the responsibility. Possession being the right in question, all who take it within the prescribed time take it subject to the special suit. If the possession[216] is held against the original dispossessor, the former holder cannot be prejudiced by a possession obtained as against him otherwise than in due course of law. The person in possession must, indeed, be made a defendant in order to prevent collusion between the other parties to his detriment, but the right of action in the original possessor is not thereby affected. If it could operate in this way we should soon see almost every wrongful or questionable dispossession followed by another ostensibly adverse, but really intended to guard it.

It follows from these considerations that all the three defendants have properly been made parties to this suit, and that the alleged owner of the ground in dispute, Abdulla Saheb, is not a necessary party. Rodrigues, who according to the plaint took part in the ejectment, has the physical detention or occupation of part of the land sued for. He may hold it solely for himself or for one or both of those who joined him in taking possession(1). If they were omitted as defendants it might turn out that the possession which they acquired had not been abandoned, as Rodrigues might be only a bailiff or a tenant in common with them. All three not having made any declaration, in taking possession, that it was taken for one or two of their number acquired it jointly (2), and have handed on a derivative possession to the actual occupant, which as against third parties ranks as their own If it was properly assumed, they all have a right to defend it ; if not, they may all be called on for restitution (3). As to Abdulla, on the other hand, he is not ostensibly in possession. He has taken no personal part in the dispossession. He is said to be owner, but this does not necessarily imply that he authorized the acts of the defendants as alleged in the plaint (4), or even that he insists on the ownership thus ascribed to him. As he has not the physical possession of the land, it cannot be assumed that he [217] has the jural possession merely on the assertion of the defendants that this is so. He, therefore, having done no palpable wrong, is not a necessary party. Those who, it is alleged, have done the wrong, cannot escape liability by putting his name forward ; nor can he, if he has really employed them, gain by their act without hazard from their liability.

The Roman interdict "de vi" to which the summary suit under Act XIV of 1859, s. 15, and under the Specific Relief Act (I of 1877, s. 9,) has sometimes been assimilated (5), had ordinarily to be sought against the person himself who had exercised the violence. If this person had in his turn been dispossessed, the remedy was available against the second equally as against the first dispossessor(6). The person who had prompted the violence was equally subject to the interdict as the active agent(7). In the case of a dispossession without authority by servants or dependents the master was answerable for all that had come to him by their misconduct,—a rule, which, Savigny says, is merely a particular

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(1) See Co. Lit. 186 *a*.

(2) See Co. Lit. 180 *b*, s. 278.

(3) See Grotius de J. Ber. P. 2, 17, 6, 7, 11.

(4) *Lord Bolingbroke* v. *Local Board of Swindon*, L. R. 9 C. P. 575. See *per* Maule, J. in *Mitchell* v. *Craswellor*, 22 L. T. C. P. 100, *Wilson* v. *Barker*, Nev. & Man, 409 ; =4 B. & Ad. 614. *Allen* v. *London and S. W. Ry. Co.*, L. R. 6 Q. B. 65 at p. 72.

(5) See *Dadabhan Narsiddas* v. *The Sub-Collector of Broach*, 7 B.H.C.R. A.C.J. 82.

(6) Poste's Gaius, 573 ; comp. Puff L. R. 4, 13, 3.

(7) Savigny Possession, s. 33.

case of a general principle of wide application. The possession thus guarded was any possession at all in the case of personal violence having been used ; in other cases it must have been evident, peaceable and of right (1). The English Statutes against forcible entry embody, so far at they extend, a similar set of ideas.

In the English law the corresponding remedy by Assise of Novel Disseisin seems to have been instituted by the Assise of Northampton in 1176. Bracton describes it as a relief "*per summariam cognitionem absque magna juris solemnitate*" (2), and his whole discussion of the topic shows very clearly the Roman source of this branch of the law. The right of suit did not depend on title, merely on possession, which, however, must have been a true possession, not a mere detention or occupation on behalf of another (3). The action lay against both the disseisor himself and against the instigator of his act, or him who took the **[218]** benefit of it (4). It lay also against successive holders of the property, whether by transfer from the disseisor or by dispossessing him (5). A prompt demand was requisite in order to obtain a complete remedy against such persons, as, failing this, they were liable only to make restitution (6) without other amends. Should a disseisin be effected in the name of some person as principal, the immediate disseisors were responsible as principals until the employer adopted or renounced their act(7). If the employer was out of the way, the servants were to be treated as principals, the result binding the absent employer, unless on his return he could get it set aside.

We have here not only analogies but rules, the reasonableness of which is immediately recognized and capable of direct application to the cases arising under the Specific Relief Act (I of 1877). **[219]** The distinctions between disseisin and dispossession(8)are not, for the present purpose, of importance. The action of ejectment was of later growth, and was

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(1) Savigny Poss.Loc. Cit.
(2) Bract. de Leg, Lib. III, fol. 164.
(3) Co. Lit. 206.
(4) Competit enim assisa..... tam contra ipsum qui auctoritatem preæbet dejicientibus præcepto concilio et auxilio inductivo quam contra ipsum qui disseysinam ratam habit ex post facto .....Item incidunt in assisam non solum unus sed plures, quidam principaliter et quidam secundario. Item...non solum ille qui fac it nomine alieno verum etiam ille, cujus nomine fit, dum tamen factum suorumet injuriam advocaverit et illam facerit esse suam.
(5) Iteme non solum ille qui facit et præcipit (vi prædictum est) verum ille qui statim et recenter ingreditur seysinam post disseysinam factam.....et hoc sive ingrediatur de voluntate desseysitoris per donationem, vel per aliam translationem sive contra voluntatem per dis seyinam et hoc ante impentrationem quando cunque.—Bract. Lib III., fol. 171.
(6) Quia ad quemcunque res prevenerit post imponetrationem oumres per diligentem impenetrationem et prosecutionem effecta sit litigiosa, ille qui eam sic receperit (quamvis in brevi non nominetur) illam restituere cogetur.....Et si quidam ant impenetrationem per longum intervallum feoffatus fuerit, vel disseyssinam fecerit de re spoliata post intervallum et si in brevi non nominetur respondere non tenetur nisi velit.—Bracton, Lib. III, fol. 171.
(7) Item facit quis disseysinam non nomine proprio (vi preaedictum est) sed nomine alieno, ut si procurator, seruus, vel familia nomine dominorum focerient disseysinam ipsi semper erunt primi at principales, quousque domini eorum factumaeorum advocaverint et disseysinam vel deadvocaverint.....Si autem..... deadvocaverint...adhuc tenentur dum tamen si preasentes siut et se gratis posuerint in assissam.....Si antem in remotis agant domini.....propter hoc...remanebit assisa in odium disseysitorum et ramanebunt disseyssitores primi et principales ita quod si assisa faciat proeis remaneant domi sui in seysina de facto suorum. Si autem contra eos, recuperabit querens et domino cum redierit si factum eorum advocaverit incidit in paenam disseysinae cum suis et si viderit sibi expedire agat de convictione.—Bract. de Leg. 204.
(8) Brac de Leg f 160 ; Co Lit 153 B ; 1 Burr. R. 109

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developed in a very artificial form. Being of the nature of trespass, it was once held that it would not lie by A, ejected by B, against C, who had in turn ejected B (1); but now the question is merely of the right to possess as against the actual possession (2). A mere servant, such as Mahomed Ali asserts himself in this case to be, cannot, it is said, be made a defendant, because he is not really the "person in possession" but if, like Mahomed Ali, "he appears to the writ and defends the action, it will be no defence that he occupied merely as servant of another person" *Doe* v. *Stradling* (3), *Doe* v. *Stanton* (4). In *Doe* v. *Stanton*, Bayley, J., says: "It is sufficient to subject a party to this action that he has the visible occupation of the premises" (5) though in fact, a servant, and the necessity for this is stated in the old case of *Wilson* v. *Weddell* (6). There it was adjudged that a servant residing with his mistress in the tenements was a sufficient trespasser and ejector to be a proper defendant. He was, it was said, (as against the plaintiff) a co-occupant. The real owner might, it was held, bring his action against either master or servant, (both being wrong-doers), and unless this were so, the master might avoid process (while retaining possession) by keeping out of the way. No owner has in this case come forward to relieve Mahomed Ali from his responsibility.

The principles, then, of both the Roman and the English law, apart from the specific provisions of particular enactments, justify, in a case like the present, a suit against each of the persons concerned in the ouster and in maintaining the alleged wrongful possession thus acquired, whether immediately or mediately, from the plaintiff. Fakru Miya now disclaims any interest in the land in dispute; but, according to the plaintiff, he took part in the dispossession, and he has not effected a re-instatement. Supposing **[220]** Rodrigues holds on terms beneficial to him he would not be bound as by an estoppel, in a subsequent suit against Rodrigues resting on an averment contrary to his present admission (7). It is essential, therefore, to the protection of the plaintiff, and not unjust to Fakru Miya, should the dispossession be established that Fakru Miya should be made a defendant and retained as a defendant, notwithstanding his disclaimer. A derivative possession conferred privately on some third party could not be affected by such a disclaimer. The suit calls on any such party to come forward and maintain his right, if right be has.

On the first three issues I find for the plaintiff.

As to the possession of the land in dispute, there is an irreconcilable contradiction between the evidence for the plaintiff and that given for the defendants. The oral testimony is on each side supplemented by documentary indications of title, and by entries in the account books of the plaintiff and of Abdulla Saheb Khan, which, if they really relate to one and the same area, necessarily imply a gross fabrication of evidence on one side or the other. [His Lordship then discussed the evidence and continued:—]

The last contractor under Mr. Virjivandas is Tukaram, who took the field last year, and whose exclusion is the ground of complaint. Tukaram's statement taken literally would deprive the present plaintiff of his right to sue by showing that Tukaram himself had possession, and was alone, therefore, in a position to be dispossessed. This may be the reason why Tukaram's sepoy or caretaker was not called; but, as the evidence stands,

(1) 9 Vin. Abr. 337.
(2) Cole on Ejectment, p. 82; Stat. 15 & 16 Vic., cap 76, ss. 168, 170.
(3) 2 Starkie 187. (4) 2 B & A. 371 = 1 Chit. Rep. 113. (5) 2 B & A. at p. 372.
(6) Yelv. 144. (7) *Ram Surun Singh* v. *Mt Pran Peary*, 13 M. I. A. 551.

Tukaram's taking of possession in the month of Jesht seems to have gone so far only as to set his sepoy to watch the grass. He may thus have acquired possession as against his lessor, with whose assent he made a kind of entry, but there was in what he ascribes no open assumption of an exclusive occupation such as to deprive of his possession a stranger who previously had it. If Virjivandas was in possession of the whole field in Jesht, Tukaram may have then taken possession of it for him, or assumed it for himself, but he did nothing apparently to expel any one else. On one day in Shravan he says his father and his servant brought home two [221] bundles of grass cut in the field. The place where they cut the grass, ought to have been proved by those persons themselves. Tukaram could not prove it on their mere report. Nor would the mere cutting of a couple of bundles of grass constitute a taking of possession where there was no possession before: *Ex parte Fletcher* (1), *Lord Townsend* v. *Ash* (2). The real possessor may have known nothing about it, and no right is gained by a bare trespass. As to what occurred the next day and afterwards, the accounts of Narayan and Tukaram do not seem reconcilable. Tukaram reported to Narayan on receiving certain information from his sepoy who has not been produced. Tukaram says he went then with Narayan to the field by which the defendants were, and the dispute at once began. Narayan says Tukaram's complaint was made on the 5th August; that on the 6th he went with Tukaram to the field, and set him to cut the grass, which he did without interruption,—a fact of which Tukaram says nothing; and that on the third day, the 7th August, he went to the field when called by Tukaram's sepoy. The account given of the occurrences at the field by Virjivandass' witnesses is plainly exaggerated. The police sepoy Lakshman Daji seems to have spoken with perfect truthfulness on this point; and what appears from his testimony is that Abdulla's men were in the field, that the defendants were beside it, and that Narayan was vehemently asserting his master's ownership of the land which the Musalmans as vehemently denied. The physical detention or occupation of the land really in dispute was at this time plainly held by Abdulla's party; but if suddenly taken, and not acquiesced in till it had acquired a colour of right, it could not be deemed a possession on which a suit could be brought if it were displaced(3). It counted for such a purpose, no higher than the cutting of a couple of bundles of grass by Tukaram's father and servant. The possessor before the dispute was the possessor still, until quite ousted, if he was ousted at its close, when his effort at reinstatement had plainly proved ineffectual, though at that moment the dispossession was to be deemed to have begun at the first known and continuous intrusion.

[222] It is necessary, therefore, to go behind this transaction in order to determine who was the real possessor of the land. The plaintiff's evidence on this point has already been discussed. That of the defendants, if it is to be believed, is equally inconclusive. I do not believe in the story of the Musalman companions of defendant No. 1 having gone to Warli quite by accident on the day of the dispute. It is clear that the field is called "Darad" if it is also called "Korti Cha-Tongar" contrary to the statements of the defendant's witnesses. The venerable Muzavar has yielded to sympathies which have affected his memory. The other witnesses, except Mr. Morris and the police sepoy already mentioned, betrayed a partisan spirit hardly less warm than that shown by those of the plaintiff.

(1) L. R. 5 Ch. D. 809
(2) 3 Atk. at p 339; 9 Vin. Abr. 323.
(3) Comp. Co. Lit. 368 A.

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The defendant's books, though there is a gap of several years in his documentary evidence, go to show from 1867, at least, pretty constant exercise of possession over the land in dispute, and so far as they extend there is no more obvious reason to distrust them than those of the plaintiff.

Rodrigues as a defendant may be thought necessarily prejudiced. He is corroborated by his partner L. Quini; and if these men speak truly, they have held the land in dispute under Abdulla for four or five years. Domas Quini held the land as one of several partners from twelve or fourteen years ago for four years from Abdulla Khor. These transactions are supported by agreements, either separate or entered in the books of the defendant's employer. There are other agreements of persons who are now dead. The recent occupation by Rodrigues, Quini and Bastian Misquita (now dead) is deposed to by a labourer who worked under them. If the pretty consistent story of these witnesses is true, there can be no doubt that Abdulla has had possession for several years; but there are some obvious mis-statements in their depositions which cast a certain doubt on all they say.

Some external test of the truth of these contradictory bodies of testimony is obviously desirable if one can be found. It seems to be sound in the evidence of Mr. Morris and of the sepoy Lakshman. Bastian Misquita, claimed as a tenant by both parties, erected a shed on the land held by him. Narayan, in order to make out that he was certainly Virjivandas' tenant, places [223] this shed south of the line of stones which divides the field. Mr. Morris proves that the still existing platform is north of the line of stones. The fact would not be inconsistent with Bastian Misquita's tenancy of the whole field, but it is inconsistent with Narayan's honesty as a witness. Misquita was apparently a partner of Rodrigues and Quini, and the sepoy Lakshman says that he has seen Rodrigues in growing vegetables on the land said to be Abdulla's during the two years of his service in that neighbourhood. These indications are confirmed by the confused account given of the alleged dispossession by Mr. Virjivandas' witnesses. Amid the mass of dubious and of absolutely false testimony with which I have had to deal, only a very few statements can be taken as absolutely trustworthy; only a few facts are unquestionably established. Comparing the whole case on each side with the facts thus ascertained, I arrive finally at the conclusion that the dispossession alleged by the plaintiffs cannot be deemed proved, and, without discussing the fifth issue, I reject their claim with costs.

Decree for defendants.

Attorneys for the plaintiffs.—Messrs. *Prescot and Winter.*
Attorney for the defendants Nos. 1 and 3.—*Mr. H. W. Payne.*

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Before Mr. Justice West.

THE LONDON, BOMBAY AND MEDITERRANEAN BANK, (*Plaintiffs*) *v.* GOVIND RAMCHANDRA, (*Defendant*).* [11th, 12th and 19th February, 1881.]

Company—Winding up—Suit against contributory—Service of notices and orders—Contributory in India to English company—Last known address or place of abode—Rule 63 of the Rules of 1862—Jurisdiction.

The London, Bombay and Mediterranean Bank, a Joint Stock Company, registered under the English Companies' Act, 1862, was ordered to be wound

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up by an order of the Court of Chancery in England in 1866, and, by a subsequent order of the said Court made in the winding up of the Bank, it was ordered that service of any notice, summons, order, or other proceeding in these **[224]** matters might be effected by putting such notices, etc., into any post office, either in England or at Bombay, duly addressed to such contributories being past members according to their respective *last known addresses or places of abode.* By a final balance order, dated 5th June, 1879, it was ordered by the Court of Chancery in England that the persons named in the schedule to the said order being contributories as past members of the said Bank should, within four days after the service of the said order, pay the amount set opposite to their names, with interest, from the 15th March, 1879. The defendant's name appeared in the said schedule, and the present suit was brought to recover the sum therein appearing as due from him to the Bank, *viz.*, Rs. 3,900. The defendant denied that he had ever held shares in the plaintiff's Bank, or that he ever had notice if any of the proceedings in the winding up. At the trial it appeared that all the various orders and notices to share-holders made in the winding up of the Bank prior to the balance order of the 4th June, 1879, had been sent by post to the defendant, addressed to him at No. 36, Fanasvadi, and were all returned undelivered. It was proved that he had never resided there; but that his brother had a place of business there, and that the defendant used occasionally to go there for the purpose of attending to his brother's business. It further appeared that the residence of the defendant, as given in the register of shareholders, was Loharchall, and not 36, Fanasvadi.

Held that the notices, orders, &c. prior to the order of 5th June, 1879, were not so served as to make the defendant subject to that final order; that the obligation to obey the command of the Court of Chancery contained therein had not arisen as aginst the defendant; and that, consequently, the present suit must fail.

It is a leading principle of English law, always understood except when expressly exoluded, that a person proceeded against in a Court must have due notice of the proceeding. Failing such notice, he is entitled to protection if the judgment or order obtained in his absence is made the ground of a suit in any Court governed by English principles. The Court of Chancery in England had not in this case so called the defendant before it as to enable it in his absence to pronounce a definitive order against him or to bind him in the Court of his domicile, although he was included in the order of the Court of Chancery.

The fact that the defendant frequently attend his brother's place of business at No. 36, Fanasvadi, was not sufficient to make that place his "last known address." If there had been evidence that he had used No. 36, Fanasvadi as an address for receiving letters, that might probably have been sufficient. It would then have been known as his address—at least as an address.

The address or residence of a member of a company entered in the register of shareholders, although sufficiently ascertained for the purpose of communication from the company, is not, therefore ascertained for a service of legal proceedings. For the purpose of such service care must be taken to find out the last known places of abode of the alleged contributory and to effect the substituted service there.

[D., 11 B. 241 (244).]

THE plaintiffs sued the defendant as a contributory, whose name appeared on the B list of contributories, to recover the sum of **[225]** Rs. 3,900 (the equivalent of £390) due from him in respect of certain shares standing in his name. The London, Bombay and Mediterranean Bank have been registered in England under the English Companies' Act, 1862, and had a branch offrce at Bombay and other places.

By an order of the High Court of Chancery in England, dated the 20th July, 1866, the plaintiffs' Bank was ordered to be wound up, and liquidators were duly appointed. By a subsequent order of the Chancery Division of the High Court of Justice in England made in the winding up of the said Bank, and dated the 4th August, 1877, it was ordered "that service of any notice, summons, order or other proceeding in these matters not requiring personal service, upon such of the contributories, being past members of the said Bank, whose respective last known addresses or places of abode are situate out of England (whether in Bombay or

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any other part of India or elsewhere), and on whose behalf respectively no appearance shall have been entered pursuant to the 62nd Rule of the General Orders and Rules of this Court of the 11th November, 1862, *may be effected by putting such notice*, copy of summons, order or other proceeding, together with a copy of this order, as a prepaid letter *into any post office receiving house* in England ; or as to such of the said contributories being past members whose last known addresses or places of abode are situate in India, either in England or at Bombay, duly addressed to them respectively according to their respective last known addresses or places of abode, in the same manner as service as aforesaid may be effected upon the other contributories of the said Bank whose last known addresses or places of abode are situate in England, and on whose behalf respectively no appearance shall have been entered as aforesaid."

The plaint further stated that by a final balance order, dated the 5th June, 1879, it was ordered that the persons named in the schedule to the said order being contributories as past members of the said Bank should, *within four days after the service of the said order*, pay the amount set opposite their names with interest from the 15th March, 1879, at 5 per cent.; that the defendant's name appeared in the said schedule as a contributory, and that the sum appearing as due from him was the sum sued for. The plaint **[226]** also stated that a copy of the order of the 5th June, 1879, was duly served upon the defendant on the 6th August, 1880.

The plaint described the defendant as a clerk in the post office, formerly shroff in the Agra Bank, and residing at Fanasvadi, No. 36, outside the Fort of Bombay.

In his written statement the defendant denied that he had ever held shares in the plaintiffs' Bank, or that his name appeared in the schedule of contributories. He also denied all knowledge of the various orders of the High Court of Justice in England made in the winding up of the said Bank, and he denied that he had been served with a copy of the order of the 5th June, 1879, or that he ever had notice of any of the proceedings in the matter. He also denied that he had been a shroff in the Agra Bank, or that he resided at No. 36, Fanasvadi.

At the hearing the following issues were raised :—

1. Whether the defendant had been served with the order of the 5th June, 1879, or received notice thereof.

2. Whether the Court in England had jurisdiction to pronounce the order in the sense that the requisite conditions as to notice to the defendant had previously been satisfied.

3. Whether the defendant was included in that order, and was bound by it for the purpose of this suit.

It was proved that the balance order of the 5th June, 1879, upon which the present suit was based, was sent in an envelope addressed to the defendant at No. 36, Fanasvadi. From there it had been returned undelivered to the post office in which the defendant was a clerk. There the packet was presented to him, but he refused it, saying it was not for him. It was also proved that the defendant resided at Loharchall, and that he had never resided at 36, Fanasvadi ; that his brother had a place of business at the last-mentioned place; and that the defendant used occasionally to go there for the purpose of attending to his brother's business, and that summons in this suit had been served upon the defendant while there.

The residence of the defendant, as given in the book of the plaintiff's Bank, was Loharchall and not No. 36, Fanasvadi. All **[227]** the various orders and notices to shareholders made in the winding up of the Bank

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prior to the balance order of the 5th June, 1879, had been sent by post to the defendant addressed to him at No. 36, Fanasvadi, and had been returned undelivered. The question was accordingly raised, whether the defendant had been duly served with these prior notices and orders, inasmuch as they had not been addressed "to his last known address or place of abode" in accordance with Rule 63 of the English Rules of 1862 (1).

Starling and *Russell*, appeared for the plaintiffs.

P. M. Metha and *Mankar*, appeared for the defendant.

JUDGMENT.

21st February. WEST, J.—The evidence of Hari Gopal and Sudashiv Waman so far supports that of Balkrishna Bapuji, that there is no reasonable doubt but that the defendant was formerly employed under the shroff in the Agra Bank. Hari Gopal, who was in a position to know, says he was there in 1864-65, and left on the suspension of payments by the Bank in 1866. He resided, as he still resides, at Lobarchall. A person of his address, and answering to this description, was the one who signed the memorandum and articles of association of the London, Bombay and Mediterranean Bank. He signed four transfers of shares also, and a receipt for scrip certificates which have been put in evidence. The defendant says these signatures are not his, and the cashier at the post office, where the defendant has been employed for several years, thinks they were made by some one else. Mr. Pallonji, however, has not been in the way of becoming specially acquainted with the defendant's hand-writing by the frequent extended perusal which awakens a perception **[228]** of minute characteristics as in the face of a friend. He speaks chiefly by comparison, and his testimony is subject to much deduction, as, on the other hand, is that of Mr. Stead. But on the whole evidence and a careful comparison of the signatures on the post office payments with those imputed to the defendant. I am satisfied that the writing was really his. This conviction is strengthened by his having purposely disguised his hand in signing papers in this suit, so that it is difficult, if not impossible, to identify it in style with the undoubted signatures on the pay-sheets.

Govind Ramchandra, the defendant, is then the Govind Ramchandra who was once a shareholder. If the orders making him a contributory have satisfied the requisite formal conditions, he is bound by them; but whether these conditions have been satisfied, is a serious question. For the purpose of furnishing materials for the B list of contributories as past members of the company, the address of the defendant was given to the Court of Chancery as 36, Fanasvadi, Bombay. The address in the register was Loharchall; but the liquidators' agent, Mr. Stead, had been told by one of his servants—though by whom he cannot say—that the defendant resided then at 36, Fanasvadi. To this address the notices intimating that the list would be settled, that it had been settled, and that the defendant

(1) Rule 63.—"Service upon contributories and creditors shall be effected (except when personal service is required) by sending the notice or a copy of the summons or order or other proceedings through the post in a prepaid letter addressed to the party himself at the address entered or last entered pursuant to the preceding rule; or, if no such entry has been made, then, if a contributory, to his last known address or place of abode; and if a creditor, to the address given by him pursuant to the foregoing rule 20; and such notice or copy, summons, order, or other proceeding shall be considered as served at the time the same ought to be delivered in the due course of delivery by the post office, and notwithstanding the same may be returned by the post office." See Buckley's Companies Practice (3rd ed.), 492.

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had been made a contributory for £390, were sent. They were all returned undelivered. On those preceding the balance order the reason given is that the addressee has not been found. It is plain that the defendant was often at 36, Fanasvadi, where his brother had a printing press. The summons in this case was served on him there. But this would not make it his "last known address or place of abode." In *Ex parte O'Loghlen* (1) a gentleman who attended an office in Westminster for several months in every year was described as residing there. But James, L.J., said that was "a place . . . . in which he would no more be said to reside than I can be said to reside in the rooms attached to this Court." If there were evidence that the defendant had actually used 36, Fanasvadi, as an address for receiving letters, that might possibly be sufficient. It would then be known as his address, at least as an address; but there is **[229]** no such evidence going even so far as to show previous enquiry made at the place. Mr. Stead speaks merely upon information which was hearsay gathered by some person unknown, and for which no one is responsible. Instead of being the known address of the defendant, 36, Fanasvadi was merely his conjectured address, and the conjecture seems to have been wrong.

The last actually known address of the defendant seems to have been Lobarchall. A letter or notice sent to him there would have been sufficient as between him and the company while in its normal state. Mr. Russell pointed out a rule of the company by which, as he thought, no service of notice was necessary at all on a member residing without the jurisdiction of the Court of Chancery, and hence he would have had me draw the inference that the mode of service could not be a material question relating, as it did, to a work of mere supererogation. But the address of a member of a company, though sufficiently ascertained by registration for the purposes of communication from the company, as under No. 35 of the model rules appended to the Indian Companies Act X of 1866, is not, therefore, ascertained for a service of legal proceedings. The convention was not entered into in contemplation of such proceedings. They are meant to subject the person affected to compulsion, and, as said in *Ex parte Chatteris* (2), the usual care must be exercised to find out, at least, the last known place of abode of the alleged contributory, and to effect the substituted service there. It would, indeed, be an absurd rule if putting a notice into the pigeon-hole of an office in London had to be treated as actual service of a summons on a native resident of Bombay. When, therefore, it is sought to make a man responsible as a contributory, neither the rule in the memorandum of association nor the register of shareholders enables the liquidator to escape from the necessity of exerting himself to find out the real address of a person on whom he proposes to bring the coercion of the Courts to bear. Such coercion can be exercised only under special safeguards, which are as necessary in the case of one charged as a contributory as in the case of any other alleged debtor. In England there are advertisements which bring pro-**[230]** ceedings in a winding-up to the knowledge of every one interested, and there are people who can be made responsible for misinformation as to an address; but the case is different in both respects as to a contributory in India to an English company. He does not habitually read English newspapers, nor does any one in England know his address except by hearsay.

(1) 6 Ch. App. at p. 406.
(2) L. R. Ch. App. 227. The case of *De Beauvain*, 39 L J. Ch. agrees with this.

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The company in this case being an English one, subject to the English statutes, I thought it probable that before placing on the list of contributories the name of any one residing out of their local jurisdiction, the Courts in England would require proof of real service. If they did require this, and after investigation determined that a particular person had been duly served and proved to be a contributory, it might be very doubtful whether a British Court anywhere could question their decisions. The matter would, *prima facie*, be within their jurisdiction under the statutes, and the statutes are binding so far as their intention extends everywhere within the British dominion(1). I see, however, on reference to Mr. Buckley's work (3rd ed.), p. 492, that the practice has been adopted of treating as sufficient "service of notice of an intention to make a call made through the post on a contributory out of the jurisdiction so far as to warrant the mere making of a call." The reason given is that "upon any proceedings in the foreign Court to enforce payment of the call it would be open to the contributory to raise the question of the validity of that mode of service (2). I should have thought that on principle an effectual service which may reasonably be supposed to have brought the matter home to the consciousness of the person to be charged, ought to be proved before making an order against him, as, if he should come within the English local jurisdiction, the foreign Court could not intervene to protect him against execution. In *Copin* v. *Adamson* (3) it was ruled that the local law of a company's head office may be in the fullest sense accepted by becoming a shareholder, and that, in spite of complete ignorance of what had been done, a person pronounced a contributory **[231]** by the local Court under the foreign law could be sued on the judgment in English Court. By joining the company the member chose his forum and its law. The same principle would apply, *a fortiori*, to the case of proceedings in the case of an English company under English statutes against a British subject in an English Court; but the extent of the jurisdiction is a reason, as regards foreign residents, for exactness of procedure, and the modes of substituted service provided by the rule 63 (4) under the Joint Stock Company's Act may properly be construed as applying to things to be done within the jurisdiction according to the analogy of the Bankruptcy Act (5). A notice posted to a resident in Paris during the siege could not besupposed to reach him; and it is a leading principle of the English law, always understood, except when expressly excluded, that a person proceeded against in a Court must have due notice of the proceeding(6). Failing such notice he is entitled, as indeed the case in the Weekly Reporter clearly recognizes, to protection if the judgment or order consequently obtained in his absence is made the ground of a suit in any Court governed, as this is, by English principles. Here there was not *de facto* notice, or what could be deemed equivalent to it. There was no investigation of the alleged "last known abode or address" of the defendant. It was not vouched for to the Court by any one who personally knew it. The mere fact that the defendant may at the post-office have seen the envelope, containing an extract from the balance order,

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(1) See *Per* Blackburn, J., in *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 161. *Ex parte* Blain, L. R. 12 Ch. Div. 522, (532). *Per* Cotton, J.
(2) *Re Gen International Agency Co.* 15 W. R. 973. (3) L. R. 1 Ex. D. 17.
(4) See Buckley on Companies, p. 492.
(5) See *Ex parte O'Loghlen*, L.R. 6 Ch. Ap. 411.
(6) See Story's Conflict of Laws, ss. 609, 610.

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was not a service of that order. Much less were the previous notices so served as to make the defendant subject to the final order.

For these reasons, and as the English Courts abnegate the function of inquiring into the sufficiency of notice, I am obliged to make the inquiry, and I find that the notice to the defendant and the balance order of the 5th June, 1879, were not served either as a summons in a suit or according to the order made under the Indian Joint Stock Companies Act which follows that under the English statute which I have already referred to. [232] The obligation to obey the command of the Court of Chancery has not arisen as against the defendant, and the foundation of the present suit fails. Taking the issues 2 and 3, as from the arguments they were meant to be taken, in the sense of questions as to whether the Court of Chancery had so called the defendant before it as to enable it in his absence to pronounce a definitive order against him, and had exercised this power so as to bind him in the Court of his domicile, I must find in favour of the defendant, although he was included in the order of the Court of Chancery. There are inaccuracies of expression in the issues, and I have at the last stage modified them, with the consent of counsel for the plaintiffs, so as to state more neatly the points actually in contravency. The real question was, whether the Court of Chancery, exercising as to the subject-matter an undoubted jurisdiction, had made an order without an essential preliminary condition of its binding the defendant in this case having been satisfied. The Court of Chancery had jurisdiction of the matter and could have concluded it; but in finding that the notices were not sufficient to make the balance order of the 5th June, 1879, binding on the defendant as a contributory, I exercise a function necessary to prevent injustice through the action of this Court, and one which the English Court intends to be used in the proper cases to prevent unqualified effect being given to its own apparently final orders.

I reject the claim with costs.

Attorneys for the plaintiffs—Messrs. *Tobin* and *Roughton*.
Attorney for the defendant—Mr. *Shamrao Pandurang*.

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ORIGINAL CIVIL.

Before Mr. Justice West.

SAKHARAM KRISHNAJI AND ANOTHER, (*Plaintiffs*) *v.* MADAN KRISHNAJI AND THREE OTHERS, (*Defendants*).*

[17th, 19th, 21st, 22nd and 24th March, 1881.]

Evidence—Registration Act III of 1877, *ss.* 17, 49, *Clauses* (*b*) *&* (*c*)—*Unregistered document—Document to contradict witness—Meaning of word "declare" in s.* 17 *of Act III of* 1877—*Acknowledgment, necessity for registration of.*

S and R sued their brothers M and V in 1880 for partition of the family property. The defendants pleaded that the property had been partitioned [233] in 1870, and that the various members of the family had been ever since in possession and enjoyment of their respective shares. At the hearing a document was produced by the defendant M, dated the 13th January 1877, which was proved to have been signed by his three brothers, S, R and V, on the occasion of M's effecting a mortgage of part of the property. This document contained the following words:—

"Our eldest brother M has built houses and is building new houses on property appertaining to his share . . . To the same we three persons and our heirs and representatives have no interest of any kind whatever. If we or they should

* Suit No. 418 of 1880.

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prefer any claim, then the same is to be null. This release paper we have duly passed in writing jointly and severally and in sound mind." This document had not been registered, and was, therefore, inadmissible as evidence of the alleged partition. In cross-examination of the plaintiff R, he was interrogated as to the circumstances under which the mortgage was made by M on the 13th January, 1877. He said: "I was present when the mortgage was made, but I was ill in bed. . . This was on the 13th January, 1877. . . I did not say on that day that I had no claim to the property." He was then shown the above document, and admitted his signature. The document was then tendered in evidence, not as a release, but to contradict the witness.

Held, that the document was admissible for that purpose, as it was not a document which itself declared a right in immoveable property in the sense intended by s. 17 of the Registration Act III of 1877. It was an acknowledgment that there had, in time past, been a partition between the brothers who signed it and the defendant M, but it was not itself the instrument of partition.

That an acknowledgment of a partition is distinct from the instrument of partition, is to be gathered from cl. (*c*) of s. 17 of the Registration Act III of 1877. Had the terms of cl. (*b*) of that section been satisfied by a mere acknowledgment, cl. (*c*) would have been superfluous. Its operation is to require an acknowledgment in the form of a receipt to be registered, but not an acknowledgment in any other shape as distinguished from the instrument of the transaction.

The word "declare" in s. 17 of the Registration Act III of 1877 is to be taken in the same sense as the words "create, assign, &c.," used in the same section *viz.*, as implying a definite change of legal relation to the property by an expression of will embodied in the document referred to. It implies a declaration of will, not a mere statement of a fact, and thus a deed of partition which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not "declare" a right within the meaning of the section. It is not the expression or declaration of will by which the right is constituted.

Quære, whether, if the above document were itself a release operating or intended to operate as a declared volition constituting or severing ownership, it could be received even for the purpose of contradicting a witness who had denied that he had previously made a statement inconsistent with his evidence.

[R., 21 B. 704 (707); 27 B. 452 (464); 9 Bom. L.R. 254 (257); 5 C.P.L.R. 102; 13 Ind. Cas. 500 (502); L.B.R. (1893—1900), 178; 48 P.R. 1905 = 33 P.L.R. 1905 = 51 P.W.R. 1905; **D.**, 20 B. 553 (557); 24 B. 615 (618); 2 Bom.L.R. 800; L.B.R. (1893—1900), 34; P.L.R. 1900, 459.]

SUIT for partition.

[234] The plaintiffs (Sakharam and Ramchandra), who were the sons of Krishnaji Raghunath, sued their half-brothers (defendants Nos. 1 and 2) for partition of the family property.

Defendant No. 3 was the mother of the plaintiffs, and was friendly to their claim. Defendant No. 4 (Hormusji Ardesir Santuk) was a mortgagee of a large portion of the property which had been mortgaged to him in 1880 by defendant No. 1.

Latham and *Telang*, appeared for plaintiffs.

Lang and *Jardine*, appeared for defendant No. 1.

Farran and *Kirkpatrick*, for the mortgagee.

The other parties did not appear.

Defendants Nos. 1 and 2 resisted the plaintiffs' claim, and alleged that the property had been partitioned in 1870, during Krishnaji Raghunath's lifetime, among his four sons, who had ever since been in separate possession and enjoyment of the portions allotted to them. In proof of the partition, evidence was given at the hearing, on behalf of the defendants, that each of the brothers had dealt independently with portions of the property. It was proved that, in 1877, Madan Krishnaji (defendant

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No. 1) had mortgaged a certain part of the land for his own purposes, and that on the occasion of this mortgage a document, in the following terms, had been signed by the other three brothers :—

"This release paper is passed in writing on Saturday, the lunar date the 14th of Powsha Vadya, in the year of Shahlivan 1798, the name of the cyclical year being Dhatra, and the English date the 13th day of the month of January in the year 1877,—to Rajeshri Madan Krishnaji, residing at New Mazagon, by Vithoba Krishnaji, Sakharam Krishnaji and Ramchandra Krishnaji, residing at the place aforesaid. The cause of this release paper being passed in writing is as follows :—Our eldest brother Rajeshri Radan Krishnaji, has built houses, and is building new houses on the immoveable property appertaining to his share. Their numbers are 85, 84, 83, 81, 86. These houses have been built by him with his own property (money). To the same we three persons and our heirs and representatives have no interest of any kind whatever. If we (or they) should prefer any claim, then the same **[235]** is to be null. This release paper we have duly passed in writing jointly and severally and in sound mind.

Vithoba Krishnaji,
Sakharam Krishnaji,
Ramchandra Krishnaji."

This document had never been registered, and was consequently inadmissible in evidence as a release. In cross-examination, however, the plaintiff Ramchandra was interrogated as to the circumstances under which the mortgage was made by his brother Madan in 1877. He said: "I was present when the mortgage was made, but I was ill in bed. . This was on the 13th January, 1877. . . I did not say on that day that I had no claim to the property."

He was then shown the above document, and admitted his signature. Thereupon counsel for the defendant tendered the document in evidence, not as a release, but to contradict the witness, and it was admitted.

Subsequently, in giving judgment,

JUDGMENT.

WEST, J.—[With reference to the admission of the above document, said :—] There was a former mortgage by Madan in 1877—. To what property that extended, is not shown ; but a paper was on that occasion signed by which Ramchandra's present statement that he never admitted a partition having been made, is flatly contradicted. The testimony as to the signing of this paper is, like the rest, of an unsatisfactory character. Ramchandra says truly that he was ill, and suggests that pressure was put upon him when he hardly knew what he was about. Ananta and Laldas, if they could be quite relied on, refute this ; but they are inconsistent with each other, and Ananta contradicts a previous statement of his own. This much, however, is certain, that Ramchandra signed the paper ; that it could be read in a couple of minutes ; that he thought or knew that it was connected with important business. He says that, in fact, he thought he was becoming a surety. It was very unlikely he should sign the document without reading it ; and, as it admits a fair partition, it makes his present denial almost worthless.

[236] An objection was taken to the admission of the document as being a declaration of an interest in immoveable property of value of Rs. 7,000, and unregistered. The law in force in 1877, when it was executed, was Act III of 1877, and if this document were itself a release,

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operating or intended to operate as a declared volition constituting or severing ownership, I should doubt whether it could be received even for the purpose of the contradiction of a witness that he had previously made a statement inconsistent with his deposition. What s. 49 says, however, is that no instrument required by s. 17 to be registered shall, if unregistered, be received as evidence of a transaction affecting such property. If tendered as evidence of an admission that such a transaction once occurred, it would not seem to be within the prohibition strictly construed; but still, as directly evidencing the transaction, it ought not, apparently, to be got in by the simple device of asking a question about the same matter. It would be practically impossible to sever its use as a contradiction from its use as direct testimony of the transaction recorded in it. Here, however, the document is not itself one which declares a right in immoveable property, in the sense probably intended by s. 17. There "declare" is placed along with "create", "assign", "limit", or "extinguish" a "right, title or interest," and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word "declare." It implies a declaration of will, not a mere statement of a fact, and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not "declare" a right within the meaning of the section. It does in one sense "declare" a right; that is, the existence of the right is directly or indirectly stated by the writing, but it is not the expression or declaration of will by which the right is constituted. Unless such a distinction as this were accepted, all correspondence would be excluded from which an admission might be gathered of a right or interest the instrument of which, if there was one, [237] would need to be registered. In the present case the paper is an acknowledgment that there has, in time past, been a partition between the brothers who signed it and the present defendant Madan. It is not in itself the instrument of partition; and that an acknowledgment of a partition is distinct from the instrument of partition, is to be gathered from s. 17, cl. (*c*) of the Act. Had the terms of cl. (*b*) been satisfied by a mere acknowledgment, cl. (*c*) would have been superfluous; its operation is to require an acknowledgment in the form of a receipt to be registered, but not an acknowledgment in any other shape as distinguished from the instrument of the transaction. Apart, therefore, from the document being applied only to the particular use of contradicting Ramchandra's assertion that he never admitted a partition, I think it is admissible, not as declaring his will and a right arising therefrom, but as admitting that there had formerly been such a transaction, and as such capable of contradiction which the instrument itself would not be.

Without resorting to this document, however, I should still be of opinion that Ramchandra's conduct had shown that he regarded himself as separated in interest from Madan. [His Lordship then proceeded to examine the evidence, and passed a decree for the defendants.]

Attorney for the plaintiffs.—Mr. *Shamrao Pandurang.*

Attorneys for defendant No. 1.—Messrs. *Balcrishna and Bhagwandas.*

Attorneys for Hormusji Ardesir Santuk.—Messrs.—*Ardesir and Hormusji.*

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[238] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

GULAM JAFAR (*Original Plaintiff*), *Appellant v.* MASLUDIN AND OTHERS (*Original Defendants*), *Respondents.**

MASULDIN AND OTHERS (*Original Defendants*), *Appellants v.* GULAM JAFAR (*Original Plaintiff*), *Respondent.*†

[30th August, 1880.]

Mahomedan law—Gift—Possession—Hanifia Code—Imamia Code.

A Mahomedan bequeathed his property to his two nephews, Gulam Rasul, and Gulam Ali, as joint tenants. Gulam Ali died, leaving a widow and a daughter, who continued to be joint tenants with Gulam Rasul; but the latter continued in exclusive possession of the property, subject to any claim which they might establish to a share in or a charge upon it. Gulam Rasul, by a written instrument, made a gift of that property to his younger son, the father of the defendants, disinheriting his elder son, the plaintiff.

Held that the gift was valid, and that the doctrine of the Hanifia, though not of the Imamia Code, that the gift of a share in undivided property, which admits of partition is certainly invalid, or, at least, forbidden, has no application to the gift of property so circumstanced.

THESE were cross appeals against the decision of Rao Bahadur Mukundrai Manirai, Subordinate Judge (First Class) of Ahmedabad.

The facts of the case fully appear from the judgment of the High Court.

Jefferson, Bhaishankar and *Dinshah*, for the original plaintiff.

Nanabhai Haridas, Government Pleader, for the original defendants.

JUDGMENT.

M. MELVILL, J.—The suit, out of which these appeals arise, was brought by the plaintiff, *in forma pauperis*, to recover from his brother, Gulam Mohidin, one-half of the estate which had descended from their father, Gulam Rasul. The property was alleged to consist of the three villages of Charal, Hirapur, and Rasulpur, a number of houses and shops, and personal property of divers descriptions.

The defence was that the plaintiff had been disinherited by his father, Gulam Rasul, and that by virtue of two deeds, one of sale and the other of gift, executed by Gulam Rasul on the 23rd and [239] 25th August, 1862, the defendant Gulam Mohidin was entitled to the whole of his father's property, and had been since the date of the said deeds in possession of the same.

The Subordinate Judge disallowed the claim, except in respect of an house, in which he awarded a half share to the plaintiffs, on the ground that, although the house was included in the deed of gift, Gulam Rasul had never parted with the possession of it, and, consequently, the gift was, to that extent, invalid under Mahomedan law. The deed of sale the Subordinate Judge found to be inoperative, inasmuch as no consideration had passed; but the deed of gift subsequently executed was, in the opinion of the Subordinate Judge, sufficient to pass the whole property of Gulam Rasul, with the exception of the house already mentioned.

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* Appeal No. 13 of 1880.

† Appeal No. 16 of 1880.

Both parties have appealed against the Subordinate Judge's decision, —the plaintiff, on account of the rejection of the greater portion of his claim, and the sons of Gulam Mohidin, in regard to the award of a half share in one house to the plaintiff. The hearing of the appeals and examination of the evidence has occupied the Court for several days.

A great portion of the argument on behalf of the appellant was employed with the object of showing that the gift made by Gulam Rasul to his son, Gulam Mohidin was null and void, because it was a gift of *musha*, or a share in joint and undivided property. It was contended that the whole, or a greater part, of the property in dispute was bequeathed by Amrula to his nephews, Gulam Rasul and Gulam Ali, as joint tenants; that the tenancy was not severed at the date of Gulam Ali's death, but that, in effect, it continued between Gulam Rasul and the widow and daughter of Gulam Ali down to the date of the gift, which it was argued, was consequently invalid, as having been made without the consent of Gulam Ali's said heirs. According to the doctrines of the Hanifia, though not of the Imamia Code the gift of a share in undivided property, which admits of partition is certainly invalid, or, at least, forbidden. But we fail to see how the doctrine can be applied in the present case; for it is certain that at the time of the gift, Gulam Ali's widow and daughter were not in possession jointly with Gulam Rasul of the property which **[240]** was the subject of the gift. Gulam Rasul had always admitted that they were entitled by inheritance to some portion of Gulam Ali's share in the estate; and in 1850 he had made an arrangement for handing over to them certain houses, which he considered to represent their share in the estate. They were put in possession of these houses; and though they were not satisfied whith this arrangement, and subsequently brought actions, and obtained decrees for an annuity to be charged upon the estate, it is certain from their plaints in those suits that from the year 1854 they had been entirely excluded from all possession of the estate which formed the subject of the gift to Gulam Mohidin. Gulam Rasul, therefore, was, at the date of the gift, in exclusive possession of this estate, subject to any claim which Gulam Ali's heirs might establish to, a share in, or a charge upon, it. It appears to us that there is nothing in Mahomedan Law to invalidate the gift of property so circumstanced. In Baillie's Digest of Mahomedan Law, Hanifia, page 517, it is stated that the confusion that invalidates a gift is one that is original, not supervenient; as, for instance when one has given the whole of a thing, and subsequently revokes a half or other undivided share of it, or a right is established to a half or other undivided share of it, the gift is not invalidated as to the remainder. The doctrine of *musha* is discussed by the Judicial Committee in *Ameeroonnissa Khatoon* v. *Abadoonissa Khatoon* (1). Two reasons are given for the rule: first, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, that the gift of an undivided share would throw a burden on the donor he had not engaged for, *viz.*, to make a division. Neither of these reasons has any operation in the present case.

Even if we were of opinion that the legal objection of indefiniteness was applicable, it would still be open to the defendants to rely on a title created by length of possession; and if it appeared that they and their father had held exclusive possession since the date of the gift in 1862, we

(1) 15 B. L. R. 67.

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do not see how it would be open to Gulam Rasul, or to any one claiming under him, to dispossess the [241] defendants after twelve years from that date. The real and only question, therefore, as regards the gift, is whether there was delivery of seisin to the donee; and it is not necessary for us to come to any conclusion on the question whether the property, or any part of it, was held by Gulam Rasul and Gulam Ali in joint tenancy.

The defendant, as we have said, relied upon two deeds—one (Ex. 40) being a deed of sale, the other (Ex. 41) a deed of gift. The former purported to convey to Gulam Mohidin, in consideration of a sum of Rs. 35,000, the village of Charal, six houses, and four shops. The latter bestows upon Gulam Mohidin the village of Hirapur and Rasulpur, and all the moveable and immoveable property of Gulam Rasul.

We fully concur in the opinion of the Subordinate Judge that no consideration passed in respect of Ex. No. 40, and that the sale, as a sale, was a pure fiction. But we do not agree with him in thinking that the property, of which Ex. No. 40 purported to be a conveyance, can be held to have been transferred, notwithstanding the defect in the sale, by virtue of the subsequent gift of "all the moveable and immoveable property" of Gulam Rasul. It seems clear that the deed of gift was not intended to supersede the deed of sale, or to take any effect upon the property included in the latter. Both deeds, though executed on different dates, were attested at the same time, and were registered together, nearly two months after their execution. The specification of property contained in them also indicates that they were intended to take effect together; and subsequent declarations, both of Gulam Rasul and Gulam Mohidin, show that they were always treated by them as being both operative. The property mentioned in Ex. No. 40 cannot, therefore be affected by the general term used in Ex. No. 41, which must be understood as meaning only such moveable and immoveable property as had not already been disposed of by Gulam Rasul. It follows that, if it had been necessary for the defendant to establish the validity of Ex. No. 40 as a deed of sale, he would, to that extent, have failed in his defence, and the plaintiff would be entitled to share in the property specified in that document. It was however sufficient for the defendant to prove that there had been a [242] *bona fide* transfer of that property, though not for a consideration, from Gulam Rasul to himself, and that ever since the date of such transfer he had been in possession of the property. For, if he succeeded in establishing this, then, inasmuch as such transfer took place in 1862, and the present suit was not brought till 1876, proof of such possession would constitute sufficient evidence of title.

The only question, therefore, which has to be decided, as regards the whole of the property, is whether there was a *bona fide* intention on the part of Gulam Rasul to divest himself *in præsenti* of the property, and whether there was such a delivery of possession as will satisfy the requirements of Mahomedan law. The burden of proof on this issue lay upon the defendant: for, inasmuch as the transactions in question were opposed to the policy of Mahomedan law, it is incumbent upon the party, who sets them up, to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been strictly complied with: *Khajooroonissa* v. *Rowshan Jekan* (1).

After a careful consideration of the evidence on the record, and of some other papers in the records of other suits to which we have thought

(1) 2 C. 184.

it desirable to refer, we have come to the conclusion that the defendant has established by sufficient proof that there was a *bona fide* transfer to him, and delivery of possession, of the greater part of Gulam Rasul's estate, and that he has been in possession as owner since 1862. The Subordinate Judge has in his judgment reviewed the evidence bearing upon this point, and it is not necessary for us to repeat what he has said, nor to add to it more than a few general observations. It is evident that Gulam Rasul had been for years actuated by an earnest desire to disinherit the plaintiff, and that he was determined to do every thing in his power to effect that object. For some years previously to the transactions of 1862, he had associated the defendant Gulam Mohidin with himself in the management of his estate and the conveyance of the villages of Hirapur and Rasulpur was taken in Gulam Mohidin's name as well as his own. This circumstance by itself would not in this country, as in England, raise a **[243]** presumption of an advancement in favour of the son (1); but taken in connection with the other circumstances in the case, it tends to show what was Gulam Rasul's intention. Immediately upon the execution of the deeds of sale and gift, the management of the estate was carried on in the name of Gulam Mohidin alone. All accounts in the joint name of Gulam Rasul and Gulam Mohidin were closed, and fresh accounts opened in the name of Gulam Mohidin.

[His Lordship proceeded to comment upon the evidence, and then continued:—]

On a careful consideration of the whole case, we have come to the conclusion that the requirements of the Mahomedan law regarding gifts were fully complied with in regard to all the property specified in the deed of gift, Ex. No. 41, with the exception of a small amount of personal property; and that although Ex. No. 40 cannot operate as a sale, yet that, with the exception of the second house mentioned in the plaint, the defendant Gulam Mohidin had, at the date of the institution of the present suit, been in possession, as owner, for more than twelve years, of all the property specified in that deed, and that, consequently, he had acquired a good title to the same.

The house to which we have referred, was admittedly in Gulam Rasul's possession down to the date of his death. The evidence that he gave symbolical possession of this house to Gulam Mohidin by delivery of the key, is very weak; and there is no evidence that Gulam Rasul ever vacated the house for a single hour. We think, therefore, that the Subordinate Judge was right in considering that, in respect of this house, there was no such delivery of seisin as the Mahomedan law requires, and that the plaintiff is entitled to a share by inheritance in this house. There is nothing to show that there were any debts of Gulam Rasul for which the plaintiff can be made liable in respect of this share.

There can be no doubt that, besides the house already mentioned, Gulam Rasul must have retained a certain amount of furniture and domestic utensils. From the evidence of witness **[244]** No. 144 we may perhaps fairly fix the value of such articles at Rs. 480, and allow to the plaintiff his share in this amount. There is also a sum of Rs. 1,031-13-3, awarded as costs to Gulam Rasul in suit No. 141 of 1868, which has been already referred to. This sum must be considered as having been recovered for Gulam Rasul's estates, and the plaintiff is entitled to share in it as one of Gulam Rasul's heirs.

(1) *Gopeekrist* v. *Gungapersad*, 6 M. I. A. 53.
Moulvi Syed Azhar Ali v. *Bibi Altaf Fatima*, 13 M. I. A. 232=4 B. L. R. 1.

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It is admitted by the plaintiff's pleader that the Subordinate Judge was in error in holding that the plaintiff, as heir of Gulam Rasul, would be entitled to claim one-half of his property. As Gulam Rasul left a widow and three sons, the plaintiff, who now claims as heir of Gulam Rasul only, would be entitled to one-third of seven-eighths, or to seven twenty-fourths of any property liable to division.

We, accordingly, amend the Subordinate Judge's decree, and award to the plaintiff seven twenty-fourths of the second house mentioned in the plaint; and the sum of Rs. 140, as his share of Gulam Rasul's moveable property. We also award to him Rs. 301 out of the costs in suit No. 141 of 1868, which are now in deposit in the Subordinate Judge's Court.

The parties will bear their own costs of these appeals; but the plaintiff must pay the Court fees which would have been paid by him if he had not been permitted to appeal as a pauper.

It would be well if the parties were to agree to the payment by the defendant's sons to the plaintiff of such sum of money as is equivalent to the share in the house awarded to the latter. Should they fail to do so, and should it be found impracticable to partition the said house, without destroying its convenience as a dwelling-house, the house should be sold, and seven twenty-fourths of the purchase-money, after deducting the costs of the sale, should be paid to the plaintiff.

Decree amended.

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5 B. 245.

[245] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

ANANDRAV CHIMUJI AVATI, (*Plaintiff*) *v.* THAKARCHAND, (*Defendant*).* [7th September, 1880.]

The Civil Procedure Code (Act X of 1877), s. 230—Decree—Application for execution—Limitation.

On the 1st June 1880, several decree-holders applied to the Subordinate Civil Court of Parner for execution of their decrees. They had taken out execution several times previously, the date of their last preceding applications being 1st June 1877. The Subordinate Judge was of opinion that the applications were barred under the last clause of s. 230 of the Civil Procedure Code, Act X of 1877. On his referring the cases to the High Court.

Held that the applications were not barred, inasmuch as the previous applications for execution had not been made under s. 230 of Act X of 1877, that Act not being then in force.

[F., 9 C. L. R. 297 (299).]

ON the 1st June, 1880, the decree-holders in this and nine other cases applied to the Court of the Second Class Subordinate Judge of Parner, in the district of Ahmednagar, for execution of their decrees. They had taken out execution several times previously, the date of their last preceding applications being the 1st June, 1877. The Subordinate Judge (Rao Saheb N. G. Phadke) was of opinion that the present applications were barred under the last clause of s. 230 of the Civil Procedure Code, Act X of 1877. He, however, referred the cases to the High Court under s. 617 of that Act.

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* Civil Reference, No. 7 of 1880.

There was no appearance of parties in the High Court.
The following is the judgment of the Court :—

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5 B. 245.

JUDGMENT.

WESTROPP, C. J.—The Subordinate Judge states that the most recent application for execution, in the suits which he enumerates, was made on the 1st of June 1877.

It follows thence that no application, with the exception of the application, the subject of this reference, has as yet been made for execution under Act X of 1877, as that Act did not come into force until the 1st of October 1877.

The third passage in s. 230 of the same Act runs thus :—

" Where an application to execute a decree for the payment of [246] money, or delivery of other property, has been made *under this section*, and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years from any of the following dates (namely), &c., &c. " Section 230 is not by any means easy of construction, but we are of opinion that the above-quoted passage governs the whole of what follows in that section, and therefore that, inasmuch as no previous application for execution has been made, under that section, in the suits mentioned by the Subordinate Judge, neither the twelve-years' bar, nor the three-years' bar, as laid down in that section, is applicable to the present application for execution in those suits, and hence that application is not barred by s. 230.

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5 B. 246=5 Ind. Jur. 534.

APPELLATE CIVIL.

Before Sir Michael, Roberts Westropp, Kt., Chief Justice and Mr. Justice Nanabhai Haridas.

GOVIND SHANBHOG, DECEASED, BY HIS SON AND HEIR, VANKATESH (*Original plaintiff*), *Appellant v.* APPAYA (*Original defendant*), *Respondent.** [29th November, 1880.]

Limitation Act (IX of 1871), *sch. II, art.* 167—*Decree—Application to enforce decree.*

G obtained a decree against the defendant on the 29th November 1867, and applied for execution of it on the 23rd July 1870. After G's death, his son made an application on the 10th March 1871 praying for substitution of his name in the place of his deceased father, and that the money due under the decree should be recovered and paid to him as heir of the original plaintiff. On the 3rd January 1874, and several times subsequently, the son applied for execution of the decree, his last application being in 1878. Both the lower Courts held that the application of the 10th March 1871 was not an application " to enforce or keep in force the decree" ; that the application of the 3rd January 1874 was therefore barred by limitation, having been made more than three years after the first application of the 23rd July, 1870, and that, consequently the subsequent applications were barred. On appeal to the High Court.

Held that the application of the 10th March 1871 was an application "to enforce the decree", and fell within art. 167 of sch. II of Act IX of 1871.

The High Court accordingly reversed the orders of the Courts below and directed that the decree should be executed, as prayed by the application of the 3rd January 1874.

[R., 19 B. 261 (268).]

[247] THIS was a second appeal from the decision of A. W. Walker, Acting Judge of the District Court of Kanara, in miscellaneous appeal

* Second Appeal No. 356 of 1880.

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5 B. 246=
5 Ind. Jur.
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No. 7 of 1878, affirming the order of the Second Class Subordinate Judge of Kumta.

The following judgment of the District Judge, in appeal, fully states the facts of the case and his reasons :—

"This is an appeal against an order passed by the Second Class Subordinate Judge of Kumta on the 5th day of September, 1878.

"The original decree-holder made an application for execution of his decree on the 23rd July, 1870. He died, and his son made an application that his name should be substituted on the 10th March, 1871. His name was entered, and the property was sold, on the original application, in April, 1871. The next application for execution was made on the 3rd January, 1874—that is more than three years after the first application. The question for determination is whether the second application was time-barred or not. After the second application there were other applications within three years of each other; but, as held in *Gopal Govind* v. *Ganeshdas Tejmal* (1), if one of the previous applications was time-barred, the subsequent ones would not avail.

"The Limitation Act in force, when the second application was made, was Act IX of 1871. Under sch II, cl. 167, the application was required to be made within three years from 'the date of applying to the Court to enforce or keep in force the decree or order.' The application of the 10th March, 1871, for the substitution of the appellant's name, was not an application for the enforcing or keeping in force of the decree. It was presented by a pleader, and merely states that the plaintiff was dead, and that the money realized should be paid to his son (present appellant). It is urged that the execution proceedings then going on served to bar limitation; but this is not the case [*Stowell* v. *Billings* (2), *Jibhaimahipati* v. *Parbhu Bapu* (3) and other cases cited by the lower Court].

"The first case relied on by the lower Court [*Sheo Pertab Lal* v. *Issur Roy* (4)] does not, however, apply. Here the appellant's **[248]** name was entered, and the inference from that case, if any, would be in appellant's favour.

"Under the new Limitation Act (XV of 1877) probably the application of March, 1871, would have sufficed; but it must be held that under the former law (Act IX of 1871) the application did not give a fresh starting point.

"I confirm the decision of the lower Court with costs."

Venkatesh filed a second appeal in the High Court on the 10th September, 1880.

Ghanasham Nilkanth, for the appellant.—The lower Courts have misconstrued the nature of the application of the 10th March, 1871. The present case is governed by *Husain Baksh* v. *Madge* (5), *Behari Lal* v. *Salik Ram* (6), *Chunder Coomar Roy* v. *Bhogobutty Prosonna Roy* (7), *Unnoda Persad Roy* v. *Sheik Koorpan Alli* (8), *Jamnadas* v. *Lalitram*(9), *Prabhacararow* v. *Potannah* (10).

The respondent was not represented.

The following is the judgment of the Court :—

JUDGMENT.

WESTROPP, C.J.—The application of the 10th March, 1871, distinctly asks that money should be levied, under the decree, from the defendant, and

(1) 8 B.H.C.R. A. C. J. 97. (2) 1 A. 350. (3) 1 B. 59.
(4) 5 W.R. Mis. App. 23. (5) 1 A. 525. (6) *Idem* 675.
(7) 3 C. 235. (8) *Idem* 518. (9) 2 B. 294. (10) 2 M. 1.

paid to Venkatesh Shanbhog as son and heir of the original plaintiff, whose death is stated. It, therefore, seems to this Court to be clearly an application "to enforce" the decree, and to fall within art. 167 of sch. II of Act IX of 1871, and accordingly the orders of the Acting Judge of Kanara and of the Subordinate Judge of Kumta must be reversed with costs, and the decree be executed as prayed by the *darkhast* of the 3rd January, 1874.

Orders reversed.

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5 B. 249.

[249] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Justice, and Mr. Justice M. Melvill.

GHANSHAMLAL (*Applicant*) *v.* BHANSALI (*Opponent*).*

[27th January, 1881.]

Code of Civil Procedure (Act X of 1877), s. 266— Jurisdiction — Decree—Execution—Attachment of debts arising out of claims over which the Courts have no jurisdiction —Debt—Subject of the Gaikwar—Subject of a Kathiawar State—Rajkot.

Debts due to a British subject by the Gaikwar Government or by a subject of that Government or of a state in the Province of Kathiawar, are not debts which under s. 266 of the Code of Civil Procedure (Act X of 1877), are liable to attachment in execution of a decree.

Claims over which no Court in British India has jurisdiction are not debts liable to be attached under s. 266 of the Civil Procedure Code, Act X of 1877.

The mere circumstances that the garnishee is at the time of the application for attachment beyond the limits of British India, would not of itself render the debts not liable to be attached.

[R., 26 M. 423 (425, 426); D., 36 M. 1 (2)=10 Ind. Cas. 665=22 M.L.J. 149=10 M. L.T. 570=(1911) 1 M.W.N. 249.]

THIS was an appeal, under s. 588 of the Code of Civil Procedure (X of 1877), against an order of Rao Bahadur Mangeshrav Balvant, Subordinate Judge (First Class) at Surat.

The father of the applicant on 23rd September, 1863, obtained against the defendant Bhansali a decree for the execution of which he made several applications. The present was the last of such applications, and was dated 22nd March, 1880. It stated that the balance due on the decree was Rs. 1,68,968-10-0, and prayed for the attachment of the following two claims:—

"1st.—The amount of about Rs. 1,68,000, with interest thereon up to this date, due to the Baroda firm of Bhansali Manekchand Rupchand from the Gaikwar Sarkar on account of the karkhana (establishment) under the control of Jamadar Ganpatrav Talekar. The right to recover the said amount of Rs. 1,68,000.

"2nd.—There is an amount of about Rs. 84,000 due to the Baroda firm of Bhansali Manekchand Rupchand from Dungarshi Devshi, inhabitant of Rajkot. The right to recover the same as well as the right to recover the interest thereon to this date."

The Subordinate Judge rejected this application on the ground that "the claims which the petitioner wishes to have attached are [250] beyond British India; and, looking to the provisions of the law, the Court cannot legally exercise jurisdiction over them." The petitioner appealed to the High Court.

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* Appeal from Order No. 21 of 1880.

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Nanabhai Haridas, Government Pleader, for the petitioner.—The law as to what property is liable to attachment, is contained in s. 266 of the Code of Civil Procedure, and that section makes "debts" attachable. This term is used without any qualification or reservation as to place or person. The English Common Law Procedure Act, 17 and 18 Vic., cap. 125, makes those debts only attachable as are owing by a person "within the jurisdiction." It is improbable that this restriction was overlooked by the Indian Legislature, and yet it does not find place in Act VIII of 1859 or X of 1877. It seems, therefore, that the Legislature does not intend to exempt from attachment debts which persons residing beyond British territory may owe to those residing within it. The former class of people are not necessarily beyond the reach of process of Court. Section 89 of the Code of Civil Procedure enacts how they can be served. The present application is one which satisfies all the conditions for its admission which are provided in s. 245, and, that being so, the Court was bound to "order execution of the decree according to the nature of the application." The provisions for carrying out the execution do not expressly say what is to be done in case the property sought to be attached consists of debts owing by persons not within British territory, but the Code nowhere says such property shall not be attached. Under s. 268 of the Code the Court should have attached the debts mentioned in the application, and then to have appointed a receiver under ss. 503 and 505, and he could then have taken the necessary steps for the realization of those debts. There is no reason to believe that the Government of the Gaikwar would raise objections. The Gaikwar might assist as he did in the case of *Harrivallabhdas Kalliandas* v. *Uttamchand Manikchand* (1). A Court of Equity in England will appoint a receiver over estates in Ireland: *Langford* v. *Langford* (2). It is not at all improbable that, if a receiver be appointed, the Government of the Gaikwar of Baroda as well as of the Thakor of Rajkot may be willing to assist the receiver in the **[251]** realization of the debts. Whatever the case may be with the Gaikwar, the Courts in Kathiawar are not beyond British trrritory. As the Privy Council remarks in *Damodar Gordhan* v. *Deoram Kanji* (3) "the whole jurisdiction exercised by the Chiefs of all the seven classes is treated as conferred upon them by the British Government." (See page 147.)

There was no appearance on the other side.

JUDGMENT.

The judgment of the Court was delivered by

SARGENT, J.—This is an appeal from an order made *ex parte* by the First Class Subordinate Judge of Surat, rejecting an application by the plaintiff and decree-holder in suit No. 306 of 1863 for the attachment of two several debts alleged to be owing to his judgment-debtors, the defendants in the above suit. These debts are described in the application for attachment as respectively due to the defendants' Baroda firm of Bhansali Manekchand Rupchand by the Gaikwar Sarkar on account of the karkhana under the control of Jamadar Ganpatrav Talekar and by one Dungarshi Davshi, inhabitant of Rajkot. The Subordinate Judge refused the application on the ground that both the claims were beyond the limits of British India. What the Subordinate Judge meant by the claim being beyond such limits, is not so clear as might be wished. The mere circumstance that the garnishee is, at the time of the application, beyond

(1) 7 B. H. C. R. O. C. J. 172.
(2) 5 L. J. Ch. (N. S.) 60.
(3) 3 I A. 102=1 B. 367.

those limits, would not of itself, we think, render the debts not liable to be attached. In the English Common Law Procedure Act, 17 and 18 Vict. cap. 125, by which debts were for the first time made liable to attachment in execution of a decree, the debts are expressly confined to debts owing by person "within the jurisdiction." That restriction is not found either in s. 236 of Act VIII of 1859 or in s. 266 of the present Civil Procedure Code (Act X of 1877). And as s. 94 of the Act of 1877 provides for "all notices and orders required by the Code to be given to or served on any person being served in the manner provided for the service of summonses," (which would include service by post where the person resides out of British India as provided by s. 89), such notices and orders as are required to be served to effect the [252] attachment of a debt could be served in conformity with the above section when the garnishee was not within the limits of British India. But it is not improbable that the meaning of the Subordinate Judge was that no Court in British India had jurisdiction over the claims in question, and such claims at least, we cannot doubt, are not debts liable to be attached under s. 266. The ss. 268, 301 and 503 of the Civil Procedure Code, which provide the machinery for executing a decree by attachment of a debt, would in such a case be virtually an attempt to interfere in the interest of a third person in the jural relations arising out of a cause of action over which, *ex hypothesi*, no Court in British India has or even claims jurisdiction. In the absence of proof of such an extension of the usual comity of Courts of Justice by express agreement with any particular foreign State as would justify such interference, it must on general principle be inferred that such claims, at least, could not have been in the contemplation of the Legislature. With respect to the first claim sought to be attached, it is quite plain that it is one over which no Court in British India has jurisdiction, and that, too, whether it be regarded as a claim against the Gaikwar Government as it was described in the application itself, or as against the controller of the karkhana as it was described at the hearing, the entire cause of action being in that case outside the limits of British India. As regards the second claim alleged to be against an inhabitant of Rajkot, it is clearly one beyond the jurisdiction of any Court to which the Civil Procedure Code applies. It was, indeed, contended that Kathiawar was British territory on the strength of certain observations of the Privy Council in the case of *Damodar Gordhan* v. *Deoram Kanjt*(1), but whether or no the Privy Council be correct in that opinion, and it is to be remarked that, as appears from the judgment of the Privy Council, such was not the opinion of the Secretary of State in 1865, it appears that the Civil Courts in many of the states of Kathiawar, including the State of Rajkot (which is a state of the 2nd Class) are purely Native Courts entirely independent of the Courts of British India, and over which neither the Government of India nor the Government of Bombay assumes to exercise any control, except, indeed, as an act of state; and in the absence of [253] any materials for concluding that an order of a Court in British India, such as is contemplated by s. 268 of Civil Procedure Code, would be recognized by such Native Civil Courts, we cannot, we think, distinguish them from foreign Courts, for the purposes of the present question.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(1) 3 I.A. 102=1 B. 367.

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5 B. 253 =
5 Ind. Jur.
536.

5 B. 253 = 5 Ind. Jur. 536.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Birdwood.

VISHNUCHARYA (*Applicant*) *v.* RAMCHANDRA (*Opponent*).*
[8th February, 1881.]

Contract—Consideration—Agency— Revocation— Specific performance—Indian Contract Act IX of 1872, *ss.* 202, 203 *and* 205.

The defendant, by an agreement in the nature of a letter of attorney, constituted the plaintiff and his descendants the hereditary agents of the defendant, gave him authority to collect the rents of his share in an inam village, and promised to pay him an annual salary out of the rents.

Held that, as between the parties and during their lifetime, the appointment was valid and binding, whether or not any valuable consideration passed,—the mere acceptance of the office by the plaintiff being a sufficient consideration for the appointment.

But, independently of the terms of the agreement, and whether or not the agency had been created for valuable consideration, the defendant had, under the general provisions of s. 203 of the Indian Contract Act (IX of 1872), a right to revoke the authority, as the mere arrangement that the plaintiff's salary should be paid out of the rents could not be regarded as giving to the plaintiff an interest in the property, the subject-matter of the agency, within the meaning of s. 202.

If the defendant had revoked the agency improperly, the remedy lay, under ordinary circumstances, in a suit by the plaintiff for damages for breach of contract. Where, however, the plaintiff chose to sue for specific performance, and demanded arrears of salary.

Held that, without a valuable consideration for the defendant's promise, the agreement passed by him to the plaintiff would be *nudum pactum*, and the plaintiff would not be entitled to recover, except for work and services actually rendered.

THIS was an application for the exercise of the Court's extraordinary jurisdiction.

[254] On the 9th of October, 1876, the defendant Vishnucharya executed to the plaintiff Ramchandra an agreement to the following effect :—

"In the inam village of Mangle I hold a fourth share. * * * You, your sons and grandsons are to manage my share of the village, and collect the rents, generation after generation. You should take Rs. 42 annually out of the rents collected, and do the business of the village as my deputy hereditarily. I will not have the work done by any other person. If I get my work done by others, I will, without making any reduction in your pay, permanently continue to give you, generation after generation, the sum of money, now fixed in writing, from out of the whole amount of my share."

On the 25th of February, 1879, the plaintiff brought a suit against the defendant, in the Court of the Subordinate Judge of Ashta, for specific performance of his contract, and demanded two years' arrears of salary. The defendant admitted the execution of the document, but pleaded that the agreement was unilateral, and without consideration, and that, in fact, the plaintiff had done no work for him. Both the Courts below found in favour of the plaintiff, and gave him a decree for the full amount claimed with costs.

The defendant applied to the High Court.

* Extraordinary Application No. 70 of 1880.

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Ghanasham Nilkanth Nadkarni, for the applicant.—The agreement is against public policy. It binds the defendant to pay Rs. 42 to the plaintiff for all time. There was no consideration moving from the plaintiff. The plaintiff has not rendered any service to the defendant, who has in consequence revoked the authority given by him, and has had to employ another man to do the work.

Ganesh Ramchandra Kirloskar, for the opponent.—We allege consideration of Rs. 500 for the agreement passed to us; but our undertaking to collect rents for the plaintiff, is a sufficient consideration. The plaintiff's salary was to be taken by himself from the collections, and he thus acquired an interest in the agency which cannot be defeated by the defendant. The plaintiff certainly worked for the defendant for six months, if not more, and **[255]** was prevented from working further by the defendant. The defendant has agreed, for a valid and sufficient consideration, to employ the plaintiff, and no one else, and if he breaks this stipulation and employs another, he is to pay the salary all the same. The plaint itself alleges a pecuniary consideration for the defendant's promise.

JUDGMENT.

The judgment was delivered by

MELVILL, J.—The instrument on which this suit was brought, is of the nature of a letter of attorney, whereby the plaintiff and his descendants were constituted the hereditary agents of the defendant for the management of his share in an inam village. As the present dispute has arisen between the original parties to the instrument, it is unnecessary for us to consider what would be the effect of such an appointment after the death of either party. As between the parties, the appointment was valid and binding, whether or not any valuable consideration passed; for the mere acceptance of the office by the plaintiff was a sufficient consideration for the appointment.

The parties seem to be agreed that the authority has been revoked. This is not indeed so stated in the plaint, but it is alleged in the defendant's written statement, and is admitted in the plaintiff's examination. The parties appear to differ as to the date of the revocation. Their statements are not very clear and precise, but the plaintiff apparently alleges that the revocation took place after he had been performing the duties of the office for six months, while the defendant declares that he revoked the authority before the plaintiff entered on the duties of the office, and that, consequently, the plaintiff never performed any service at all.

We do not understand that the plaintiff disputes the defendant's power to revoke the authority; nor, if he did so, could his contention be maintained. The instrument itself contains a provision that the defendant shall continue to pay the plaintiff's salary, even if he gets the work done by any other person; and this implies that the defendant has a right, conditional on the payment of a penalty, to employ another agent. And, independently of the terms of the instrument, the defendant would have a right, under the general provisions of the law (Indian Contract Act, IX of **[256]** 1872, s. 203) to revoke the authority given to the plaintiff, whether or not the agency had been created for a valuable consideration. The mere arrangement that the plaintiff's salary should be paid out of the rents, cannot be regarded as giving to the plaintiff an interest in the property which formed the subject-matter of the agency; and the Legislature has not adopted to its full extent the *dictum* of Lord Eldon in *Bromley*

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v. *Holland* (1) that, where a power of attorney was granted upon a valuable consideration, the Court (of Chancery) would not permit it to be revoked.

The remedy for the improper revocation of an agency lies, under ordinary circumstances, in an action for damages for breach of contract. By s. 205 of the Contract Act, the principal is bound to make compensation to the agent, whenever there is an express or implied contract that the agency shall be continued for any period of time. This would probably always be the case when a valuable consideration had been given by the agent. An action for damages might probably have been maintained in the present case, whether a valuable consideration was given by the plaintiff or not. In such an action the plaintiff would have been bound to claim a lump sum as compensation, and it would not be competent to him to break up his damages into annual instalments, and to bring periodical actions for their recovery. As, however, the present action does not purport to be one for damages on account of the revocation of the agency, it is not necessary for us further to consider this question.

We must deal with this claim as it is put forward by the plaintiff himself in his plaint, and in his answers on examinations. In his plaint he claims his salary for two years on account of service rendered. In his examination, however, he states that he worked for six months only, and that then the defendant refused to allow him to perform any more service. He is undoubtedly entitled to recover his salary as for work and services done for the period during which such services were rendered, but on his own showing such period did not exceed six months. Whether it amounted to six months, is a matter which will have to be considered; but, at any rate, for at least eighteen **[267]** months out of the two years to which the claim relates, the plaintiff must show some other foundation for his claim than that of work and services rendered.

As it is not contended, and could not be contended, that the agency still subsists, and as the suit is not for damages, but for specific performance of the terms of the contract which relate to the payment of the plaintiff's remuneration, the only foundation for the plaintiff's claim for payment after his services ceased must be the clause of the agreement to which reference has already been made, and which is as follows: "If I get my work done by others, I will, without making any reduction in your pay, permanently continue to give you, generation after generation, the sum of money now fixed in writing from out of the whole amount of my share. This is the clause on which the Courts below have proceeded in awarding the full amount claimed, without thinking it necessary to inquire whether the plaintiff had rendered service or not. But it cannot be doubted that such an agreement to pay a perpetual annuity, whether any services were rendered by the annuitant or not, would be *nudum pactum*, unless there were a valuable consideration for the promise. The plaintiff himself seems to have felt this, for he alleges in his plaint that he paid Rs. 500 to the defendant in consideration of the execution of the Ex. No. 20. This allegation has not been inquired into by either of the Courts below; but we find it impossible to determine the rights of the parties unless the truth of the allegation be ascertained.

If the allegation were established, the plaintiff would be entitled to recover his remuneration, whether he performed service or not; and it would not then be necessary to determine the length of time for which service was rendered. But, if he fails to prove the payment of the Rs. 500,

(1) 7 Ves. 28.

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it will then have to be ascertained whether the plaintiff worked for the defendant for six months as he alleges, or for any shorter period, or not at all. The evidence offered by the defendant to prove that the plaintiff performed no service at all, waa refused by the Courts below; but, in the eventuality which we have supposed,it will become necessary to take it.

[258] We must, therefore, require the District Court, after taking, or causing to be taken, the evidence produced by the parties, to find on the following issue:—

Has the plaintiff proved that he paid Rs. 500 to the defendant in consideration of the execution by the defendant of the instrument (Ex. No. 20)?

If the above issue be found in the negative, but not otherwise, the District Court should find, after taking, or causing to be taken, the evidence on the point which was rejected, on the following issue:—

For what period did the plaintiff actually perform work and services as the defendant's agent under the Ex. No. 20?

It is, perhaps, scarcely necessary to say that the District Judge should require very strong and convincing evidence of the payment of the Rs. 500 as consideration for the creation of the agency. The Ex. No. 20 contains no indication of the payment of any consideration; and, as the instrument has been drawn up with rather more than ordinary care and formality, it is certainly remarkable that no mention should have been made of such an important circumstance, and that there should be no provision for the payment of the sum advanced in the event of the agency being revoked.

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5 B. 258.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Birdwood

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SHIVRAM HARI (*Original Plaintiff*), *Applicant v.* ARJUN AND TWO OTHERS, SONS OF MANA (*Original Defendants*), *Respondents.**

[3rd February, 1881.]

Vakil and client—Inam chithi—Vakalatnama—Act I of 1846, *s.* 17—*Nudum pactum.*

Where the acceptance of a *vakalatnama* by a pleader and the execution of an *inam chithi* (agreement) by his client, intended as remuneration for the professional services of the pleader, were contemporaneous, and the *vakalatnama* was not filed by the pleader until after the execution of the *inam chithi*.

Held that the acceptance of the *vakalatnama* and the execution of the *inam chithi* constituted one transaction, and that the agreement was not illegal under Act I of 1846, s. 7.

Ramchandra Chintaman v. *Kalu Raju* (1) distinguished.

[R., 8 B. 413; 61 P.R. 1907=33 P.L.R. 1907=45 P.W.R. 1907 (F.B.).]

[259] THIS was an application under the extraordinary jurisdiction of the High Court against the decision of E. Cordeaux, Judge of the District Court of Khandesh, affirming the decree of D. A. Dalvi, Second Class Subordinate Judge of Erandol.

The plaintiff Shivram Hari brought this suit against Arjun and his two brothers for Rs. 50, due on an agreement (*inam chithi*) executed to

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* Extraordinary Application, No. 88 of 1880.

(1) 2 B. 362.

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him by the defendants on the 12th August, 1879. The *inam chithi* stated that a certain Marwari had brought a suit (No. 624 of 1879) against the three defendants in the Subordinate Judge's Court at Erandol; that they had given the plaintiff a *vakalatnama* for conducting their defence; that they promised to pay the plaintiff Rs. 50 as *inam* if the plaintiff's claim should be rejected and the suit decided in their favour. The *vakalatnama* filed by the plaintiff on behalf of the defendants in suit No. 624 of 1879 was dated the 12 August, 1879. The Marwari's claim against the defendants in that suit was rejected. The plaintiff, therefore, sued to recover the amount of the *inam chithi*.

The defendants admitted the execution of the *inam chithi* and their liability to pay the plaintiff's claim.

The Subordinate Judge, however, dismissed the suit, holding the *inam chithi* to be *nudum pactum* on the authority of *Ramchandra Chintaman* v. *Kalu Raju* (1).

In appeal, the District Judge upheld the decision of the first Court. He observed: "The only question is whether the Subordinate Judge has rightly applied the above decision of the High Court to the present case. I find that decision does apply. The *vakalatnama* and the *inam chithi* were executed on the same day (12th August, 1879), but the latter expressly recites that the former was executed first. Consequently, the plaintiff was bound by the terms of the *vakalatnama*, and there was no fresh consideration from the plaintiff under the *inam chithi*. The case is similar to the case of *Rao Saheb V. N. Mandlik* v. *Kamaljabai* (2) in all respects, except the interval elapsing between the two documents. After hearing the pleader for the appellant, without giving notice to the respondent, I confirm the decree."

[260] The plaintiff thereupon applied to the High Court under its extraordinary jurisdiction.

Manekshah Jehangirshah, on behalf of the plaintiff, applied for a rule *nisi*—As the defendants admitted the plaintiff's claim, the Subordinate Judge ought to have made a decree inplaintiff's favour for the amount claimed, as laid down in s. 102 of the Civil Procedure Code (Act X of 1877). The Subordinate Judge was wrong in raising of his own accord an issue which was not called for by the defendants. The lower Courts were wrong in holding that there was no consideration for the *inam chithi*. The execution of the *vakalatnama* by the defendants and the acceptance of it by the plaintiff were parts of the same transaction, and the agreement was a consideration for the acceptance of the *vakalatnama*. The lower Courts have misapplied to the facts of this case the ruling of the High Court in *Ramchandra Chintaman* v. *Kalu Raju* (1). That case does not apply, because there the *inam chithi* was passed long after the acceptance of the *vakalatnama*. The *inam chithi* bears the same date as the *vakalatnama*, and the *vakalatnama* was filed in Court subsequently to the execution of the *inam chithi*. It is not illegal for a party and his pleader to settle by such private agreement the amount of remuneration to be paid by the former for the professional services of the latter, under Act I of 1846, s. 7.

The High Court (Kemball and F. D. Melvill, JJ.) granted a rule *nisi*.

Subsequently the High Court (Westropp, C. J., and F. D. Melvill, J.) directed the District Judge to report to them certain facts, which he submitted to the following effect:—That the *vakilpatra* was filed in suit

(1) 2 B. 362.

(2) 10 B. H. C. R. 26.

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No. 624 of 1879 after 10 o'clock on the 12th August, 1879; that the *inam chithi*, which bears the same date as the *vakalatnama*, was executed some hours before the filing of the latter in the said suit; that the Marwari plaintiff in that suit sued for Rs. 310, and his suit was rejected as against the defendants; that their costs, which amounted to Rs. 15-14-10, were not awarded to them; that their defence was actually conducted by the plaintiff, though another pleader was also retained in the case.

[261] The High Court (WESTROPP, C.J., and BIRDWOOD, J.) in making the rule absolute on the 8th February, 1881, gave the following judgment:—

JUDGMENT.

WESTROPP, C.J.—This case differs materially from that of *Ramchandra Chintaman* v. *Kalu Raju* (1), inasmuch as the acceptance of the *vakalatnama* by the pleader (the plaintiff in this case) and the execution of the agreement sued upon, were contemporaneous, and the *vakalatnama* was not filed by the pleader until after the execution of the agreement. The agreement, it is true, is called an *inam chithi*, but it was evidently given as the sole intended remuneration for the professional services of the pleader; and, looking at Act I of 1846, s. 7. we cannot say that such an agreement is illegal. The words "we have given you a *vakilpatra*" in the past tense occur in it, but the report of the Subordinate Judge and the evidence taken by him lead us to the conclusion already expressed that the acceptance of the *vakilpatra* (or *vakalatnama*) and the execution of the *inam chithi* were simultaneous, and constituted one transaction. Although we cannot designate the remuneration as extortionate, yet we regard it as high, when the amount sued for in the case in which the plaintiff was to act as pleader for the defendants was only Rs. 310, and we feel no disposition to encourage agreements which give to pleaders a personal interest in the litigation of their clients. We must set aside the decrees of the Courts below, and direct a new trial. But we give no costs to the plaintiff either of his original suit or of the appeal, or in this Court.

Decree set aside.

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5 B. 262.

[262] APPELLATE CRIMINAL.

Before Mr. Justice M. Melvill and Mr. Justice Nanabhai Haridas.

EMPRESS v. HUSEN.* [15th February, 1881.]

Lunatic—Imbecile—Inability to understand proceedings—The Code of Criminal Procedure (X of 1872), ss. 186 and 423.

The provisions of s. 186 of the Code of Criminal Procedure do not apply to a person who is of unsound mind; they apply to persons who are unable to understand the proceedings from deafness, or dumbness, or ignorance of the language of the country, or other similar cause. But where the inability to understand the proceedings is due to unsoundness of mind, the procedure provided in chap. XXXI of the Code must be followed.

Where a Magistrate found that an accused person convicted of theft was an imbecile, and consequently unable to understand the proceedings, but that he was not of unsound mind, the High Court held that this distinction was

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* Criminal Reference No. 2 of 1881.

(1) 2 B. 362.

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without a difference, and, under s. 297 of the Code, annulled the conviction, and, declaring the accused to be of unsound mind, directed that he should be released on sufficient security being given that he would be properly taken care of, and prevented from doing injury to himself or any other person, and for his appearance when required; and that, in default of such security being given, the case should be reported to Government.

[R., 7 B. 15 (18); Rat. Unr. Cr. Cas. 696 (697): U.B.R. (1892—1896) 38 (Cr.).]

5 B. 262.

THIS was a reference, under s. 186 of the Code of Criminal Procedure (Act X of 1872), by J. R. Middleton, Magistrate of the District of Dharwar.

The accused was tried and convicted of theft by the Magistrate (Third Class), Dharwar District, and sent to Mr. Wiltshire, Divisional Magistrate, under s. 46 of the Code of Criminal Procedure, for a more severe punishment than the trying Magistrate was competent to award. The strange demeanour of the accused induced Mr. Wiltshire to subject him to the examination of the Civil Surgeon, Dr. Bell, who deposed: "Accused is an imbecile, and I consider him incapable of making his defence. I do not think that he will ever be better than he is, and I think that he has been in the same condition for years. He is so imbecile, that I consider him incapable of knowing the nature of an act: *e.g.*, theft, or that he is doing what is either wrong, or contrary to law, when committing theft." Upon this evidence the Divisional Magistrate found that the accused could not be made to under- **[263]** stand the proceedings; but, acting under s. 186 of the Code, proceeded with the trial, and convicted the accused.

This finding was not considered sufficiently explicit by the High Court, and the Divisional Magistrate was, therefore, again directed to find specifically whether the accused was of unsound mind. The Divisional Magistrate accordingly found "that the accused is an imbecile, and, consequently, unable to understand the proceedings, but that he is not of unsound mind."

At the hearing by the High Court there was no appearance either for the accused or the Crown.

JUDGMENT.

Per Curiam.—It is impossible to understand the Magistrate's finding that the accused is an imbecile, and, consequently, unable to understand the proceedings, but that he is not of unsound mind. This is a distinction without a difference.

Section 186 of the Code of Criminal Procedure (X of 1872) is intended to provide for cases in which the accused person is deaf and dumb, or, from ignorance of the language of the country and the want of an interpreter, is unable to understand, or make himself understood. In such cases the High Court would probably order the prisoner to be detained during Her Majesty's pleasure. That was the course adopted by the Queen's Bench Division in *The Queen* v. *Berry* (1) in which the prisioner was deaf and dumb, and, consequently, unable to understand the proceedings.

But in the present case it is quite clear that if the prisoner was unable to understand the proceedings, it was from unsoundness of mind properly so called, and from no other cause. The Magistrate should, therefore, have found before trial that the prisoner was of unsound mind,

(1) L.R. 1 Q.B.D. 447.

and should have stayed further proceedings in the case. (The Code of Criminal Procedure, s. 423).

Under the provisions of s. 297 of the Code, this Court now quashes the conviction, and declares that the accused, Husen valad Bade Miya, is of unsound mind and incapable of making his defence; and the Court directs that the said Husen be released on sufficient security being given that he shall be properly taken **[264]** care of, and shall be prevented from doing injury to himself or to any other person, and for his appearance when required; and that, in default of such security being given, the case shall be reported by the Magistrate for the orders of Government.

Order accordingly.

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APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

BHAGIRTHIBAI (*Original Plaintiff* No. 1), *Appellant v.* BAYA (*Original Plaintiff* No. 2) AND OTHERS, *Respondents.**
[1st March, 1881.]

Hindu law—Inheritance—Right of sisters to succeed—Sisters endowed and unendowed, equal right of—Appeal against a co-plaintiff—Practice—Procedure.

Hindu sisters when they succeed take equally. An unendowed sister has no prior right of succession over an endowed sister, such as an unendowed daughter has over an endowed daughter.

By consent of parties the High Court allowed an appeal by one plaintiff against another plaintiff, and adjudicated upon their rights.

[R., 15 B. 145 (147); 15 B. 203 (209); 16 B. 119 (122); 21 B. 739 (744).]

THIS was a second appeal against the decision of J. L. Johnson, Acting Assistant Judge of Ratnagiri, modifying the decree of M. N. Nanavati, Subordinate Judge of Malvan.

The suit was originally brought by Bhagirthibai against Jandhuri and Nardhuri to eject them from a field, they having refused to pay her rent. She alleged in her plaint that the field belonged to her father, from whom her brother inherited it, and on his death his widow, Rukhmin, became the proprietor. Rukhmin died in November, 1871, and she, the plaintiff, claimed to be her heir.

Jandhuri and Nardhuri answered that the last proprietor Rukhmin mortgaged the field to one Yesu, and bequeathed all her property to her brother Sitaram, who was, consequently, the owner of the field, and that they were Sitaram's tenants.

The Subordinate Judge of Malvan, in whose Court the plaint was filed, added Yesu and Sitaram as defendants, and it appearing that Bhagirthibai had two sisters, Baya and Chevle, they were added as plaintiffs without any objection from Bhagirthibai. **[265]** Baya, however, did not appear in the Court of the Subordinate Judge; and Chevle, though she appeared, expressed a desire to give up her claim in favour of Bhagirthibai. The newly-added defendant answered that, under Rukhmin's will, the defendant Sitaram was the proprietor of the field, and not any of the plaintiffs. The Subordinate Judge made a decree, directing all the defendants to give up the field to the plaintiffs.

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* Second Appeal No. 367 of 1883.

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Against this decision two appeals were made to the District Court of Ratnagiri. The plaintiff Bhagirthibai appealed as against her two sisters, the newly-added plaintiffs; and the newly-added defendants, Yesu and Sitaram, appealed as against all the plaintiffs. The original defendants, the tenants in possession, did not appear. In disposing of the appeal the Acting Assistant Judge raised an additional issue, *viz.*, whether Baya (plaintiff No. 2) is poor, and Bhagirthibai (plaintiff No. 1) possessed of property, and, if so, whether by Hindu law plaintiff No. 2 has the right to inherit, and not plaintiff No. 1?" He disposed of that issue with the following remarks:—

"Baya is poor and Bhagirthi is possessed of property, and, by Hindu law, Baya, as being unendowed, has a prior right of inheritance as compared with Bhagirthi, who is endowed. In the case of *Bakubai* v. *Munchha Bai* (1) the suit was remanded for evidence on the following issue—'whether the pecuniary circumstances of the widows B and M are so far different as to give B a prior right of inheritance, under Hindu law, as compared with M, on the ground that she is an unendowed daughter.' The same criterion of comparative poverty was adopted as a rule in *Poli* v. *Narotam* (2). 'A *nirdhan* (unendowed) daughter has preference over a *sadhan* (dowered) daughter.' By Bhagirthibai's own admission she is rich, and Baya is poor."

The Assistant Judge accordingly modified the order of the Subordinate Judge, and decreed the Baya (plaintiff No. 2) should recover from the defendants possession of the field.

Bhagirthibai (plaintiff No. 1) alone appealed to the High Court, making the original and subsequently added parties respondents.

[266] *Ghansham Nilkanth Nadkarni*, for the appellant.—This is an appeal by one plaintiff against another, and is irregular; but to prevent litigation the appellant and respondent have agreed to submit their difference for adjudication by the High Court. The question is whether an unendowed sister has a prior right of inheritance over her endowed sister. There is no text of the Hindu law which gives such a preference, and no decision by any of the High Courts to that effect. The cases cited by the Assistant Judge refer to the daughter whose position is different from that of the sister: Stokes' Hindu Law Books, p. 89.

Jushvan and *Vasuder Athlye*, for the respondent Baya.—There is no express text to help the solution of the question, which should be determined by analogy. The case of daughter is analogous to that of sisters. The preference given to an unendowed sister is based upon a text of Gautama, which says: "A woman's property goes to her daughter's, unmarried or unprovided" (3). This text should also be resorted to in deciding the case of sisters. The analogy of male heirs, such as brothers, would be improper, for their succession stands on a different footing from the succession of female heirs (4). The daughters as well as the sisters are born in the family of the *propositus*, and the nature of their estate is to a certain extent held to be analogous in *Vinayak* v. *Lakshmibai* (5).

Ghanasham in reply.—The sister's right to succeed is based upon a specific text (6). The Mayukha, which provides for the case of competition among daughters by a specific rule, is silent in regard to sisters. Hence

(1) 2 B.H C.R. A.C J. 5.
(2) 6 B.H.C.R. A.C.J. 183.
(3) Gautama 28, 22; Stokes' Hindu Law Books, pp. 86, 384, 440.
(4) Mayne's Hindu Law, 441-2-3.
(5) 1 B.H.C.R. 117.
(6) Stokes' Hindu Law Books, p. 89, para. 19.

it must be taken that, according to Nilkantha, the sisters take equally, irrespective of considerations of wealth or marriage.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—The Acting Assistant Judge ought not to have allowed one plaintiff to appeal against another, and ought to have declined to decide the rights of different plaintiffs *inter se*. Baya **[267]** had been joined as co-plaintiff with Bhagirthibai without any objection on the part of either; and, if successful, they were entitled to a joint decree, which would leave it open to them to adjust their respective claims subsequently.

The claim of the third sister, Chevle, was disallowed by the Acting Assistant Judge, and she has not appealed to this Court. It appears, moreover, that in the Court of first instance she expressed her readiness to resign any right which she might have in favour of Bhagirthi. The regular course for this Court to take would, therefore, be to reverse the Acting Assistant Judge's decree, to strike out Chevle's name from the Subordinate Judge's decree, but in other respects to confirm that decree. But the only parties before us are Bhagirthi and Baya, and the pleaders of both express a desire that we should determine the question between them, and decide, once for all, whether one only of the sisters, or both, are entitled to inherit the estate of their deceased brother. To prevent further litigation, we are willing to comply with this request.

The Acting Assistant Judge has held that Baya is poor, and Bhagirthi is possessed of property, and that, by Hindu law, Baya as being unendowed, has a prior right of inheritance as compared with Bhagirthi, who is endowed.

The rule of Hindu law, on which the Acting Assistant Judge's decision is based, is expressly applicable to daughters only, and no authority has been shown to us for making it applicable to sisters also. It depends upon a text of Gautama, quoted as authoritative both in the Mitakshara and the Mayukha. The rule as relating to daughters, is very clearly stated in both these commentaries; but no hint is given that it is to be applied to cases of inheritance by females other than daughters. It is true that the Mitakshara does not, in terms, refer to the question of inheritance by sisters; but the Mayukha deals with the subject in express terms, and within a very few paragraphs from that portion of the same chapter in which the inheritance by daughter is discussed, and the text of Gautama quoted and applied. It is not to be imagined that Nilkantha would not have expressly stated his opinion, if that opinion had been that the rule of **[268]** comparative wealth and poverty, which he had just been discussing, was applicable to sisters as well as to daughters.

It was suggested to us that, in the absence of authority, we should hold that sisters should be treated as daughters by analogy, and some observations by the Supreme Court in *Vinayak Lakshmibai* (1), at p. 124 of Vol. 1, Bombay H.C. Reports, were relied upon as supporting the suggestion. But we cannot see that the grounds, on which the succession of sisters depends, are such as would justify us in holding that a special rule regulating the inheritance of daughters ought, by analogy, to be applied to sisters. It would rather appear that analogies, if any, are to be sought in

(1) 1 B. H. C. R. 117.

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the rules applicable to brothers, or to *gotraja sapindas*, according as the Mitakshara or the Mayukha is taken to be the principal authority governing the case. We reverse the decree of the Acting Assistant Judge, and decree that Bhagirthi and Baya do recover the property in dispute, and hold the same as coparceners, until partition be effected between them. The original defendants to pay the costs of Bhagirthi and Baya in the Court of first instance and in appeal No. 74 of 1879. Bhagirthi and Baya to bear their own costs in cross appeal No. 81 of 1879 and in this second appeal.

Decree reversed.

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Before Mr. Justice West.

MERBAI, WIFE OF RATANJI JIVANJI, AND THE SAID RATANJI JIVANJI (*Plaintiffs*) *v.* PEROZBAI, WIDOW OF BURJORJI MERWANJI (*Defendant*).* [21st, 25th, 29th and 31st January, and 8th February, 1881.]

Gift—Necessity of endorsement of Government notes in order to complete gift—Donor constituting himself trustee for donee—Enforcement of trust by representative of donee—Trust—Trustee, liability of—Gift to sole and separate use among Parsis.

The plaintiffs Merbai and Ratanji were Parsis, and were married in the year 1851. The defendant was the widow of Burjorji Merwanji, who was the father of the plaintiff Ratanji. The plaintiffs sued to recover from the defendant [269] certain Government promissory notes which they alleged had been presented by Burjorji to Merbai at her marriage for her sole and separate use. They alleged that the said notes, then of the nominal value of Rs. 1,500 were endorsed in the name of the said Burjorji, and had been deposited by him for safe custody with Merbai's grandfather Jehangir; that the said Burjorji during his life used from time to time to receive the said notes from Jehangir, and draw the interest thereon for Merbai; that Burjorji died in 1864, and that after his death the defendant, who was his widow and executrix, used to draw interest for Merbai; that in 1869 she obtained possession of the said notes, and had ever since continued in possession thereof, informing the plaintiffs that she was duly keeping them and collecting the interest for Merbai; that the plaintiffs had been living with the defendant until shortly before the present suit, and having then separated from her, had called upon her to hand over the notes and the accumulated interest, which she refused to do. The defendant denied that her husband Burjorji had ever presented Merbai with Government notes for her separate use. She alleged that the notes, which had been deposited by Burjorji with Jehangir, were her own separate property, and not Merbai's; that she and her husband had dealt from time to time with them, and that no interest was ever paid to the plaintiffs, or either of them, or for their benefit. She further stated that some of the notes which had been deposited with Jehangir had been disposed of by Burjorji in his lifetime with her consent; that in 1869 she obtained the remaining notes from Jehangir, and sold them, and applied the proceeds to her own benefit. At the hearing it was proved that, on the occasion of the plaintiffs' marriage, presents were made to Merbai both by her own family and by that of the bridegroom, Ratanji. Two accounts were then opened in the books of the firm of J. N. & Co., of which Merbai's grandfather Jehangir was a partner, one of which showed her acquisitions from her own family and the other her acquisitions from the family of her husband. The latter account contained an entry (under date August, 1854), to the effect that Burjorji, the father-in-law of Merbai, had bought two Government notes for Rs. 1,500 in Merbai's name, and had obtained the interest on them, which was duly credited to her. Other documents were produced, proved to be in the handwriting of Burjorji and Jehangir, in which the said Government notes were alluded to as the property of Merbai, and as having been purchased with her moneys. In 1864 Burjorji died without

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having endorsed the notes over to Merbai, or to any one in her behalf, and ey remained in his name in the hands of Jehangir until 1869, when the defen ant got possession of them.

Held that the notes not having been endorsed to Merbai, there was no valid gift of them to her by Burjorji. If Burjorji intended to bestow the notes as a gift only, without any intention that his purpose should be effected otherwise than by a substitution of ownership, his purpose remained unfulfilled, and the Court could not fulfil it for him.

Without endorsement, or something equivalent, a gift of Government stock cannot be completed. Where a particular form of transfer is prescribed by law, a transfer in another form is as inefficacious *inter vivos* as in a will.

Held, also, that Burjorji was liable to answer for the notes *as a trustee*, and after Burjorji the defendant as his executrix and representative. In the [270] documents put in evidence Burjorji alluded to the notes as Merbai's property. His placing them, as he did, with Merbai's grandfather, was itself an acknowledgment, according to the practice of the class to which he belonged, that the benefit was to be hers and her children's. He thus sufficiently admitted an obligation as trustee. The legal ownership was his, but he had acknowledged with sufficient clearness an obligation to hold and use the ownership for the benefit of another. Such a purpose clearly manifested constitutes a trust, and burdened with a trust the property passed from Burjorji to the defendant as his representative, and could be enforced against her.

Held, further, that having regard to the general practice among Parsis, the conduct of Burjorji in relation to the notes showed that it was his intention that the property should be enjoyed in sole and separate use by Merbai and her children.

Among Parsis a gift may be made to the separate use of a married woman, or of a woman about to be married.

[R., 10 Bom. L.R. 1209.]

THE plaintiffs in this suit prayed that the defendant should be ordered to endorse and deliver to the plaintiff Merbai certain Government promissory notes of the nominal value of Rs. 2,200 belonging to the plaintiff Merbai, and that, in default thereof, the defendant should be ordered to pay to the said Merbai the sum of Rs. 2,200 and interest thereon, and that the defendant should be ordered to pay to the said Merbai the sum of Rs. 300, the proceeds of the sale of a pearl nose-ring of the said Merbai, being part of a trust fund belonging to the plaintiff Merbai, and held by the defendant, and all interest thereon.

The plaint stated that the first and second plaintiffs intermarried in or about the year 1851, the plaintiff Merbai being then a child, and that on the occasion of the marriage the plaintiff Merbai was presented for her separate use by Burjorji Merwanji Mowji, the husband of the defendant Perozbai, with Government promissory notes of the nominal value of Rs. 1,500; and that the said notes, which were endorsed in the name of the said Burjorji Merwanji Mowji, were deposited for safe custody with the plaintiff Merbai's grandfather Jehangir Framji Jussawalla until the year 1869. The said Burjorji Merwanji during his life used from time to time to receive the said notes from Jehangir Framji Jussawalla, and draw the interest thereon for the plaintiff Merbai. With the interest of the said notes, other notes had been purchased, and at the time of Burjorji's death, which took place in 1864, the plaintiff Merbai's promissory notes were of the nominal value of Rs. 2,200.

[271] After Burjorji's death the defendant, his widow and executrix, used to receive the notes from Jehangir Framji Jussawalla, and draw interest for the plaintiff.

In December, 1869, the defendant Perozbai obtained possession of the said notes, and ever since had continued in possession thereof, informing

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the plaintiffs that she was duly keeping the same and collecting the interest for the plaintiff Merbai.

Both the plaintiffs had been living with the defendant until shortly before the present suit. They then separated from the defendant, and called upon her to hand over the notes and accumulated interest. The defendant refused to do so, and denied that she ever held the said notes as trustee for the plaintiff Merbai.

The plaint also stated that in the year 1872 the plaintiff Merbai delivered to defendant a pearl nose-ring, that the same might be sold and the proceeds held by the defendant in trust for the plaintiff Merbai; that the said nose-ring realized Rs. 300, of which the defendant was in possession as trustee for the plaintiff Merbai.

In her written statement the defendant denied that her husband Burjorji had ever presented the plaintiff Merbai with Government promissory notes for her separate use. She alleged that, on various occasions subsequent to the marriage of the plaintiffs, Burjorji Merwanji Mowji, with the defendant's consent, deposited Government promissory notes, amounting altogeter to the nominal value of Rs. 3,500, with Jehangir Framji Jussawalla for safe custody; that the said notes were endorsed in Burjorji's name, but were the separate property of the defendant; that the said notes were not deposited for the benefit of the plaintiff Merbai; and that the defendant and her husband dealt from time to time with them, and the interest thereon was never paid to the plaintiffs, or either of them, or for their benefit.

The defendant further stated that some of the notes deposited as aforesaid had been disposed of by Burjorji in his lifetime with her consent; that in December, 1869, she applied for and obtained the remainder of the notes which remained with Jehangir Framji Jussawalla, and sold the same and applied the proceeds for her own benefit. She denied that the plaintiff Merbai had ever delivered a pearl nose-ring to her, or that she had ever sold the same **[272]** as alleged; she further denied that the plaintiff had ever lived with her, and she alleged that the present suit was the result of a family quarrel.

The Hon. *J. Marriott* (Advocate-General) and *Farran*, for the plaintiffs.

Latham and *Inverarity*, for the defendant.

The following cases were cited:—*James* v. *Bydder* (1); *Thorpe* v. *Owen* (2); *Arthur* v. *Clarkson* (3); *Gee* v. *Liddell* (4); *Richardson* v. *Richardson* (5); *Dunkley* v. *Dunkley* (6); *Scott* v. *Spashett* (7); *Francis* v. *Brooking* (8); *In re Cordwell* (9).

JUDGMENT.

February 8. WEST, J.—The present case is one which has arisen out of a bitter family quarrel, and it has been frankly and properly admitted on both sides that but a qualified reliance can be placed on the oral testimony. Under such circumstances the recognized criterion by which to try conflicting statements is to compare them with those facts which are established beyond reasonable question. Of such facts there are several in the present case, by the aid of which the relations of the parties to each other with respect to the property in dispute are so strongly indicated that a forcible presumption arises in favour of the story that agrees

(1) 4 Bea. 600. (2) 5 Bea. 224. (3) 35 Bea. 458.
(4) 35 Bea. 621. (5) L.R. 3 Eq. 686. (6) 2 DeG. M. & G. 390.
(7) 3 Mac. & G. 599. (8) 19 Bea. 347. (9) L. R. 20 Eq. 644.

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with them, and against that with which they can be reconciled only by supposing matters to have proceeded in a manner very different from the ordinary course of human affairs.

When the plaintiff Merbai was married to Ratanji about the 5th December, 1851, a number of presents were made to her of jewels and apparel, both by her own family and by that of the bridegroom. Ratanji's father, Burjorji, was married to the daughter of a wealthy contractor Jivanji, and Ratanji himself seems to have been adopted by Jivanji and his wife Herabai. They were his grandparents through their daughter Perozbai, the present defendant. It is not proved by disinterested evidence that money was presented exactly at the time of the marriage to **[273]** anything like the amount of the Government loan notes now in question: the two accounts opened in Merbai's name at that time contain no entry of any such sum placed to her credit. These accounts were opened in the books of Jehangir Nusserwanji and Co., of which firm the grandfather of Merbai, Jehangir, was then a partner. One of them, called the "Maira" account, was intended to represent her acquisitions from her own family of birth; the other, called the "Sasra" account, her acquisitions from the family of her husband. The latter, as the clerk Cursetji deposes, is opened by a transfer from the Maira account. The other entries in it are few and of no great amount, but on the 19th of August, 1854, Merbai is credited with Rs. 181$\frac{0}{4}$·54 (Ex. R), and the entry says: "Your father-in-law bought two Government notes for Rs. 1,500 in your name. He sent the interest on them by Bhai Cavasji Jehangir." The interest corresponding to this sum had, in fact, been drawn by Burjorji on two notes of Rs. 1,000 and 500, appears from the Government books. The account in which it is credited to Merbai has for fifteen years been under the control of a firm of which Jehangir was no longer a member, and is not in any way influenced. The details of the Rs. 181$\frac{0}{4}$·54, as given in it, do not quite tally with those of the interest actually drawn by Burjorji as shown by the Government books; but Burjorji in sending the money, would probably not be careful in his description of the manner in which the total had been arrived at. There had been a conversion of the loan from 5% to 4% and a payment in advance of part of the interest. It seems likely that the mehta's calculation was in a great part conjectural, but there is not any ground for supposing, as to the main facts, as that a scheme of fraud was initiated in 1854 to support a claim never pressed until 1880.

It is clear, then, that in 1854 Burjorji was, in fact, appropriating the interest on two notes for Rs. 1,000 and 500 to Merbai's benefit. In what capacity was he doing this? As a donor, a trustee, or a merely benevolent connection assigning a fixed measure to a bounty which still remained entirely under his own control?

The document marked Ex. A is an old envelope addressed originally, as it would appear, to Jivanji, the maternal grandfather **[274]** of Ratanji and by adoption the father-in-law of Merbai. On this there are several endorsements in the writing of Merbai's grandfather Jehangir. The first of these is undated. It says:—

"Government Loan Notes for Rs. for the ornaments of Bai Merbai, the daughter of Bai Kavasji, are given by her father-in-law Burjorji and his mother-in-law Bai Herabai."

Then comes—

"Notes, two in number, for Rs. 1,500."

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The next endorsement, dated 13th October, 1857, says that Burjorji sent for the two notes for Rs. 1,500 in order to draw the interest, and this is followed by one of the 22nd October, 1857, which says that Burjorji, having received Rs. 150, for interest, has credited that sum at his place, and sent back the notes by Dadabhai. Dadabhai Cursetji proves, was a clerk of Jehangir.

On the 22nd January, 1863, there is an endorsement saying: "You sent for three notes for Rs. 1,000, 500, and 700,—in all Rs. 2,200—this day to draw the interest." Lastly, the return of the notes by the hand of Cursetji is noted. Cursetji is the witness of that name who recollects taking and bringing back the notes for his master Jehangir.

Jehangir having died in 1875 it is hard to suppose he made false endorsements resulting in an obligation on himself which were to be made no use of for several years afterwards. There is no doubt as to the genuineness of the writing. It plainly points to some deposit in which Jehangir was interested on account of his granddaughter. It is probably authentic, for the entries correspond in date to those in the Government books as to interest drawn by Burjorji. But, still, it is conceivable that Jehangir may have put on Burjoji's expression of a benevolent intention a construction which converted it into a declaration of an immediate gift of his interest in the notes to Merbai. He was her grandfather, and would have a natural tendency to understand what was said and done in a way favourable to her. The document Ex. E is open to a similar remark. That says: "These are Merbai's notes for Rs. 1,500. Her father-in-law, Burjorji, after drawing the interest sent them on the 7th July, [275] 1860, by the hands of Ratanji." It is clear that Jehangir regarded the notes as the property of Merbai, but his supposing they were hers would not make them so. Burjorji might intend to benefit Merbai, and yet reserve entire control and ownership to himself.

The documents K and L thus come to be of great importance. There was a contest over the genuineness of these documents, purporting to be written by Burjorji, in which the members of the family deposed strictly according to the sides they had taken. Mr. Bapooji Dinanath pronounced the document K a fabrication, on the grounds of the signs presented by it of the letters having been copied and retouched and of its disagreement with admitted and proved writings of Burjorji. The document L he thought genuine. Mr. Flynn could not see the marks of retouching in K which Mr. Bapooji discerned there, nor can I. The writing looks as little like a forgery as any that I have ever examined;—certainly in no way more suspicious than the letters in the group W or in No. 10. Mr. Nusserwanji Cowasji Jussawalla swears the disputed documents are in Burjorji's writing, and I believe he tells the truth.

The document Ex. K is as follows. In this exhibit and also in Ex. L the plaintiff Merbai is called Gulbai, which was her name in Burjorji's household:—

"The interest from the 1st January, 1855, to the 31st December, 1857, being 30 months, on a four per cent. note (or notes) for Rs. 1,500 (purchased) with Gulbai's moneys, has been brought, being Rs. 150. This sum is credited at my place on this day (*i.e.*, on the 22nd day of October, 1857, written by Merwanji Patel."

In L also Burjorji sends for the notes in the following terms:—

"To Setji Saheb Jehangir Framji Jussawalla, written by Burjorji Merwanji Mavji, whose salutations do you be pleased to read. To wit: the cause of this being written is as follows:—There are Behan Gulbai's

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(loan) notes. Do you be pleased to send them for drawing the interest. After drawing the interest I will return them.

"Dated 15th January, 1863."

An endorsement on this, not itself to be regarded as evidence, says that these notes for Rs. 1,000, 500 and 700 are accordingly **[276]** sent to Burjorji. The witness Nusserwanji Jussawalla accounts for this increase in the amount of the deposit by saying that on the occasion of Merbai's first pregnancy, Burjorji adding something to the interest then standing to her credit with him, bought a loan note for Rs. 700, which he placed with the other two in Jehangir's custody. Jehangir's memorandum of the 22nd January, 1863, (A) agrees with this, and Cursetji took the notes and brought them back again.

Burjorji died in 1864, and Nusserwanji and Cursetji depose to a visit which they paid to him in his last illness on the subject of the notes deposited with Jehangir. According to their account he expressed his willingness to endorse them over; but Perozbai having remonstrated against her husband, who was dangerously ill, being disturbed by what might alarm him, the notes were not sent to him by Jehangir, and they remained in his name at the time of his death. His acknowledgment of Merbai's right was complete if the recollection of these two witnesses is to be trusted; but the memory is treacherous in such matters. Cursetji and Nusserwanji, too, thought the notes were Merbai's—there seems no doubt of that,—and people are apt to allow their own impressions to colour what was really said to them when this has long been stored in the memory without close and frequent analysis. Perozbai entirely contradicts these witnesses. I fear she has allowed herself to be swayed in her testimony very much by feelings of a not altogether creditable kind. This is apparent in several places, as it is apparent, too, in the evidence of her sons and other witnesses. What Nusserwanji and Cursetji say, however, is not at all improbable in itself. They might have been expected to take the notes with them in case Burjorji should be willing to endorse them at once; but their not doing so, though it has deprived the plaintiffs of a positive addition to their evidence, cannot be regarded as a weight in the opposite scale.

Burjorji's position in 1864 has, in the main, to be gathered from his own writings. In Ex. L he sends for "Gulbai's notes." In Ex. K he calls them "(the produce) of Gulbai's money." The expressions used by Burjorji seem inconsistent with his having thought that he still remained, except formally, master of the notes. They had been deposited for twelve years probably with **[277]** Jehangir, or, at least, two of them had; and a third note had, according to the evidence, been added to the deposit as a simple increment taking the character of the original benefit. From the testimony of Mr. Nusserwanji Petit, it appears that gifts are commonly made to Parsi ladies in much the same fashion as was adopted in this case. Every time Burjorji sent for the notes and returned them, he confirmed the impression that he did not regard them as his own. The proper construction of a man's acts and language is that which he may most reasonably suppose they will receive in the circumstances from those with whom he has to deal, and, thus interpreted, I think Burjorji's words and conduct conveyed and were intended to convey that he did not regard himself as master of the loan notes on his own account.

Still, however, the notes were not endorsed over to Merbai, or to any one on her behalf. This is by no means inconsistent with Burjorji's

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regarding her as owner, for he may well have thought that they were safer in his own name than in that of any one else; but he had not done all that he could have done to transfer the notes. Merbai was of full age long before Burjorji died. He might have endorsed the notes to her, or to her and himself jointly. He omitted this, and, without it, or something equivalent, I do not think a gift of Government stock could be completed. Where a particular form of transfer is prescribed by law, a transfer in another form is as inefficacious *inter vivos* as in a will. And to such a unilateral transaction in a case where it is gratuitous, completion cannot be given by the Courts, as where a consideration has been paid and the contract must be enforced in order to prevent fraud. The learned Advocate-General contended that, the notes having been given at the marriage, the marriage was a consideration to support a transfer of the interest, and that thus, as on contract, Burjorji was to be regarded as forthwith made a trustee for his daughter-in-law; but, so far as appears, the notes were not given exactly at the time of the marriage, or stipulated for in the contract, or regarded on either side as part of the consideration. No writing to that effect has been produced. They were meant to be bestowed as a bounty; but, if as a gift only, without any intention on Burjorji's part that his purpose should be effected otherwise than by a substitution of ownership, his **[278]** purpose, though entertained for so many years, remained unfulfilled, and the Court cannot fulfil it for him.

It is as a trustee, if at all, that Burjorji was liable to answer for the notes, and, after Burjorji, his executrix Perozbai as his representative. The word 'trust' does not occur in the writings, which are material; but it is of no consequence that the word is not used if the sense is clearly there. Now, in the document K, Burjorji speaks of the notes as the produce of, or purchased with, Gulbai's money. In L he calls them Gulbai's loan notes. His placing them, as he did, with Gulbai's grandfather was itself an acknowledgment, according to the practice of the class to which he belonged, that the benefit was to be hers and her children's. It seems very likely, as Hirabai was a lady of considerable wealth, that the money for the purchase of the notes came from her; but, however that may be, I think that when Burjorji, parting with the custody of the notes to Merbai's grandfather, calls them her notes, and says they were purchased out of her money, he sufficiently admits an obligation as trustee.

The legal ownership was his, but he had acknowledged with sufficient clearness an obligation to hold and use the ownership for the benefit of another. Such a purpose, clearly manifested, constitutes a trust; and burdened with a trust the property passed from Burjorji to his representative. The trust subsists still, and can in some form be enforced against the defendant Perozbai.

The English cases on voluntary trusts from *Ex parte Pye* down to *Fox* v. *Hawkes* have been sufficiently discussed at the hearing. As the Judges in England have not been able to satisfy one another, I need not scruple to say that I find it impossible altogether to reconcile judgments, one group of which tends to obliterate a distinction which the other rigidly guards. In principle they all cling to the rule that a gratuitous transfer, intended to operate only as a transfer, but defective, will not be treated as complete; while he who, retaining the ownership of property, makes it understood that he holds it wholly or in part for the benefit of another, is forthwith bound to this. A beneficial ownership or interest of the proposed beneficiary has instantly arisen, and the formal proprietor has come under the obligations of a trustee. The variances of decision have

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[279] arisen rather from differences of logical method, or of susceptibility to the force of particular kinds of proof than from any differences in legal principle. The present case, tested by those adjudged on in England, falls within the border line of trust rather than of ineffectual assignment.

What I have said, relates to the loan notes : as to the nose-ring or the price of the nose-ring said to have been deposited with Perozbai on the same trust as the loan notes, there is nothing to go upon, or almost nothing, but oral evidence. The claim as to this money was an afterthought. The account first given of it differs from that which has been deposed to in Court. The amount has been variously fixed at Rs. 350 and Rs. 300. The defendant and her daughter, Avabai, seem almost as worthy of credit on the one side, as Merbai and Dhunjibai on the other. The testimony of Dosibai and the receipt given to her by Merbai's brother, Nusserwanji, would be by no means conclusive against a transaction otherwise well established, such as Merbai describes. The pearls said in the list to have been sold, might belong to some other piece of jewellery. Still the receipt does suggest very strongly that there had been a sale by Merbai inconsistent with the story she now tells, and not leaving her a similar jewel to sell in order to fund the proceeds with Perozbai. A real sale has, I believe, in this instance, suggested a groundless claim. As a suit was to be instituted, Merbai and her party thought they might as well seek as much as there was any chance of getting.

In determining what was the matter of the trust as secured by Burjorji, it is necessary to bear in mind the common practice of the Parsi community to which he belonged. The customs of his people are amongst the most important circumstances by which a man's expression of his will is to be construed and supplemented. They form a part of his consciousness, and are accepted as operating, and likely to operate, apart from their legally coercive force. That presents of large value are given at Parsi marriages, is a matter of common knowledge. The social opinion which prescribes them, is a frequent source of embarrassment to those who feel its pressure. In the case referred to in argument, Bayley, J., decided that custom amongst **[280]** the Parsis assigned the control of property thus given to the married pair jointly during their lives, and after the death of one of them to the survivor. This custom, however, if to be deemed a law as having a coercive force, does not exclude the possibility of a gift for the separate use of a married woman or of a woman about to be married. Such an arrangement is no longer regarded as opposed to the policy of the law, and the donor can impress on his bounty the character in this respect which he desires. There is in the present case no evidence, of an impartial kind, as to any precise declaration made by Burjorji with regard to the use and benefit of the bounty of which he was the source or the channel, such as to exclude the interest of the husband ; but the evidence of Mr. Nusserwanji Petit as to the general practice of the Parsis in similar cases shows what would be understood, and what Burjorji would know to be understood, by his conduct in relation to the loan notes in question. He called them Gulbai's ; he deposited them with her grandfather ; he, as usual, retained a control over them to be exercised for her advantage and for hers only ; a transfer to her name might have given a direct ownership to her husband which could be used to her prejudice, and this was avoided by Burjorji's retaining the notes in his own name. There is no

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indication that Ratanji was intended to appropriate or even share this benefit. He never has shared it. I cannot doubt that the intention was that it should be enjoyed in sole and separate use by Merbai and her children, and to this intention of a trust, when it is ascertained, I must give effect. That it is not explicitly set forth, so as to exclude all argument against it, makes it more difficult to reach the conclusion, but does not affect the consequences of the conclusion when once arrived at.

Another question has been started and another issue raised in the case on the point of whether, supposing Ratanji to have a marital right over the loan notes, that right could be given effect to without a provision being made out of the property for his wife and daughter. It is from his side that the property came, but it was not meant for him, and he seems for many years not to have been in circumstances to support his family as his wife might reasonably expect. She has lived mostly with her brother. Her [281] pocket-money was supplied by her grandfather. She has had to sell her jewels to raise funds. Ratanji himself became insolvent eight years ago. He is still without a certificate; and gaining a scanty and precarious livelihood, he cannot be trusted to provide a decent maintenance for those dependent on him. The property, if adjudged to be his, would pass forthwith to the Official Assignee for his creditors, and thus there can be no doubt the purpose of Burjorji would be defeated. Ratanji himself disclaims all but a purely formal interest as plaintiff; he did not, he says, include this property in his assets, because he did not regard it as his. Neither, it may be presumed, did his creditors; they respected the intended disposition; and there is no reason why at this day the Court should let "right too rigid harden into wrong" by giving Ratanji an unqualified common law property which no one desires. The Official Assignee himself is passive: he seeks nothing and renounces nothing. Under such circumstances, supposing the trust had not originally been created for the sole benefit of Merbai and her children, I should think myself justified in directing the whole amount, which is but small, to be secured for their advantage.

Perozbai has sold the notes. She must pay an equal sum in money. Down to the rupture, last May, it is evident that she held the capital, and used the interest for domestic purposes in which all parties were interested. No demand was made on her for an account in such imperative terms that she must have felt she would be held legally responsible for every item of receipt and expenditure. It is said that, when pressed to return Merbai's notes to the former custody, she promised to make them and the interest a trust. They were a trust already; and there is nothing to indicate that Merbai ever gave up her right, as beneficial owner, to the capital and the accumulations as they had come to the hands of Perozbai. On the other hand, Perozbai was not bound gratuitously to maintain, or partly maintain, Merbai and her husband. It is very probable that, if she had been called on for a strict account, or to render up the securities, she would have declined to receive her son and his wife as members of her house-hold. They contributed some trifle, it seems, to the house-keeping in the last four years, but it cannot have been much; and accepting a house and sustenance from Perozbai, which considerably exceeded [282] in cost the accruing interest of the notes, probably allowed her to use that produce for the common purposes. I am induced to say "probably," because it is most unlikely that any distinct agreement was ever come to. The oriental mind is averse to

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close definitions, and the relations of a family transcend the sphere of law. The parties here, as in most such cases, allowed strict right, it may be assumed, to be absorbed in mutual benevolence so long as amity prevailed amongst them ; and it was not necessary that Merbai should execute any formal instrument to warrant the expenditure which she tacitly sanctioned. Her husband, Ratanji, I cannot doubt, knew, as well as his brothers, that the notes had been sold. With the hopeful temperament of a spendthrift he reckoned on their being replaced when wanted.

While, therefore, Perozbai is not to charge the plaintiffs for their board and lodging during the years of her widowhood, neither is she to account for the interest she has drawn and expended in that time. She has not, it is true, set up the defence of a set off on this account. It never occurred to her, we may suppose, until lately, that her sons and their wives were not, of course, to sit at her table and share the shelter of her roof ; but, if legal right is to take the place of kind impulses and religious duty, whose part it can but imperfectly fulfil, then it must, in justice, be applied all round. Perozbai had rights which she voluntarily sacrificed on the altar of the family. Merbai's non-assertion of her rights was a reciprocal sacrifice no less voluntary. What was distinctly her property she did not give up ; the accruing proceeds she allowed to be employed for the domestic needs. At Burjorji's death a definite sum was due by him as trustee for the interest he had received in excess of what he had paid to Merbai. An account must be taken of it, interest being reckoned at 9 per cent. on each item, from its reaching his hands, and the total thus constituted, added to Rs. 2,200, must be paid by Perozbai and secured for the benefit of Merbai and her daughter according to a scheme on which I will hear counsel again when the account has been ascertained and the arrangement framed.

Decree for the plaintiffs.

Attorneys for the plaintiffs.—Messrs. *Ardesir and Hormusji.*
Attorneys for the defendant.—Messrs. *Chalk and Walker.*

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[283] APPELLATE CIVIL.—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice M. Melvill, Mr. Justice Kemball and Mr. Justice F. D. Melvill.

RACHAPA (*Original Defendant*), *Appellant v.* AMINGOVDA (*Original Plaintiff*), *Respondent.**
[30th and 31st August and 6th September, 1880.]

Regulation XVI of 1827, *s.* 20—*Vatan, alienation of—Bombay Act III of* 1874, *ss.* 5, 8, 9, 10—*Construction Certificate of Collector under s.* 10.

Previously to the year A. D. 1818, R, the great-grandfather of the plaintiff settled accounts with Rudrapa, the father of the defendant, in respect of debts due by himself (R) and his ancestors. The amount found due to Rudrapa was Rs. 20,000, and as security for this sum, R, by deed, dated A.D. 1818, mortgaged to Rudrapa certain vatani lands, and also an annual allowance of Rs. 200 received by him (R) on account of a *rusum*. Under this deed these properties were to be held by Rudrapa, in lieu of interest until repayment of the principal of Rs. 20,000.

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* Miscellaneous Special Appeal No. 2 of 1877.

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A dispute subsequently arose as to the amount of the *rusum*, and A, the son and successor of R, the mortgagor, having by attachment interrupted Rudrapa's possession (as mortgagee) of the vatani lands, he (Rudrapa) presented a petition of complaint to the Sub-Collector of B, who issued an order on the 10th November, 1830, to the Mamlatdar, directing him to require the parties to refer their disputes to arbitration. The arbitration took place, and on the 20th August, 1831, both parties executed a *rajinama* (Ex. No. 20), which set forth the terms of settlement agreed upon. Rudrapa was to hold the mortgaged lands and *rusum* (annual allowance) for fifty years. At the end of that period the principal debt and all interest thereon was to be deemed to have been paid off, and the lands and *rusum* were to be surrendered to the mortgagor or his heir. Under this *rajinama* the mortgagee held uninterrupted possession of the mortgaged property until A.D. 1872. A, one of the signatories of the *rajinama*, died in 1843, and was succeeded as vatandar by R, and R, again was succeeded by the present plaintiff who in 1872 brought this suit against the defendant (Rudrapa's son) to recover possession of the mortgaged property.

The Subordinate Judge held that the mortgage of A. D. 1818 was not genuine, and that the *rajinama* of A. D. 1831, being an alienation of vatani property after the passing of Reg. XVI of 1827, s. 20, was invalid as against vatandars subsequent to the grantor. He, therefore, made a decree for the plaintiff. In appeal, the Assistant Judge held that the mortgage of A. D. 1818 was genuine, but he agreed with the Subordinate Judge in regarding the *rajinama* as a fresh alienation of vatani property, and, therefore, invalid as against the plaintiff, having been executed since the passing of Reg. XVI of 1827, s. 20. He, therefore, affirmed the decree of the Subordinate Judge. The defendant thereupon filed a special appeal in the High Court, which on the 29th September, 1875, reversed the decrees of the Courts [284] below, holding that the *rajinama* was not a fresh alienation of vatani lands, but a compromise of a dispute in regard to an alienation by way of mortgage, in A.D. of 1818, of vatan lands, and that the *rajinama* was, therefore, valid, and ought to be enforced, and was not affected by Reg. XVI of 1827, s. 20.

Previously to this decree of the High Court the plaintiff had applied for execution of the Subordinate Judge's decree, and had been put into possession of the mortgaged property on the 9th June 1873.

The decrees of the lower Courts being thus reversed by the High Court, the defendant in 1876 presented a petition to the Subordinate Judge, praying a restoration of the mortgaged property to his possession. The plaintiff did not oppose his application, but the Subordinate Judge refused it, on the ground that he had received a certificate from the Collector, issued under s. 10 of Bombay Act III of 1874, stating that the property, the subject of the application, formed part of a vatan. In appeal, this Assistant Judge affirmed the order of the Subordinate Judge, being of opinion that the receipt of the certificate by the Subordinate Judge compelled him to refrain from giving effect to the decree of the High Court. Thereupon the defendant filed a special appeal in the High Court.

Held that the certificate of the Collector was unlawfully issued and that the Subordinate Judge should proceed to give effect to the decree of the High Court of the 29th September, 1875, by reinstating the defendant in possession of the premises mentioned in the *rajinama*.

The certificate which the Collector is authorized to issue under s. 10 of Bombay Act III of 1874 should be sent to the Court, by whose decree or order the vatan is affected in the manner mentioned in the section. The Collector's certificate in this case, therefore, had not been issued to proper Court.

The restitution of the mortgaged property to the defendant in whose possession it was at the commencement of this suit in 1872, and until the execution of the erroneous decree of the Court of first instance in 1873, was not such a passing into the ownership or beneficial possession of any person not a vatandar of the same vatan as is meant by s. 10 of Bombay Act III of 1874.

The alienation of the vatani property to Rudrapa having, in 1831, received the sanction of the authorized officer of Government, s 10 of Bombay Act III of 1874 did not apply,—the intention of the Act being that, whenever the alienation of a hereditary officer's vatan has received the sanction of Government, the Collector should not issue his certificate.

The words "without the sanction of Government" in s. 10 of the Act qualify the whole section.

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Bombay Act III of 1874 does not authorize the Collector to issue his certificate for the purposes of preventing the rectification of a Subordinate Court's decree by the High Court, or the reinstatement of a person in possession of which he has been deprived by the execution of the erroneous decree of a Subordinate Court.

[R., 14 B. 82 (89); 21 B. 55 (57); 35 B. 146 (152)=12 Bom. L.R. 839=8 Ind. Cas. 166; 4 C.P.L.R. 167 (163).]

THIS was a miscellaneous special appeal from the order of E. Hosking, Senior Assistant Judge at Kaladgi, in the district of [285] Belgaum, affirming the order of the Second Class Subordinate Judge of Bagalkot.

In the year A. D. 1818, Ramaradigovda (the great-grandfather of the plaintiff) who was sar-desai and sar-deshpande of Hungund, and sar-nadgauda of Balgundi, mortgaged by a deed dated in that year (Ex. No. 8) to Rudrapa, the father of the defendant, certain vatani lands, and also an annual allowance received by him (Ramaradigovda) on account of *rusum*. The mortgage was given as security for the repayment of Rs. 20,000, which was the amount found due on a settlement of accounts in respect of debts due by Ramaradigovda and his ancestors to Rudrapa. By the mortgage deed the above properties were to be held by Rudrapa in lieu of interest until repayment of the principal of Rs. 20,000.

Ramaradigovda died, and Amingovda, his son, succeeded him as vatandar. A dispute arose between him and Rudrapa as to the amount of the *rusum*, and Amingovda having by attachment interrupted Rudrapa's possession (as mortgagee) of the vatani lands he (Rudrapa) presented a petition of complaint to Mr. Elliott, Sub-Collector of Bagalkot, who issued an order to the Mamlatdar, directing him to require the parties to refer their disputes to arbitration. This arbitration was held, and on the 20th August, 1831, both parties executed a *rajinama* (Ex. No. 20) which contained the terms of settlement agreed upon. Rudrapa was to hold the mortgaged lands and *rusum* (annual allowance) for fifty years. At the end of that time the principal debt and all interest thereon, was to be deemed to have been paid off, and the lands and the *rusum* were to be surrendered to the mortgagor or his heir.

Under this *rajinama* Rudrapa, the mortgagee, held uninterrupted possession of the mortgaged property until A.D. 1872. Amingovda died in 1843, and was succeeded as vatandar by Ramradigovda, who in turn was succeeded by the present plaintiff, Amingovda.

In 1872, Amingovda, a minor, by his mother brought the present suit to recover possession of the mortgaged property.

The Subordinate Judge held that the mortgage of 1818 A.D. was not genuine, and that the *rajinama* of A.D. 1831 was an [286] alienation of vatan property, and was, therefore, invalid as against vatandars subsequent to the grantor under s. 20 of Reg. XVI of 1827. He, therefore, passed a decree for the plaintiff. In appeal, the Assistant Judge held that the mortgage of A. D. 1818 was genuine; but he concurred with the Subordinate Judge in holding that the *rajinama* was a fresh alienation of vatan property, and, therefore, invalid as against the plaintiff, having been executed subsequently to the passing of Reg. XVI of 1827, s. 20. He, therefore, affirmed the decree of the Subordinate Judge.

The defendant then filed a special appeal in the High Court, which on the 29th September, 1875, reversed (1) the decrees of the Courts below, holding that the *rajinama* was not a fresh alienation of vatan lands, but a compromise of a dispute in regard to the alienation by way of mortgage,

(1) See Printed Judgments for 1875, p. 269.

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in A. D. 1818, of vatan lands, and that the *rajinama* was, therefore, valid, and ought to be enforced, and was not affected by Reg. XVI of 1827, s. 20.

In the meantime, however, the plaintiff had applied for execution of the Subordinate Judge's decree, and had been put into possession of the mortgaged property on the 9th June, 1873.

The decrees of the lower Courts having been reversed by the High Court, the defendant in 1876 presented a petition to the Subordinate Judge, praying to be restored to the possession of the mortgaged property. The plaintiff did not oppose the application; but the Subordinate Judge refused it, on the ground that he had received a certificate from the Collector, issued under s. 10 of Bombay Act III of 1874, stating that the property, which was the subject of the application, was part of a vatan. In appeal, the Assistant Judge affirmed the order of the Subordinate Judge, being of opinion that the receipt of the certificate by the Subordinate Judge compelled him to abstain from giving effect to the decree of the High Court.

The defendant thereupon filed a special appeal.

Gokuldas Kahandas, for the appellant.

Shantaram Narayan, for the respondent.

[287] *Nanabhai Haridas* (Government Pleader), for the Collector.

The following authorities were cited:—*Lati Kader* v. *Sobadra Kader* (1); *Hurro Chunder Roy* v. *Sooradhonee Debia* (2); Broom's Legal Maxims (5th ed.), p. 131; *Gopal Hanmant* v. *Sakharam Govind* (3); *Mahadaji* v. *Rajaram* (Mis. S. A. 17 of 1876); *Visaji* v. *Rajaram* (Mis. S. A. 22 of 1876), (both decided by Westropp, C. J., and Melvill, J., on 19th December 1877); *Collector of Kaladgi* v. *Sitabai* (4); *Jagjivan* v. *Ismail Ali Khan* (5); *Davidas* v. *Ismail Ali* (6).

JUDGMENT.

6th September, 1880. WESTROPP, C. J.—The facts of the present case are simple. Previously to the Christian year 1818, Ramaradigovda (the great-grandfather of the present plaintiff) who was sar-desai and sar-deshpande of Hungund, and sar-nadgauda of Balkundi, came, with the assistance of mediators, to a settlement of accounts with Rudrapa of Honavar, the father of the present defendant Rachapa, in respect of the debts of himself (Ramaradigovda) and of his ancestors to Rudrapa, who then held title-deeds and papers belonging to Ramaradigovda, and relating to certain vatani property of the latter, as security for such debts. Those title-deeds, &c., were then produced, and copies furnished to Ramaradigovda, and the sum found due from him to Rudrapa on taking the account, was fixed at Rs. 20,000, as appears by Ex. 8, dated 19th July, 1881 (15 Ramazan Sursan 1219, 2nd Ashai Bahul Shalibahan 1740) which charged Ramaradigovda's sayar (to the extent of a *rusum* of Rs. 200 payable annually) and certain vatani lands with the above-named sum of Rs. 20,000. That document having been executed in 1818—*i.e.*, nine years before Reg. XVI of 1827, s. 20, was passed—was a valid alienation of the property therein mentioned, although it was vatani property. See the cases collected in 4 Bom. H. C. Rep., 14, 15, *et seq.*,

(1) 3 C. 720.
(2) B.L.R. (Full Bench Rul. 1862-68), 985=9 W.R. 403.
(3) 4 B. 254.
(4) Extraordinary Application, No. 45 of 1877, decided 6th December, 1877 (not reported).
(5) 4 B. 426.
(6) Extraordinary Application, No. 91 of 1879.

A. C. J. Those properties and their income were, under that document, [288] to be held by Rudrapa in lieu of interest "until repayment of the principal" of Rs. 20,000. All prior bonds, &c., for debts of Ramaradi and his ancestors to Rudrapa and his ancestors were then given up to Ramaradigovda.

The mortgage (Ex. 8) of 1818 is supported by Exs. 9 and 10 [bearing the same date (19th July 1818) as Ex. 8] whereby Ramaradigovda informed the officers of the villages, in which the vatan property is situate, of the execution of Ex. 8, and directed those officers to make over possession of the mortgaged premises to Rudrapa of Honavar.

Subsequently, in A. D. 1830, a dispute as to the amount of the *rusum* having arisen, and Amingovda the son and successor (as desai and deshpande) of Ramaradigovda, the mortgagor, having, by attachment, interrupted the mortgagee's possession of the vatani lands mentioned in the mortgage of 1818, he (Rudrapa of Honavar) took proceedings against Amingovda by presenting a pettition to Mr. Elliott, the Sub-Collector of Bagalkot, complaining of Amingovda's conduct—the result of which petition was that the Sub-Collector, on the 11th November, 1830 (Fasli 1240), issued an order Ex. 19) to the Mamlatdar of Hungund, referring to the mortgage of 1818 and to the question as to the *rusum*, and to the attachment, and stating "that it was not proper (for the desai) to realize the produce by attachment (of the lands); that, therefore, the desai should be requested to pay (make over) the produce to the Honavarkar, and that *rajinamas* should be taken from both the parties for the appointment of an arbitration to sit at Bagalkot or Badami, whichever they may choose, to settle all the disputes between the parties, and submitted to the Huzur.

The arbitration, thus directed by Mr. Elliott, was held at Badami, and the result of it was that a *rajinama* (Ex. 20), dated the 20th August, 1831 (Fasli 1241), was executed by both of the contending parties. It runs thus :—"To the Company's Government. A *rajinama* is executed by the plaintiff Rudrapa of Honavar, and the defendant Amingovda, desai and sar-desai in the pargana of Hungund, as follows :—The defendant's father had, in the Fasli year 1228 (A.D. 1818) assigned, in payment [289] of interest, ten kudas of land and the sayar *rusum* to the plaintiff. Latterly, in the Fasli year 1240, the defendant having taken objection to the continuance of the same in lieu of interest, and the plaintiff having preferred a complaint to the Huzur, (he) got an order to the Mamlatdar. The Mamlatdar took *rajinamas* from the plaintiff and defendant and sent (them) to Badami, where the parties came mutually to certain agreements, of which the following are the particulars :—300-0-0 being the amount settled for ten kudas of land assigned to the plaintiff by the defendant's father, 155-0-0 the sayar *rusum* in Company's coin. In this manner the defendant is to continue (the above) to the plaintiff for fifty years from the Fasli year 1241 (1831). In the fifty-first year (the plaintiff) is to give up the lands and *rusum* assigned by the defendants, and the plaintiff is to return to the defendant all the papers that have been given to the plaintiff. And, if the sayar amount fall short of Rs. 155 by any sum, the defendant is to make good to the plaintiff the sum. Thus a *rajinama* is executed by both the contending parties." Then followed the date and signatures of Rudrapa and Amingovda and those of the attesting witnesses. The certified copy of that document (Ex. 20) comes from the Mamlatdar's office, and was put in evidence on behalf of the present

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plaintiff. That exhibit proves a compromise, entered into at the suggestion and with the sanction of the Sub-Collector of Bagalkot, highly favourable to the then Desai Amingovda and his successors. Its legal effect is to reduce the amount of the annual *rusum* from Rs. 200 (stipulated for in Ex. 8) to Company's Rs. 155, and at the end of fifty years from A.D. 1831—*i.e.*, at the end of A.D. 1881—to relieve the lands and *rusum* altogether from the Rs. 20,000, pricipal secured by Ex. 8, which sum, together with all interest upon it, is then to be deemed to be paid off, and the lands and *rusum* are at that time to be surrendered to the debtor, or his heir.

Amingovda, one of the two signatories of Ex. 20, having died in or about 1843, was succeeded as vatandar by Ramradigovda, who appears not to have attempted to disturb the possession of the defendant. His successor Amingovda, a minor, by his mother, instituted in 1872 the present action of ejectment, which has, since his death, been continued by his widow Shivbasava **[290]** (also a minor) through the administrator of her estate under Act XX of 1864, the Collector of Kaladgi.

The Subordinate Judge, while of opinion that there had been an early mortgage of vatani property, regarded Ex. 8 as not genuine, and Ex. 20 as an alienation since Reg. XVI of 1827, s. 20, and, therefore, invalid as against vatandars subsequent to the grantor, and made a decree for the plaintiff. The defendant appealed, and the Senior Assistant Judge, Mr. Tagore, differing, with good reason, from the Subordinate Judge held the genuineness of Ex. 8 to be satisfactorily proved and that it had been acted upon by the parties and the defendant Rachapa, and his father Rudrapa had been in possession under it. The *rajinama*, Ex. 20, produced for the plaintiff is an official copy of its original in the Mamlatdar's office, and its original, though disputed by the defendant, was, by the Senior Assistant Judge, held to be proved. His finding as to its genuineness binds this Court. But he regarded it as a fresh alienation of the vatani property mentioned in it, and, it having been executed since Reg. XVI of 1827, s. 20, came into force, he pronounced it to be invalid as against the plaintiff, and on that ground affirmed the decree of the Subordinate Judge.

The defendant Rachapa instituted a special appeal to this Court, which was heard by my brother Kemball and myself on the 29th September, 1875. Both of the parties were represented by able counsel—Mr. *Inverarity* being for the special appellant, and Mr. *Branson* for the special respondent. Mr. Justice Kemball and I,—being of opinion that Ex. 20 was "not a fresh alienation of vatan lands," but a compromise of proceedings instituted before the Sub-Collector, made with the sanction of arbitrators and of the Sub-Collector in respect of a dispute arising in regard to "an alienation by way of mortgage (Ex. 8), in A.D. 1818, of vatan lands, &c., and, moreover, not an extension of that alienation, but a modification thereof, very much in favour of the mortgagor and those deriving under him,—held that Ex. 20 is valid and ought to be enforced, and was not affected by Reg. XVI of 1827." The decrees of the Courts below were accordingly reversed with costs. It may now be observed that, if Ex. 20 **[291]** had been held to be a fresh alienation and, therefore, invalid, as having been executed since Reg. XVI of 1827, s. 20, came into force, the result would have been that the defendant, the mortgagee, would have been wholly remitted to his mortgage of 1818, which was more unfavourable to the plaintiff, and would certainly, according to the authorities already mentioned, have bound him as having been executed before 1827.

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Previously to the decree of this Court of the 29th September, 1875, the plaintiff had applied for, and been put into, possession of the mortgaged property upon the 9th of June, 1873, under the decree of the Subordinate Judge.

The decrees of both of the Courts below having been reversed by the decree of this Court, the defendant Rachapa became, as a matter of course, entitled to have the mortgaged premises restored to his possession, and the moneys (mesne profits) which were received by the plaintiff, while in possession under the erroneous decrees of the Courts below, refunded to him. The defendant Rachapa presented in 1876 an application to the Subordinate Judge, praying a restoration of the mortgaged premises to his possession. The plaintiff did not appear to oppose his application; but the Subordinate Judge, on the 13th June, 1876, refused it on the ground that the Collector had issued a certificate (Ex. 5) under s. 10 of Bombay Act III of 1874 (the Hereditary Officers' Act) stating that the property, the subject of the application, formed part of a vatan. The defendant Rachapa appealed against that order, but it was affirmed by the Assistant Judge, who was of opinion that the receipt of the certificate by the Subordinate Judge compelled him to refrain from giving effect to the decree of this Court. Rachapa has made a special appeal to the High Court, which has been heard by a Full Bench. The parties have been represented before us by their respective pleaders, and notice of the case having by this Court been given to the Government Pleader, he has been heard on behalf of the Collector.

The questions are: first, whether, if the Collector were entitled to issue his certificate under Bombay Act III of 1874, s. 10, at all, he should have issued it to this Court and not to the Subordinate Judge's Court; secondly, whether, under the circumstances **[292]** above detailed, he was entitled to issue such a certificate to either Court.

As to the first question, the decree which the Subordinate Court was invited to execute, and which entitled Rachapa to be reinstated in possession, was that of the High Court, and not that of either of the Courts below. The last passage in s. 10 of Bombay Act III of 1874 leads to the conclusion that the Bombay Legislature intended the certificate to be sent to the Court, whose decree was supposed to give effect to an alienation of the vatan, for it provides that, on receipt of the certificate, the Court shall (*inter alia*) cancel the decree or order complained of, so far as it concerns the vatan. It is wholly improbable that the Bombay Legislature, even if it had the power so to legislate—a point which it is unnecessary now to discuss—could have intended that the Subordinate Judge should cancel the decree of the High Court. We think that the certificate, if properly issuable, should be sent to the Court, whose decree or order is that whereby the vatan is affected, in the manner mentioned in that section, and, therefore, that, in this case, the certificate, if properly issuable, should have been sent by the Collector to this Court, and not to the Subordinate Judge.

As to the second question, we think that the Collector had not any authority to issue, even to this Court, his certificate under s. 10 of Bombay Act III of 1874, under the circumstances of this case as above detailed.

It is admitted that none of the vatani property, the subject of this suit, has been assigned (under s. 23 of that Act or otherwise) as the remuneration of the officiator. Hence the first portion of s. 10, so far as it relates to vatan so assigned, is inapplicable. Seven or eight cases have been cited to us by the learned Government Pleader in which this Court has given

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effect to the certificate of the Collector. Those cases, however, are not in point, as in all of them the suits were brought against the vatandar, and sought to dispossess him, or to obtain from him a portion of the profits of the vatan. The present suit is brought by the vatandar, and seeks to dislodge the mortgagee from the possession which he has enjoyed since 1818 with the slight [293] interruption in 1831, which interruption was censured and put an end to by the intervention of the Sub-Collector in that year; and with his sanction, nay more (as it would appear from Ex. 19) at his command, the compromise was entered into in the same year, which compromise has been acted upon for forty-one years preceding the institution in 1872, of the present suit. Wholly erroneous decrees have been made in it in the Courts below, and have been reversed by the High Court's decree of 1875, which entitled the defendant Rachapa to be reinstated in the position which he occupied with respect to the mortgaged property before the Court of the Subordinate Judge executed its erroneous decree in the period intervening between the passing of it and its reversal. The contention of the plaintiff is that, in consequence of the issuing by the Collector of his certificate, this Court is bound, by s. 10 of Bombay Act III of 1874, to cancel its decree whereby it reversed the erroneous decrees of the Courts below, and to permit the execution of those erroneous decrees by allowing the plaintiff to remain in possession of the mortgaged premises wrongfully made over to him by the Court of first instance. We do not think that the Bombay Legislature had any such purpose in its contemplation, when enacting s. 10 of the Act, as to take advantage of the errors of the Civil Courts by maintaining a possession obtained by their wrongful operation, or to interfere with the jurisdiction of the High Court to reverse and prevent the execution of erroneous decrees of Courts subordinate to it. The restitution of the mortgaged property to the defendant Rachapa, in whose possession it was at the commencement of this suit and until the execution of the erroneous decree of the Court of first instance, does not appear to us to be such a passing into the ownership or beneficial possession of any person not a vatandar of the same vatan as is meant by s. 10. Moreover, the beneficial possession passed to Rudrapa, *qua* mortgagee, in 1818 was subsequently modified and confirmed with the direct intervention and sanction of the revenue officer (the Sub-Collector) of the locality in 1831. Upon that occasion that officer must be regarded as representing Government. Section 10, which is very ill-penned, uses the words "without the sanction of Government." The location of those words in that section may, [294] at first sight, lead to the supposition that they are limited to vatans assigned under s. 23 of the Act as remuneration of an officiator; but, on the purview of the Act, we think that those words are intended as a qualification of the whole of s. 10. We find them in s. 5, which is the leading section and indicates the general policy of the Act. It is as follows:—No vatandar shall, *without the sanction of Government* sell, mortgage, or otherwise alienate or assign any vatan, or part thereof, or interest therein to any person not a vatandar of the same vatan." The same words occur in s. 8, and equivalent words are to be found in s. 9. The general intention of the Act seems to us to be that, whenever the alienation of an hereditary officer's vatan has received the sanction of Government, the Collector should not issue his certificate.

Having arrived at the following conclusions—(1) that the Collector has not issued his certificate to the proper Court; (2) that the Act does not authorize the Collector to issue his certificate for the purpose of

preventing the rectification of a Subordinate Court's decree by the High Court, or the reinstatement of a person in possession, of which he has been deprived by the execution of the erroneous decree of a Subordinate Court; and (3) that the alienation of the vatani property in this case to Rudrapa has received the sanction of the authorized officer of Government so far back as A.D. 1831: we must hold that the certificate of the Collector was unlawfully issued, and, accordingly, the orders of the lower Courts of the 13th June, 1876, and the 23rd October, 1876, must be reversed, and the Subordinate Judge must proceed to give effect to the decree of the High Court of the 29th September, 1875, by reinstating the defendant Rachapa in possession of the mortgaged premises in Ex. 20 and in the plaint in this suit mentioned. The plaintiff must pay to the defendant the costs of the application to the Subordinate Judge and of both appeals in the same. As a suit has been instituted for mesne profits in the Subordinate Judge's Court, and a regular appeal in that suit is now pending in the Assistant Judge's Court, we make no order as to mesne profits.

We may state that we do not suppose that, if the Collector **[295]** were fully informed of the circumstances of this case as above detailed, he would have issued his certificate.

Having formed the opinion which we have expressed as to the construction of the Act, and as to the alienation being one which had the sanction of the Sub-Collector, we do not discuss the point as to the authority of the Bombay Legislature (specially circumscribed as it is) to direct the cancellation of decrees of the High Court made in rectification of decrees of Courts subordinate to it, or to prevent the reinstatement of persons against whom execution has been had of wrongful decrees of the latter Courts in the position occupied by them before such execution.

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ORIGINAL CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice, M. Melvill.

LUCKMIDAS KHIMJI (*Plaintiff*) *v.* MULJI CANJI (*Defendant*).*

[21st February, 1881.]

Small Causes Court—Jurisdiction—Equitable defence—Plea by defendant of his own fraud—Act IX of 1850, *ss.* 91, 98, 25.

The plaintiff in 1879 took out a summons, under s. 91 of the Presidency Town's Small Cause Court Act IX of 1850, calling on his nephew, the defendant, to deliver up possession of certain premises in his occupation belonging to the plaintiff. The plaintiff alleged that he had purchased the premises in question in 1870 from one N to whom the defendant had mortgaged them in 1866 with power of sale. The plaintiff produced the deed of mortgage to N, and the conveyance to himself. It was admitted on his behalf that he had never received any rent from the defendant, and never had manual possession of the premises occupied by him. But the plaintiff produced a writing of attornment dated April, 1873, passed to him by the defendant, whereby the latter acknowledged that he was occupying the premises in question as the plaintiff's tenant, and agreed to pay rent for the same at Rs. 25 a month. His defence was that the mortgage, the sale and the writing of attornment were all merely colourable, executed for the purpose of defeating his creditors and screening the property from execution; that no money had passed between the

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* Suit No. 25320 of 1879.

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parties; that the defendant had never been out of possession, and that the plaintiff now required the Court to assist him in turning his own wrong to his own advantage. At the hearing in the Court of Small Causes the defendant proposed to prove the above facts, and submitted that, under the circumstances, a *bona fide* question of title was raised which ousted the jurisdiction conferred on the Court by s. 91. The Court, however, refused to receive the evidence, and held that it had jurisdiction. On reference to the High Court.

[296] *Held* that the defendant was entitled to set up the defence which he did, and that it ousted the jurisdiction of the Court of Small Causes to proceed further with the action—inasmuch as such defence raised a question of adverse title, which, in suits under s. 91 of Act IX of 1850, that Court had not jurisdiction to decide.

[R., 10 M. 17 (20); 18 M. 378; 20 M. 326; 32 M. 323=2 Ind. Cas. 616=5 M.L.T. 77.]

THE following case was stated for the opinion of the High Court, under s. 55 of Act IX of 1850, by N. Spencer, Second Judge of the Court of Small Causes at Bombay :—

"This is a summons issued under s. 91 of Act IX of 1850, calling on the defendant to show cause why he refuses to deliver up possession to the plaintiff of the second storey and the gable of a house assessed under Nos. 70, 71 and 73, situated in Hanuman Gully, belonging to the plaintiff, which is now occupied by the defendant as, it is alleged, the tenant of the plaintiff.

"2. The house in question was at one time the property of the defendant, and was, with other houses and lands belonging to him, mortgaged by him by a deed, dated the 8th of October, 1866, to one Nensey Hunsraj, to secure the repayment of the sum of rupees one hundred thousand and interest.

"3. Default having been made by the defendant in payment of the mortgage-debt, the mortgagee, under the power given to him by the deed, put up the properties for sale by auction, and the plaintiff, as the highest bidder, became the purchaser of the same. A copy of the deed of conveyance by the mortgagee to the plaintiff, dated 16th August, 1870, is annexed, marked A.

"4. It is admitted that on the 28th of April, 1873, the defendant passed to the plaintiff a writing (Ex. B) acknowledging that he was occupying the premises, from which it is now sought to eject him, as the plaintiff's tenant, and agreeing to pay him rent for the same at Rs. 25 per month.

"5. It is also admitted that, although he passed this agreement, the defendant has not paid the plaintiff any rent. No evidence was taken to account for no rent being exacted from him; but it was stated by the plaintiff's advocate that the reason was the relationship between the plaintiff and defendant, and because the defendant was in needy circumstances. The occupants of the parts of the house, other than those occupied by the defendant, [297] pay rent to the plaintiff; but this is done, according to the statement of the defendant's advocate, by defendant's permission and in furtherance of the scheme hereinafter mentioned.

"6. For the defendant it was alleged that he was a promoter of one of the financials which were started in Bombay in 1864, and that being liable to pay a large sum of money on account of calls due on the shares held by him, he, at the suggestion of the plaintiff, executed the mortgage of the 8th of October, 1866; that the mortgagee, Nensey Hunsraj, was but a nominee of the plaintiff, and the mortgage a colourable transaction for the purpose of defeating his creditors, no consideration having been paid by the mortgagee. That the subsequent sale by auction to the plaintiff

was also fictitious, no portion of the purchase-money having been paid by the plaintiff, and that the agreement to pay rent was a part of the same scheme, made with the view of giving the transaction a *bona fide* appearance, and that the plaintiff was only a trustee of the property for the defendant.

"7. The defendant's advocate contended that, under these circumstances, there was a *bona fide* question of title in dispute between the parties which ousted the jurisdiction conferred on this Court by s. 91, and he proposed to call evidence to prove the facts stated in the preceding paragraph.

"8. On the part of the plaintiff it was contended—

"1*st*. That the defendant was estopped from denying the plaintiff's title.

"2*nd*. That the defendant was bound by the deed of mortgage and the writing, Ex. B, and could not be heard to say that they were executed as a part of a scheme to defeat his creditors.

"3*rd*. That this Court's jurisdiction was only ousted when there was a question of title which could legally be raised, and that there was no question of title which could legally be raised in this case.

"9. I was of opinion that there was no question of title involved in this case, so far as this Court was concerned, and I declined to receive the evidence tendered. I held that until the mortgage to Nensey Hunsraj and the conveyance to the plaintiff had been **[298]** set aside by a Court of competent jurisdiction, this Court was bound to regard these deeds as *bona fide*, and executed for valuable consideration ; that by these deeds the legal estate in the house had become vested in the plaintiff, and that by agreement B the defendant had acknowledged himself to be a tenant of the plaintiff, and that it was not within the province of this Court to receive the evidence proposed to be given.

"10. I, therefore, gave judgment for the plaintiff, and directed that the defendant should quit and deliver up possession of the premises to the plaintiff, but, at the request of the defendant's advocate, this judgment was given contingent on the opinion of the High Court on the following point :—

'Was there such a question of title involved or raised in this case as to deprive this Court of the jurisdiction conferred on it by s. 91 of Act IX of 1850, and was the Court in error in refusing to receive the evidence tendered ?'

"11. Pending the decision of the High Court on this question, the execution of the warrant of possession has been stayed."

Kirkpatrick, for the defendant.—The Court below was wrong in refusing to admit the defendant's evidence. Section 25 of Act IX of 1850 expressly provides that an equitable defence may be pleaded in the Small Cause Court. In a Court of Equity the evidence offered by the defendant would be admitted, and his defence, if proved, would be good ; *Ram Surun Singh* v. *Mt. Pran Peary* (1); *Sreemutty Debia* v. *Bimola Soonduree*(2); *Ashruf Sirdar* v. *Ranee Bhubo* (3); *Bowes* v. *Foster* (4) ; *Bone* v. *Ekless*(5); Taylor on Evidence (6th ed.), Vol. I, p. 108, s. 80. See, also, Indian Evidence Act (I of 1872), s. 92, Proviso I. If the facts we allege are proved, a question of title is raised, and the jurisdiction of the Court is ousted : *Nowla Ooma* v. *Bala Dharmaji*(6).

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(1) 1 W. R. 156. On appeal 13 M. I. A. 551. (2) 21 W. R. 422.
(3) 25 W. R. 40. (4) 2 H. & N. 779. (5) 5 H. & N. 925. (6) 2 B. 91.

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The Hon *F. L. Latham* (Acting Advocate-General), for plaintiff. —The plaintiff denies the fraud alleged by the defendant, but this case must be argued as if the statements of the defendant were true. The question here arises on the ejectment sections of [299] the Act, and the dispute is as to the right to possession, not as to the title. The plaintiff rests his claim on a mortgage-deed, a conveyance and a writing of attornment, all of which are admitted by the defendant. The plaintiff is the legal owner, and has a right to obtain possession under s. 91. This section is borrowed from English County Courts Act, 9 and 10 Vic., c. 95, s. 122. See also 19 and 20 Vic., c. 108, 50. The English cases apply: *In re Fearon* v. *Nowall* (1); *Lilley* v. *Harvey* (2); *Loyd* v. *Jones* (3). See, also, *Dadabhai* v. *Kuverbai* (4). Even if the defendant proved the facts he alleges, they would be no defence. The Judge was, therefore, right in excluding evidence of them: *Doe d. Roberts* v. *Roberts* (5); *Bessey* v. *Windham* (6); Kerr on Fraud, p. 306. Where documents are produced giving an apparent title, the party who seeks by his evidence to render them of no effect is to be regarded as invoking the aid of the Court, and such aid the Court will not give in case of fraud. Equity would not restrain such an ejectment suit as this: *Curtis* v. *Perry* (7); *Brackenbury* v. *Brackenbury* (8); *Cecil* v. *Butcher* (9); *Groves* v. *Groves* (10). It is true that s. 25 of Act IX of 1850 allows equitable defences, but that section refers only to cases in which a final decision upon the rights of the parties is given—not to cases under s. 91 in which there is no such final decision, but only a provisional possession awarded.

JUDGMENT.

WESTROPP, C.J.—This is a reference from Mr. Spencer, one of the Judges of the Court of Small Causes at Bombay, in a suit brought in that Court under s. 91 of Act IX of 1850, whereby the plaintiff sought to eject the defendant from the second storey and another portion of a house in Hanuman Gully in this island.

The defendant was originally the owner of the whole house and of considerable other immoveable property, and being so, mortgaged the same by deed of the 8th of October, 1866, to a fellow casteman (as has been admitted at the Bar), one Nensey [300] Hunsraj, for one lakh of rupees, repayable with interest. Under a power of sale contained in the mortgage-deed, Nensey Hunsraj, on the ground that default had been made in payment of the money purported to be secured by the mortgage, put up the whole of the mortgaged premises for sale by public auction, at which the plaintiff, being the highest bidder, became the purchaser, and the mortgaged premises were conveyed to him by Nensey Hunsraj under date the 16th August, 1870. The price was Rs. 65,000 as stated in that conveyance. It is admitted that the mortgage and conveyance were registered. It is also admitted that on the 28th of April, 1873, the defendant executed and gave to the plaintiff a Gujarati writing on a stamp of Re. 1-8, whereby he acknowledged himself tenant to the plaintiff, at Rs. 25 *per mensem*, of the second storey and loft, the subject of the present suit. That instrument, it is admitted, was not registered. The learned Judge states that, notwithstanding the Gujarati agreement just mentioned, it is admitted that the defendant has not paid any rent to

(1) 17 L.J.Q.B. 161. (2) 17 L.J.Q B. 357. (3) 17 L.J. C.P. 206.
(4) 10 B.H.C.R. 386. (5) 2 B. & A. 367. (6) 6 Q.B. 166.
(7) 6 Ves. 739. (8) 2 Jac. & W. 391. (9) 2 Jac. & W. 565.
(10) 3 Y. & J. 163.

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the plaintiff. No evidence in explanation of this fact was given on behalf of the plaintiff, but his advocate said that the reason for such non-payment was the relationship between the plaintiff and defendant and the needy circumstances of the latter. The relationship was, at the Bar here, stated to be that the defendant is nephew of the plaintiff. The occupants of the parts of the house, other than those occupied by the defendant, pay rent to the plaintiff; but this, it was stated on behalf of the defendant, was merely in furtherance of the general scheme, the existence of which the defendant alleged as his defence, and was refused permission to prove.

The defendant alleged, and sought permission in the Court of Small Causes to prove, that the mortgage of 1866, the sale and conveyance of 1870, and the Gujarati writing of 1873 were merely colourable transactions entered into for the purpose of securing the property, the subject thereof, from expected claims against the defendant, who had been a promoter of one of the financial associations in Bombay in 1864, and in that capacity had become liable to pay a large sum of money in respect of calls on shares held by him; that this scheme was devised by the plaintiff; that Nensey Hunsraj, the ostensible mortgagee, was the creature and **[301]** nominee of the plaintiff, and that the plaintiff was no more than a trustee of the property for the defendant. Under these circumstances, it was contended for the defendant that there was a *bona fide* question as to the title which excluded the jurisdiction of the Court of Small Causes under s. 9 of Act IX of 1850.

For the plaintiff it was contended that—

1. The defendant could not be permitted to deny the plaintiff's title.

2. That the defendant was, by the mortgage of 1866 and the Gujarati writing of 1870, estopped from making his proposed defence.

3. That the jurisdiction of the Court of Small Causes was only ousted when there was a question of title which could legally be raised, and that there was no question of title which could legally be raised in this case.

The learned Judge was of opinion "that there was no question of title involved in this case so far as his Court was concerned, and he declined to receive the evidence tendered." He "held that, until the mortgage and conveyance had been set aside by a Court of competent jurisdiction, the Court of Small Causes was bound to regard those deeds as *bona fide*, and executed for valuable consideration; that by those deeds the legal estate in the house had become vested in the plaintiff, and that by the Gujarati writing the defendant had acknowledged himself to be a tenant of the plaintiff, and that it was not within the province of that Court to receive the evidence proposed to be given." Judgment was then given for the plaintiff, contingent on the opinion of the High Court on this point—"Was there such a question of title involved or raised in this case as to deprive the Court of Small Causes of its jurisdiction under s. 91 of Act IX of 1850, and was that Court in error in refusing to receive the evidence tendered?"

It is perfectly settled that, under s. 91 of that Act, a Presidency Town's Court of Small Causes cannot try a question of adverse title. Thirty years ago it was so decided by the Supreme Court at Calcutta in *Hurrymonee Dosee* v. *Gopaul-***[302]***chundra Mookerjee* (1). We have not any reason to believe that the soundness of that decision was ever questioned. This Court followed that case in 1877 in *Nowla*

(1) 2 Taylor and Bell 57.

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Ooma v. *Bala Dharmaji* (1). But it has been argued that the adverse title set up by the defendant in such a suit, in order to exclude the jurisdiction of the Court, must be a title at law, and not any mere equitable defence. But s. 25 of Act IX of 1850 enacts that "all suits where the debt or damage claimed or value of the property in dispute is not more than Rs. 500, whether on balance of account or otherwise, may be brought in the Court of Small Causes.; and all such suits brought in the said Court shall be heard and determined in a summary way; and every defence which would be deemed good in the Supreme Court sitting as a Court of Equity shall be a good bar to any legal demand in the Court of Small Causes." This, no doubt, is not a suit under s. 25; but it will be perceived that the equitable defence permitted by s. 25 does not appear to be confined to suits brought under that section. It is not there said that an equitable defence shall be a good bar *in such suits as aforesaid, viz.*, in suits brought under that section, but that it "shall be a good bar to any legal demand in the Court of Small Causes." The meaning of the word "demand" as used in Act IX of 1850 was considered by Peel, C.J., in *Radhamoney Boystomey* v. *Anandomaye Dabey* (2). His observations have been transcribed in *Walji Karimji* v. *Jaganath Premji* (3), in which latter case the meaning of the same word "demand," as well in Act IX of 1850 as in Act XXVI of 1864, was much considered, and it was held to comprise within its scope all suits in respect of immoveable property which might be brought under those Acts. The preamble of Act IX of 1850, as styled by Peel, C.J., or, more properly, its title, *viz.*, "An Act for the more easy recovery of small debts and demands in Calcutta, Madras, and Bombay," was under the term "demands" regarded by him as referring to the recovery of things in specie—chattels as well as lands and houses. Further s. 37 of Act IX of 1850 enacted that "the Judges of the Court shall be empowered to determine all **[303]** questions as well of fact as of law or equity as determined in the Supreme Court in all cases which they have authority to try."

Now, although those Judges have not authority finally to determine, in cases under s. 91, any question of adverse title, either legal or equitable, yet it is competent for a defendant in a suit under that section to set up an adverse title, either legal or equitable, in bar of the demand, *i.e.*, the action. The Court of Small Causes cannot determine whether either of those titles is good, but it may, and indeed must, determine, in order to ascertain whether or not its jurisdiction to proceed with the suit is ousted, whether an actual question of title has been set up. The averment, by way of defence, of facts which do not amount to an allegation of title would not oust the jurisdiction under s. 91. *Dadabhai* v. *Kuverbai*(4). The defendant in that case put forward the intention of her husband to make a settlement on herself and her children. The Court, after saying that did not amount to an allegation of title, was careful to add: "It is no assertion of an agreement or contract *or trust* or other legal or *equitable* liability to convey to or hold the premises for the benefit of the defendant Kuverbai and her children." In speaking of s. 91, Peel, C.J.(5), says: "The value of possession where there is no title is so well known that it would be quite unreasonable to suppose that it had escaped the notice of the Legislature, or that, when they reserved to another tribunal or trial this decision of title (6), they meant to invert the position of the several claimants, to

(1) 2 B. 91.
(2) 2 Ind. Jur. 146.
(3) 2 B. 84 (88, 89).
(4) 10 B.H.C.R. 386.
(5) 2 Taylor and Bell at pp. 58, 59.
(6) See sec. 98, Act IX of 1850.

displace one from the possession and to put in another whose claim, had he been in the position of a plaintiff, might not have been capable of proof, or might have been subjected also to some defect." In *Nowla Ooma* v. *Bala Dharmaji* (1) the defendant, whom it was sought to eject from a room in a house, was, as the defendant is here, attacked upon deeds executed by himself, *viz.*, a mortgage and a further charge, to both of which he admitted his signatures. He had formerly been, as the defendant was here, owner of the whole house. Neither of these documents had been set aside by a Court of competent jurisdiction, nor had a deed of sale executed under a power of sale contained in the mortgage. Thus far the two **[304]** cases coincide. The defence in Nowla Ooma's case was fraud in obtaining from the defendant the mortgage and deed of further charge. The late Chief Judge of the Small Cause Court held that to be such a defence as ousted the jurisdiction of his Court, and his view was affirmed by the High Court. The defence in the present case is that the mortgage, the sale and the writing of attornment were all merely colourable, executed to screen the property from execution, that no money passed between the parties, that the defendant has never been out of possession of the portion of the property now claimed, and that the plaintiff has come into Court to ask it to aid him in turning his own wrong to his own advantage. It is difficult to suppose that the Legislature could by s. 91 have intended to assist, under such circumstances as alleged here, a plaintiff, never in possession, to turn out the defendant and put him to his action on the title to recover the premises, and thus shift from the plaintiff to the defendant the burden of the attack. Were we to do so, we think that we should act at variance with Sir L. Peel's view of the scope of that section and with the decision of this Court in *Nowla Ooma* v. *Bala Dharmaji* (1). It must be remembered that the parties are Hindus, and that, if the defendant's case be true, the plaintiff has never had even a technical possession, inasmuch as the writing of attornment is a mere sham. Actual possession, either manual or by payment of rent, it is admitted that the plaintiff never had. It does not appear to us that it was the intention of the Legislature, that, when a defendant makes such a contention as the defendant does here, the Court of Small Causes should use s. 91 to give to the plaintiff an advantage which he never previously had, *viz.*, possession. The parties here are *in pari delicto*, if the defendant's allegations be true, and, under such circumstances, even at law, *potior est conditio defendentis*. The plaintiff's counsel has relied on *Doe d. Roberts* v. *Roberts* (2) to the contrary; but, looking to the cases collected by Mr. Pit Taylor in para. 80, p. 108 of the 1st vol. of his Treatise on Evidence (3), it seems doubtful that even in a Court of common law that case would now be followed. Where there was an action on a bond of fair aspect, but really given to induce a prosecutor of an indictment for perjury to withhold his evidence, **[305]** Wilmot, C. J., said: "The manner of the transaction was to gild over and conceal the truth, and whenever Courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish and show the transactions in their true light" (4). It is an indisputable proposition that as *against an innocent party* "no man shall set up his own iniquity as a defence any more than as a cause of action" (*Per* Lord Mansfield, 1 Wm. Blackstone's Rep., 364). Where, however, a contract or deed is made for an illegal or immoral purpose, a defendant,

(1) 2 B. 91.
(2) 2 B. & A. 367.
(3) 6th ed.
(4) *Collins* v. *Blantern*, 2 Wils. at p. 349.

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against whom it is sought to be enforced, may show the turpitude of both himself and the plaintiff, and a Court of Justice will decline its aid to enforce a contract thus wrongfully entered into. "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his own sake, however, that the objection is ever allowed, but is founded on general principles of policy, which the defendant has the advantage of" (*Per* Lord Mansfield, Cowper's Rep. 343). It is on this principle that defendants in suits on contracts, ostensibly *bona-fide*, are permitted to show that those contracts really are mere wagering transactions. In *Ram Surun Singh* v. *Mt. Pran Peary* (1) the Privy Council say: "It is impossible to treat this deed of conditional sale and mortgage as creating any estoppel. *It is sought to be enforced by a person out of possession.* It is, in truth, the case of a common mortgage on which the defendant says there never was the money advanced. It is open to a mortgagor in this country to deny that the money, the receipt of which is generally acknowledged under his hand and seal, was advanced, and to cut it down to a nominal sum or nothing. That being so, and the instrument being relied upon by a person out of possession seeking to obtain possession through the medium of a foreclosure suit, it appears to their Lordships that there is nothing whatever to prevent the defendant from showing the real truth of the transaction." As to the objection that a tenant may not deny his landlord's title, there is not any tenancy whatever between the plaintiff and defendant here if the latter's defence be true, and the plaintiff, so far from being the landlord, is the trustee of the defendant.

[306] We think that the Small Cause Court was in this case deprived of jurisdiction under s. 91 of Act IX of 1850 by the defence set up by the defendant. The judgment of that Court should be reversed, and the suit should have been dismissed for want of jurisdiction.

The parties respectively should bear their own costs of the suit and reference.

Attorney for the plaintiff.—Mr. *H. W. Payne.*

Attorneys for the defendant.—Messrs. *Hore, Conroy and Brown.*

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5 B. 306.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Birdwood.

JADOW MULJI (*Plaintiff*) *v.* CHHAGAN RAICHAND, DECEASED, BY HIS SON JAMNA, MINOR, BY HIS GUARDIAN, *ad litem* WANMALI HARJIVAN (*Defendant*).* [8th March, 1881.]

Administrator of a minor's estate—Guardian ad litem—*Next friend—Minors' Act, XX of* 1864, *s.* 2—*Civil Procedure Code* (*Act X of* 1877), *ss.* 443, 456, 458—*Act XII of* 1879—*Act X of* 1876, *s.* 15—*Act XV of* 1880, *s.* 3, *cl.* (*b*)—*Courts of Small Causes —Jurisdiction.*

Where no administrator of the estate of a minor is appointed under Act XX of 1864, there is no objection to the appointment of a guardian *ad litem* under s. 443 of the Civil Procedure Code (Act X of 1877) (as amended by Act XII of 1879) for the purpose of defending a suit against the minor.

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* Small Cause Court Reference, No. 1 of 1881.

(1) 13 M.I.A. 551 at p. 559.

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Act XX of 1864, s. 2, has no bearing on the case of a next friend or guardian *ad litem* not claiming charge of the minor's estate.

Neither Act XX of 1864, nor the Civil Procedure Code, (Act X of 1877) (as amended by Act XII of 1879) empowers any Court to appoint a person against his or her will, to be a next friend, *guardian ad litem*, administrator of the estate, or guardian of the person of a minor.

Section 458 of the Civil Procedure Code (Act X of 1877) is not, so far as regards payment of costs, applicable to any person appointed to act as guardian *ad litem* without his previous assent.

Section 3, cl. *b*, of Act XV of 1880 preserves jurisdiction to a Court to try a suit against a minor, notwithstanding the appointment of one of its officers to be the minor's guardian *ad litem*.

The decision in *Mohan Iswar* v. *Haku Rupa* (1) is superseded by Act XV of 1880, sec. 3, cl. *b*, in so far as that decision affected officers of the Court [307] appointed guardians *ad litem* under s. 456 of Act X of 1877, as amended by Act XII of 1879.

Inconvenience, pointed out, of introducing into Acts relating, and enacted as relating, to special jurisdiction only, provisions affecting civil procedure generally.

[F., 20 B. 534; Rel., 15 C.L.J. 3=16 C.W.N. 256=13 Ind. Cas. 414; R., 9 B. 239; 9 B. 395.]

THIS case was referred for the opinion of the High Court by Cursetji Manekji, Judge of the Small Cause Court at Ahmedabad, under s. 617 of the Civil Procedure Code (Act X of 1877), with the following remarks :—

"Plaintiff's suit is on balance of account settled by Chhagan Raichand, since deceased. The said Chhagan has left a son who is a minor, and property which is worth more than Rs. 250. The said minor is made defendant with Wanmali Harjivan as his guardian *ad litem*. Wanmali, however, declines to act as such guardian, though he is the minor's maternal uncle, and it appears from the man's demeanour in the witness-box that he simply objects for the purpose of evading or delaying satisfaction of plaintiff's claim.

"The questions which arise are—

"1*st*—Has this Court power to appoint a guardian *ad litem* under s. 443 of the Civil Procedure Code, (Act X of 1877) where the estate is beyond Rs. 250 in value, supposing a person is found willing to act as such guardian?

"2*nd*.—Has this Court power to appoint such guardian where the person is unwilling to act as such guardian, though his unwillingness is merely vexatious, and is assumed for the purpose of delay or evasion?

"3*rd*.—If the Court appoints one of its own officers guardian *ad litem* under s. 456, Civil Procedure Code, (as amended by s. 73, Act XII of 1879), would it have jurisdiction to try the suit?

"My opinion, as to the first question, is in the affirmative. If a person be found 'fit and willing', s. 443, I submit, authorizes any Civil Court to appoint him guardian *ad litem* to defend the suit on behalf of a minor, irrespective of the value of the estate to which the minor may have succeeded *Moorlidhur* v. *Supdev* (2) [308] has been urged against this opinion; but that decision does not, I think, apply, as there, from the frame of the suit, it appeared that plaintiff claimed to have 'charge of the property,' and, as that was worth more than Rs. 250, a certificate was necessary under Act XX of 1864. A guardian *ad litem* is a totally different person; he has nothing to do with the administration of the minor's property; he is simply appointed to contest the particular suit in order to protect the

(1) 4 B. 638.

(2) 3 B. 149.

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minor from a false claim ; and, when decree is made and executed, he is *functus officio*. Thus, as regards a guardian *ad litem* under s. 433, it would make no difference whether the property is worth more or less than Rs. 250, and a certificate in the former case is not necessary. The very fact that under s. 456 (as amended by s. 73, Act XII of 1879) a plaintiff or creditor of a minor's estate can apply for the appointment of a guardian *ad litem*, would show that Act XX of 1864 does not apply to him ; for in that Act there is no provision by which such creditor can ask the District Court to have a guardian appointed, though this is sometimes done on the authority of *Dhondiba* v. *Kusa*(1), a decision which, I humbly submit, is not altogether a satisfactory one.

"As regards question No. 2, I am of opinion that a person cannot be forced to act as guardian *ad litem* against his will. When no person is found willing to act, all that the Court could do, would be to appoint some one of its own officers. The amending words of s. 456 are 'where there is no other person fit and *willing* to act'; and the necessary implication from these words is that the person to be appointed must not only be fit, but also willing. It often happens that a person, though he has the custody of the minor, declines to act as his guardian *ad litem* for the purpose of delaying the plaintiff, or from fear of being harassed in execution proceedings ; but the Court has now the power to appoint its own officers, and thus get over the difficulty which otherwise would have presented itself when the friends or relatives of the minor were recalcitrant.

"As to question No. 3, I am of opinion in the affirmative. A recent decision of the High Court (I. L. R., 4 Bom., 638) decides **[309]** that an officer of a Civil Court appointed under s. 456, amended as aforesaid, would be a Government officer, and thus this Court and other subordinate Civil Courts would have no jurisdiction. But, subsequently to the passing of that decision, the Legislature has added an important provision to s. 32, Act XIV of 1869, as amended by s. 15 of Act X of 1876 (see s. 3, Act XV of 1880, passed on 3rd November last). By this proviso a Court officer, appointed as aforesaid, would not be acting as a Government officer, and this Court would, therefore, have jurisdiction."

There was no appearance of parties in the High Court.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C.J.—As this Court understands that there has not been any administrator of the minor's estate appointed under Act XX of 1864, there does not appear to be any valid objection to the appointment of a guardian *ad litem* under s. 443 of Act X of 1877 (as amended by Act XII of 1879) in the present case. (See s. 464.) Section 2 of Act XX of 1864 has not any bearing on the case of a next friend or guardian *ad litem not claiming charge of the estate of the minor*. [See *Vijkore* v. *Jijibhai* (2).]

As to the second question, this Court is of opinion that neither Act XX of 1864 nor Act X of 1877 (as amended by Act XII of 1879) empowers any Court to appoint, against his or her will, any person, to be a next friend, guardian *ad litem*, guardian of the person, or administrator of the estate, of a minor. So it was decided as to Act XX of 1864 in *Babaji* v. *Maruti*(3). In s. 456 of Act X of 1877 (as amended by Act XII of 1879) the words "no other person fit and willing to act as guardian for the suit"

(1) 6 B.H.C.R. 219 (220). (2) 9 B.H.C.R. 310. (3) *Infra in notis*, 5 B. p.310.

clearly indicate that the Legislature did not intend to force the office of guardian *ad litem* on any person *in invitum* ; and such, even independently of those words, this Court would have deemed to be the proper construction of the Act, unless the contrary distinctly appeared in it, which it does not. Section 458 does not, so far as regards payment of costs, appear to be properly applicable to any person appointed to act as guardian *ad litem* without his previous assent.

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[310] The reply to the third question, *viz.*, whether the Court of Small Causes at Ahmedabad, if it appointed one of its own officers to be guardian *ad litem* under s. 456, would thereby lose its jurisdiction to try the suit, is given by s. 3, cl. *b*, of Act XV of 1880, the effect of which is to preserve to the Court of Small Causes its jurisdiction notwithstanding the appointment of one of its officers to be guardian *ad litem*. That enactment, which received the Viceroy's assent on the 3rd November, 1880, supersedes the law as laid down in the decision in *Mohan Ishwar* v. *Haku Rupa* (1), made on the 13th July, 1880, in so far only as that decision affects officers of the Court appointed under s. 456 of Act X of 1877, as amended by Act XII of 1879.

This is a suitable opportunity for observing that the introduction of a clause affecting civil procedure and Civil Courts generally, such as s. 15 of Act X of 1876, into an Act purporting to regulate a special branch of civil procedure only, *viz.*, that relating to revenue jurisdiction, is inartistic in legislation and inconvenient in the administration of justice. Such a general provision, when hidden in a special Act not often resorted to in practice, is apt to be overlooked by pleaders and Judges who are seldom concerned in revenue cases. This irregularity of legislation having been commenced in Act X of 1876 is, therefore, less inappropriately continued in Act XV of 1880.

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5 B. 310.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

BABAJI (*Plaintiff*), *Appellant v.* MARUTI, A MINOR, BY HIS GUARDIAN GUJAI (*Defendant*), *Respondent.** [15th September, 1874.]

The Minors' Act, No. XX of 1864—*Certificate of Administration—Minor— Defendant—Procedure.*

An order for the issue of a certificate of administration to any particular individual, under Act XX of 1864 ought not to be made until it is ascertained whether that individual is willing to take it.

Where an order for the issue of a certificate of administration was made on default of the mother of the infant to appear and show cause why the certificate should not be issued to her.

[311] *Held* that such default in appearance ought not to be accepted as an assent to the issuing of the certificate to the non-appearing party.

If no relative or friend of the minor can be found who is willing to take out a certificate, the District Judge should name some officer of his Court, or some respectable nominee of the suing creditor of the infant.

[F., 7 C.L.R. 407 ; R., 5 B. 306 ; 13 B. 656 (663).]

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* Civil Reference, No. 10 of 1874.

(1) 4 B. 638.

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APPELLATE CIVIL.

5 B. 310.

THIS case was referred for the opinion of the High Court by R. F. Mactier, Judge of the District Court of Satara. It came before him in appeal, and was stated by him as follows :—

"On the 5th of April, 1872, Babaji bin Kusaji applied to this Court, as he stated, under Act XX of 1864, in order that a certificate, as guardian and administratrix of her infant son, Maruti, might be granted to Gujai, widow of Yeshwanta, deceased, against whom he had a claim, and wished the guardian of the infant to be placed in a position to enable him (Babaji) to sue her as guardian of the minor heir of the deceased Yeshwanta. The decision of the High Court in *Dhondiba* v. *Kusa* (1) and that in *Ex parte Waman Bapuji* (2) (Appeal No. 6 of 1870 under Act XX of 1864) and other similar decisions were put forward as authority for this application.

"This application of Babaji under the above ruling of the High Court was entertained, and notice was served on Gujai to appear to take out the certificate, or show cause for her not doing so. Gujai did not appear, and, under the ruling of the High Court, an order was passed that Gujai should receive a certificate as guardian of the infant Maruti.

"On the strength of this order having been given, copy of which he obtained, Babaji sued Gujai to recover the amount of a debt due by her husband, Yeshwanta, making her a defendant 'as guardian and manager of the minor Maruti, son and heir of Yeshwanta, deceased.' The case was heard by the Subordinate Judge, First Class, who dismissed the suit, on the ground that, though an order had been passed on Babaji's application to give Gujai a certificate, she had not actually taken out the certificate, and was not, therefore, properly made a defendant.

"Babaji has now appealed against the decision of the Subordinate Judge dismissing his suit, and the case has been partly heard; but, as I am in doubt as to what is to be done under the circumstances, I am forced to ask for the opinion of the High Court on the matter.

"This Court has done all that it could possibly do in appointing Gujai guardian of her infant son on the application of a third party, and it appears to have gone somewhat beyond the law in even doing so much, as there seems to be no law to force a person to take out a certificate, and none to authorize a third party to get another person to be appointed guardian, who will not apply to be so made of his own accord.

"This Court has done all that it could do. The question, then, is—Should the Subordinate Judge have refused to admit Gujai as a defendant without the actual certificate of guardianship? According to the *strict* reading of [312] s. 2 of Act XX of 1864, the Subordinate Judge was right, for Gujai has not actually *obtained* a certificate. But I know of no law to force Gujai to come and obtain a certificate, and as she cannot be so made to take a certificate, and as the Subordinate Judge was right, on the other hand, in not admitting her name as a defendant until she did hold a certificate, the matter, as it stands, leaves me in doubt as to what is to be done.

"If this Court were to appoint the nazir a guardian, *ex-officio*, of a minor under the charge of the Civil Court, this would be attended with great inconvenience. Many such minors as this one have no property whatever which could be made available to pay 'for taking charge of the estate,' and, though in this case there may be some property, there are many in which there is none at all, and yet the nazir would have all the trouble of defending suits against the minor under his charge without any remuneration.

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(1) 6 B. H. C. R. A. C. J. 219.

(2) Unreported.

"If the nazir were made by this Court trustee of every minor's estate, the 'manager' of which would not take out a certificate, it is probable that this difficulty would be got over, but it would not be without a great deal of unremunerated trouble to the nazir of the District Court, and it might probably also involve him in expense.

"Under these circumstances, I am obliged to ask for the opinion of the High Court, and would respectfully suggest a review of the decision in *Dhondiba* v. *Kusa* (1) which, I would submit, is hardly supported by Act XX of 1864."

There was no appearance of parties in the High Court.

The following is the judgment of the Court :—

JUDGMENT.

WESTROPP, C. J.—This Court concurs with the District Judge in thinking that a certificate of administration cannot be forced on the mother of the infant, and is further of opinion that an order for the issue of such a certificate to a particular individual ought not to be made until it is ascertained whether that individual is willing to take it. In the present case the order for the issue of the certificate appears to have been made on default of the mother of the infant to appear and show cause why the certificate should not be issued to her. Such default in appearance ought not to be accepted as an assent to the issuing of the certificate to the non-appearing party. If no relative or friend of the minor can be found who is willing to take out a certificate, the District Judge will be under the necessity of naming some officer of his Court or some respectable nominee of the suing creditor of the infant. Difficulty will sometimes arise in such cases: but this Court is inclined to think, and certainly hopes, that the instances will be rare in which a minor, whom it is worth the creditor's while to sue, will be so completly destitute of friends and relatives as that none can be found to protect his interest.

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5 B. 313.

[313] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice, and Mr. Justice West.

CURSETJI RUSTOMJI SETNA (*Plaintiff*) *v.* THOMAS WILLIAMS (*Defendant*).* [28th and 29th April, 1881.]

Small Causes Court—Ship—Bill of lading--Charter party—Incorporation in bill of lading of terms of charter party—Cargo—Freight payable on intake measurement—Measurement at port of delivery—Discrepancy in measurements—Evidence—Burden of proof—Suit by consignee for excess freight.

K. V. at Moulmein consigned to the plaintiff at Bombay 135 logs of teak timber shipped on board the defendant's ship. The bill of lading, which was signed by the defendant, described the logs as marked K. V., and measuring tons 115-12-10, and it provided for the payment of freight thereon at Bombay at the rate of Rs. 17 per ton of 50 cubic feet on right delivery. The last clause of the bill of lading was in the handwriting of the defendant, and was as follows :— "Marks, number, quantity and measurement unknown : all other conditions as per charter party." The charter party was expressed to be between the owners of the ship and Messrs. B. of Rangoon, as charterers of the whole ship, and provided for the payment of freight "at the rate ot Rs. 18 per ton of 50 cubic feet for all timber, one rate throughout, except 100 tons broken stowage at half

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* Suit No. 30 195 of 1880.

(1) 6 B. H. C. R. A. C. J. 219.

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freight, by intake measurement." On arrival of the ship at Bombay, the plaintiff, as consignee of the timber and holder of the bill of lading, paid the defendant (the captain of the ship) Rs. 1,500 on account of freight, and took delivery of the 135 logs. On measuring them, he found that, according to his method of measurement, the total measurement of the 135 logs came only to tons 58-27-11-6 and not tons 115-12-10 as mentioned in the bill of lading. He claimed, therefore, to be chargeable with freight only on the smaller quantity, (*viz.*, Rs. 995-8), and to recover from the defendant the difference, (*viz.*, Rs. 504-8), between that sum and Rs. 1,500 paid on account as for an overpayment of freight. It was proved that all the timber on board had been measured at Moulmein by an employee of the charterers acting apparently as agent of all the different shippers, and that the measurements in the bills of lading were supplied by this person to the defendant as the measurements of the different consignments. It was also proved that the 135 logs received and measured by the plaintiff in Bombay were the same logs that were shipped under the bill of lading, and that the plaintiff's measurement of them was correct according to the mode of measurement which he adopted. There was no evidence as to what was the mode of measurement followed at Moulmein, nor, except the statements in the bill of lading, as to what was the actual intake measurement of the timber there.

Held that the effect of the last clause in the bill of lading was to incorporate into that document the clause of the charter party which provided that freight should be payable on the intake measurement: that the burden [314] of proving what the intake measurement actually was, lay upon the plaintiff who sought to recover back money which he alleged he had paid in excess of what was due, and that, in the absence of such evidence on behalf of the plaintiff, the statement of quantity contained in the bill of lading was *prima facie* evidence of the intake measurement of the timber.

THE following case was stated for the opinion of the High Court, under s. 7 of Act XXVI of 1864, by W. E. Hart, First Judge of the Court of Small Causes at Bombay:—

"The plaintiff Cursetji Rustomji Setna sued Thomas Williams, the captain of the ship *Abyssinian*, to recover the sum of Rs. 504-8 as an over-payment of freight under the following circumstances:—

"One Karanee Veeraswamy at Moulmein consigned to the plaintiff in Bombay 135 logs of teak timber, shipped on board the defendant's ship, and covered by a bill of lading signed by the defendant.

"The bill of lading, which is annexed hereto, describes the 135 logs as marked K.V., and measuring tons 115-12-10, and provides for the payment of freight thereon at Bombay at the rate of Rs. 17 per ton of 50 cubic feet on right delivery. The last clause of the bill of lading is in the handwriting of the defendant, to the following effect: 'Marks, number, quantity and measurement unknown; all other conditions as per charter party.'

"The charter party, which is also annexed hereto, is expressed to be between the owners of the ship and the firm of Messrs. Bhagwandas of Rangoon as charterers of the whole ship, and provides (*inter alia*) for the payment of freight at the rate of Rs. 18 per ton of 50 cubic feet for all timber, one rate throughout, except 100 tons broken stowage at half freight, *by intake measurement*.

"On arrival of the ship at Bombay, the plaintiff, as endorsee and holder of the bill of lading and consignee of the goods mentioned therein, paid to the defendant Rs. 1,500 on account of freight, and took delivery of the 135 logs. On measuring them, however, he found that, according to his method of measurement, which was to measure the length, breadth and thickness of each log separately, making no deduction for holes or fractures, the total measurement of the 135 logs came only to tons 58-27-11-6, and not tons [315] 115-12-10, as mentioned in the bill of lading. He claimed, therefore, to be chargeable with freight only on the

smaller quantity, Rs. 995-8, and to recover from the defendant the difference between that sum and Rs. 1,500 paid on account (Rs. 504-8) as for an over-payment of freight.

"It was proved before me that the ship took no part in the measurement of the timber at Moulmein, but that all the timber put on board was measured by an employee of the charterers acting apparently as the agent of all the different shippers, and that the measurements in the bills of lading were those supplied by this person to the defendant as the measurements of the different consignments.

"I also found as facts that the 135 logs measured by the plaintiff in Bombay were the same 135 logs as were shipped under this bill of lading, and that his measurement of them was correct according to the mode of measurement which he followed.

"There was no evidence as to what the mode of measurement followed at Moulmein was; nor, except the statements in the bill of lading, as to what was the actual intake measurement there of this particular consignment. Neither party would apply for a commission to Moulmein for the purpose of ascertaining these particulars, each contending that the burden of proof lay on the other.

"The following authorities were cited before me:—Maclaghlan on Shipping, p. 430; *Tully* v. *Terry* (1); *Buckle* v. *Knoop* (2); Leggatt on Bills of Lading, p. 338; and *Christy* v. *Ran* (3).

"I held—first, that the effect of the last clause in the bill of lading was to incorporate into that document the provision of the charter party that freight was to be calculated on the intake measurement; second, that the burden was on the plaintiff to show that the intake measurement was tons 58-27-11-6 only; and, third, on the authority of *Spaight* v. *Farnworth* (4), that the measurement by the plaintiff in Bombay afforded no criterion as to what was the intake measurement at Moulmein.

"**[316]** I accordingly directed a non-suit to be entered; but, at the request of the plaintiff's pleader, and on condition of the plaintiff depositing in this Court Rs. 50 to cover the costs of the reference, and Rs. 34, the certified professional costs of the defendant in this case, the order for a non-suit was made subject to the opinion of the High Court on points of law to be stated by the plaintiff's pleader within three days.

"These conditions have been complied with, and the points on which the plaintiff's pleader requires the opinion of the High Court, are the following:—

"1. Was not the burden of proving what was the intake measurement at Moulmein wrongly laid on the plaintiff, and should it not have been laid on the defendant?

"2. Ought the measurement mentioned in the bill of lading to be taken to be the intake measurement at Moulmein?

"3. Was not the Court in error in considering that the case of *Spaight* v. *Farnworth* was applicable to the present case?

"4. Inasmuch as the bill of lading contained an express provision for the payment of freight, was not the Court in error in holding that the words in the last clause, 'all other conditions as per charter party,' operated to incorporate into the bill of lading the provision in the charter party that freight was to be calculated on the intake measurement?"

(1) L.R. 8 C.P. 679.
(2) L.R. 2 Ex. 125.
(3) 1 Taunt. 300.
(4) L.R. 5 Q.B.D. 115.

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The bill of lading was in the following terms :—

"Shipped in good order and condition—by Karanee Veeraswamy in and upon the good ship or vessel called the *Abyssinian*, whereof T. Williams is master for this present voyage, and now lying in the river Solevem, and bound for Bombay—K. V. (135) one hundred and thirty-five teak square measuring tons 115-12-10, being marked and numbered as per margin, and are to be delivered in like good order and condition at the aforesaid port of Bombay (all and every dangers and accidents of the sea and navigation of whatsoever kind or nature excepted) unto order or to his assignee. Freight for the said goods payable there at the rate of Rs. (17) seventeen per ton of 50 cubic feet on right delivery with average accustomed. In witness whereof the master or [317] purser of the said ship or vessel both affirmed to two bills of lading, all of this tenor and date, one of which bills being accomplished, the rest to stand void. Dated in Moulmein this 20th September, 1880."

The following words were added in the handwriting of the captain :—

"Weight and contents unknown. Marks, numbers, quantity and measurement unknown.

"All other articles as per charter party."

Farran, for plaintiff.—The reasoning in the case of *Spaight* v. *Farnworth* (1) has no application to the present case. The ground of the decision in that case was, as stated on p. 120 of the report, that "errors of measurement in part would be corrected by opposite inaccuracies in another part." That would be so as between the charterer of the ship and the owners, but this is a case between the charterers and a consignee of a portion of the cargo, and if he is overcharged, he will not be compensated by the fact that another consignee may be undercharged for his part of the cargo. The words "all *other* conditions," added to the bill of lading, mean that all the conditions, *except the one relating to measurement*, are to be taken from the charter party. It is, therefore, necessary to measure the timber here, and the consignee has done so. In certain exceptional cases freight is payable on the measurement taken at the port of shipment, but the rule is that it is payable on the quantity actually delivered (Maclaghlan on Shipping, p. 430). Further, there is no evidence that the measurement, given in the bill of lading, is the intake measurement. The words added by the captain, declaring that the weight, &c., was unknown, operate to eliminate the figures given in the bill of lading, which must, therefore, be read as if they were altogether omitted. It is improbable that the shipper intended to be bound by measurements taken by a servant of the charterer, who would naturally make them as large as possible. Counsel referred to *Gibson* v. *Sturge* (2), *Spaight* v. *Farnworth* (1).

Kirkpatrick, for defendant.—The effect of the words added to the bill of lading by the captain is to incorporate the provisions [318] of the charter party. One of the conditions or terms of the bill of lading is that timber measuring 115 tons is to be delivered at Bombay. In his note to the bill of lading the captain in effect says : "I do not know whether the weight and measurement stated in this condition of the bill of lading are correct, but all other conditions are to be taken from the charter party." One of those *other* conditions is that freight is payable on intake measurement, and that condition accordingly is incorporated into the contract contained in the bill of lading. The parties chose to run risk of

(1) L.R. 5 Q.B.D. 115.

(2) 10 Ex. 622.

mistake in the measurement. Had the error been the other way, the captain would be the loser. It is to be remembered that the measurement was taken by the shipper's agent. The statement in the bill of lading is *prima facie* evidence of what the intake measurement was, and it rests with the plaintiff to rebut it. Counsel referred to *Tully* v. *Terry* (1), *W. Nicol & Co.* v. *J. S. Castle* (2), *Wegener* v. *Smith* (3).

JUDGMENT.

SARGENT, J.—The question in this case comes before us on a reference from Mr. Hart, the First Judge of the Small Cause Court, in a suit brought by the consignee of one hundred and thirty-five logs of timber shipped in the *Abyssinian* at Moulmein for conveyance to Bombay, to recover a sum which he has paid to the captain of the ship, but which he alleges was in excess of the amount properly payable as freight. There is no dispute as to the actual timber which was put on board. The logs which were shipped, appear to have been duly delivered at Bombay. The question turns on the measurement of the timber; the captain contending that by the contract of carriage the freight was to be calculated upon the intake measurement at Moulmein, and the consignor on his part contending that it is to be paid upon the actual measurement of the timber in Bombay, the port of delivery.

The *Abyssinian* was chartered in July, 1880, to Messrs. Bhagwandas of Rangoon, and the charter party contains the terms of the contract between them and the owners. The charterers subsequently proceeded to obtain cargo for the ship at **[319]** Moulmein, and goods of various shippers were received on board. Among them was the timber in question, which was shipped by one Karanee Veeraswamy, and consigned to the plaintiff at Bombay.

The measurement of the timber put on board by the shipper at Moulmein is stated in the bill of lading to be upwards of 135 tons, but the plaintiff alleges that upon its arrival and delivery at Bombay he himself measured it, and found the measurement to amount only to something above 58 tons, and upon this quantity, and not upon the amount stated in the bill of lading, he contends that he is liable for freight.

The bill of lading is as follows:—"Shipped in good order and condition—by Karanee Veeraswamy in and upon the good ship or vessel called the *Abyssiniam*, whereof T. Williams is master for this present voyage, and now lying in the river Salevem, and bound for Bombay—K. V. (135) one hundred and thirty-five teak square, measuring tons 115-12-10-0, being marked and numbered as per margin, and are to be delivered in like good order and condition at the aforesaid port of Bombay (all and every the dangers and accidents of the sea and navigation of whatever kind or nature excepted) unto order or to his assignee. Freight for the said goods payable there at the rate of Rs. 17 (seventeen) per ton of 50 cubic feet on right delivery with average accustomed. In witness whereof the master or purser of the said ship or vessel both affirmed to two bills of lading, all of this tenor and date, one of which bills being accomplished, the rest to stand void. Dated in Moulmein this 20th September, 1880.

"Weight and contents unknown.

"Marks, numbers, quality and measurement unknown.

(1) L.R. 8 C.P. 679. (2) 9 B.H.C.R. 329. (3) 15 C.B. 285.

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"All other conditions as per charter party."

It is these last words, added by the captain to the bill of lading, which have raised the question we have to decide. The defendant contends that their effect is to incorporate into the bill of lading the various conditions of the charter party, and, amongst them, the condition which provides that freight is to be payable "for all timber one rate throughout (except 100 tons broken stowage at half freight) *by intake measurement.*"

[320] Some reference was made in argument to the use of the word "conditions" in the written words at the foot of the bill of lading. We think, however, that it must be taken as equivalent to "terms," and that the phrase "all other conditions as per charter party" means simply that, except where other and inconsistent terms are expressly mentioned in the bill of lading, the terms of the contract between the charterer and the shipper for the carriage of the timber are to be the same as the terms of the contract contained in the charter party.

Now the bill of lading provides that the freight shall be payable at Bombay at the rate of Rs. 17 per ton of fifty cublic feet, but it states nothing as to the mode of measurement, nor does it indicate where the measurement is to be ascertained. When, however, we refer to the charter party, we find a term which expressly provides that the freight is to be payable "by intake measurement," and the case of *Spaight* v. *Farnworth* (1) decides that intake measurement means the measurement actually taken at the port of shipment.

The port of shipment in the present case was Moulmein, and, therefore, the intake measurement upon which frieght is made payable is the measurement actually taken at Moulmein.

Mr. Farran, however, urged that it was improbable that it was intended that freight should be payable upon measurements ascertained (as he said) by a servant of the charterers, whose object it would be to make the measurements as large as possible. But it appears that the person who measured at Moulmein, although an employee of the charterers, acted as agent of the shipper, and was, therefore, we must assume, a person in whom the shipper had confidence. It is clear that under these circumstances we cannot give much weight to the suggestion of improbability.

Mr. Farran also argued that the addition, by the captain, of the words "marks, number, quantity and measurement unknown" operated to eliminate altogether from the bill of lading, the statement of the quantity of timber shipped; that by these words the captain declined to be bound by the figures contained in the **[321]** bill of lading, and that, therefore, the bill of lading was to be read as if it contained no measurement at all. But we do not think that the addition of the words "measurement unknown" has this effect. These words are added for a limited purpose, *viz.*, to protect the captain from liability for short delivery; and, as shown in the case of *Tully* v. *Terry* (2), they do not nullify altogether the statement of quantity contained in the bill of lading.

We are, therefore, of opinion that the effect of the words added by the captain to the bill of lading was to incorporate the clause of the charter party which provided that freight should be payable on the intake measurement.

From the 5th para of the case it appears that the plaintiff paid Rs. 1,500 to the defendant *on account*, but that, now being of opinion

(1) L.R. 5 Q.B.D. 115.
(2) L.R. 8 C.P. 679.

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that he has paid too much, he seeks to recover a part of that sum. He must, therefore, prove that he has paid too much, and to do so must, if he disputes the accuracy of the statement in the bill of lading, show what the intake measurement really was upon which he is liable for freight. At the hearing, however, no evidence upon this point was given by the plaintiff, and he was, therefore, properly non-suited.

Of the questions referred to us, we answer the first in the affirmative. The second we answer also in the affirmative, as, looking to the sixth and eighth paragraphs of the case, we think there was evidence that the statement of quantity in the bill of lading was the intake measurement, and this evidence was not rebutted by the plaintiff. To the third question we do not think it necessary to give any answer; and the fourth we answer in the negative.

WEST, J.—I am of the same opinion. Apart from the decided cases, I should feel disposed to give to the disputed clause the effect which has been proposed by the plaintiff, and to hold that where the captain added such words as "weight, measurement, &c., unknown" to a bill of lading, there is no agreement as to the quantity shipped on board. But the authorities which bind us have laid down that these words do not cancel the statement of quantity contained in the bill of lading, but that under **[322]** their protection, if the captain deliver what was given to him, he is not bound by any clause in the bill of lading which purports to state the quantity of goods shipped. That being so, there is in this case some evidence that upwards of 115 tons of timber were shipped at Moulmein. The measurement appears to have been taken by some person acting as the agent of shipper, and the taking the bill of lading in this form argued that the same terms which were to govern the payment of freight as between the owners of the ship and the charterers upon the whole cargo should apply also as between the charterer and the shipper in respect of the payment of freight upon a particular portion of the cargo. The shipper ran the risk of the measurement being incorrect. That, however, was his own doing, and cannot now affect the captain's clause. I think the bill of lading is *prima facie* evidence of the intake measurement upon which freight was to be paid, and I agree in the answers made to the question referred to us.

Attorneys for the plaintiff: Messrs. *Nanu and Hormusji.*
Attorney for the defendant: Mr. *H. W. Payne.*

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Before Sir Charles Sargent, Kt., Justice, and Mr. Justice M. Melvill.

THE COLLECTOR OF THANA (*Original Defendant*), *Appellant v.* KRISHNANATH GOVIND AND ANOTHER (*Original Plaintiffs*), *Respondents.** [6th December, 1881.]

Limitation—Act XIV of 1859, s. 1, cls. 12 and 16—Grant by a Hindu sovereign to a Hindu temple—Applicability of Hindu law to determine questions of limitation—Antastha sadilwar — Kherij jamabandi parbhare paiki — Nibandh — What is immoveable property.

The Peishwa, by a *sanad* dated 1790, granted to the temple of Shri Vyankatesh, at Mahim, an annual sum of Rs. 350 in cash out of the "antastha

* Second Appeal No. 12 of 1879.

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sadilwar",* and three khandis of rice out of the "kherij jamabandi parbhare"† derivable from the [323] several mahals and forts therein particularly mentioned. The Collector of Thana stopped these allowances in 1859, when the plaintiffs' father died, and the plaintiffs in 1871 claimed to have their right established to the benefit of the above grant.

The right of the plaintiffs admittedly depended on whether the grant was immoveable property or an interest in immoveable property, and, as such, subject to the twelve-years' period of limitation provided by cl. 12 of s. 1 of the Limitation Act XIV of 1859.

Held (*per* SARGENT, J.)—

1. That the grant in question was of the nature of immoveable property, and that the suit, therefore, fell within the provisions of cl. 12 of s. 1 of the Limitation Act XIV of 1859.

2. In using the expression "subject of the suit" in the rule laid down by the Privy Council in the Toda Giras case (*Maharana Fatesangji* v. *Desai Kallianrayaji* (1) their Lordships intended to include in it all the facts which determine the nature of the plaintiff's claim, and not merely of the allowance itself, and to confine the application of Hindu law to those cases in which the "subject of the suit" has such a distinctive Hindu character as that only Hindu law and usage can be legitimately invoked to determine its quality and nature.

3. It is the fixed and permanent character of an allowance, from whatever source derived, which by Hindu law entitles it to rank with immoveables. Here the grant, from the object which it had in view, was to be deemed to be one in perpetuity, and the fund out of which this perpetual allowance was to be paid was derived from a permanent source. It had, therefore, all the characteristics of permanency and durability which were essential to bring it, according to Hindu law, within the term "immoveable property."

Held (*per* MELVILL, J.)—

1. That the allowance in question was not immoveable property, and that the suit, therefore, did not come within the provisions of cl. 12 of s. 1 of the Limitation Act XIV of 1859.

2. From a consideration of the judgment of the Privy Council in *Maharana Fatesangji* v. *Desai Kallianrayoji*, it would appear that the rule which their Lordships intended to lay down is this, *viz.*, that, whenever it is possible to do so, the term "immoveable property" and, "interest in immoveable property" in Act XIV of 1859 must be interpreted, on general principles of construction, with reference to the nature of the thing sued for and not to the *status*, race, character, or religion of the parties to the suit; but that in exceptional cases, in which the thing sued for is of such a special and exceptional character that its nature cannot be determined without reference to the special and peculiar law of a particular sect or class, in such cases, and in such cases only, the law of such sect or class may properly be referred to as furnishing a guide to the determination of the question.

3. The Privy Council has thus laid down a rule and an exception, and the question in every case must be whether the rule or the exception applies.

[324] The rule is that the terms "immoveable property" and "interest in immoveable property" are to be held to include not only land and houses, and such other things as are physically incapable of being moved, but also such incorporeal hereditaments as issue out of, or are connected with, immoveable property properly so called, and which, therefore, "savour of the realty" *e.g.*, rights of common, rights of way, and other profits *in alieno solo*, rents, pensions and annuities secured upon land,—all these clearly constitute an interest in immoveable property. Pensions and annuities not secured upon land, houses, or the like as clearly do not constitute such an interest. When a classification can thus be made, it ought to be so made without reference to the character of the party claiming the right.

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* "Antastha sadilwar" means extra assessment levied to meet local charges analogous to the present local cess fund.

† "Kherij jamabandi parbhare" means extra assessment in kind upon land over the regular land assessment collected by local officers, and paid by them direct.

(1) 10 B.H.C.R. 281.

4. But there may be cases in which the test prescribed by the rule fails, or is very difficult of application, and then will come in the operation of the exception to the rule, and it may become the duty of the Court to seek for guidance in some arbitrary definition contained in the religious law of the claimant, *e.g.*, in the instance of an hereditary office in a Hindu community incapable of being held by any person not a Hindu. The claim now in question is a claim to an annuity granted by a Hindu sovereign to a Hindu temple. The annuity is not made a charge upon land, and it is not, therefore, according to general principle of construction, immoveable property. That being so, it is not necessary to go further.

[R., 10 B. 149 (151); 19 C. 544 (F.B.); 3 Bom. L.R. 94 (97); D., 23 B. 22 (30).]

THIS was a second appeal from the decision of W. M. P. Coghlan, Judge of Thana, reversing the decree of H. Batty, Assistant Judge.

The plaintiffs in 1871 sued to establish their right to an annual allowance of Rs. 350 payable in cash out of a fund called "antastha sadilwar," and a similar allowance of three khandis of rice out of "the kherij jamabandi parbhare" in virtue of a *sanad*, dated 1790, granted by the Peishwa to the ancestors of the plaintiffs as a contribution to the expenses of the temple of Vyankatesh at Mahim, in the district of Thana. The suit was first brought in the Court of the Assistant Judge of Thana, who rejected it on a preliminary point of limitation, and his decision was upheld, in appeal, by the Judge. The High Court, however, reversed both these decrees, and directed the suit to proceed, leaving it open to decide any question of limitation that might properly arise upon a further examination of the pleadings. Upon the retrial before the Assistant Judge, the defendant (*inter alia*) contended that the allowances having been stopped in 1859, when the plaintiffs' father died, the suit, brought in 1871, was time-barred. This contention was based on the ground that the allowances were not a charge upon land, and, consequently, not immoveable property, or any interest in such property within the meaning of s. 1, [325] cl. 12 of Act XIV of 1859. Mr. Batty, the Assistant Judge, came to the conclusion that the defendant's contention was right, and rejected the plaintiff's claim. The Judge, Mr. Coghlan, arrived at a different conclusion, and, reversing Mr. Batty's decree, remanded the suit for a trial on the merits.

The defendant appealed to the High Court.

Jardine and *Nanabhai Haridas*, Government Pleader, for the appellant.

The Hon. Rao Saheb *Vishvanath Narayan Mandlik*, for the respondents.

JUDGMENT.

SARGENT, J.—The question which the Court has to determine in this case arises upon a grant by *sanad* made in 1790 by the Government of the Peishwa to the temple of Sri Vyankatesh at Mahim of the annual sum of Rs. 350 in cash out of the antastha sadilwar and three khandis of rice out of the kherji jamabandi parbhare derivable from the several mahals and forts therein particularly mentioned. The plaintiffs seek by their plaints to have their right established to the benefit of the above grant and to be paid six years' arrears of the same. The only issue raised in the Court below was whether the plaintiffs' claim was barred by the statute of limitations, and that question having been determined and a decree passed by the lower Court in favour of the plaintiffs, this case now comes before us on appeal. It was admitted by both sides that the only question was whether that issue was rightly determined by the lower

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Court, and that the answer to it must depend upon whether the grant was of the nature of immoveable property, and, as such, subject to the twelve years' period of limitation as provided by cl. 12, s. 1 of the Limitation Act XIV of 1859. The sadilwar or sadilwar patti, which by the terms of the *sanad* was to provide the cash payment of Rs. 350 *per annum*, is stated in Wilson's Glossary to be the extra assessment above the public revenue levied formerly by the revenue officers for the purpose of defraying local district charges, and would appear, so far as the objects for which it was levied, to have been analogous to the local fund cess of the present day. "Antastha," according to Wilson, means secret expenditure; also items in the darbar kharch or Court charges of **[326]** the Peishwa. The antastha sadilwar would thus be the extra assessment levied to meet local charges imposed by the Peishwa on the fund. It further appears from the *sanad* that the sadilwar, out of which the Rs. 350 were to be paid, was itself a cash payment levied upon certain mahals and forts therein particularly mentioned, and derived in part from customs levied at various ferries in the several mahals. The evidence of witness No. 86 (and it is not disputed) shows that the tax upon the mahals, or mahalanihai, was a ½ anna cess paid in cash on each rupee of land revenue, and the various entries in the revenue books which are in evidence in this case show that the sources from which the sadilwar was actually derived were, both in the time of the Peishwa and also after the assumption of the Government by the East India Company, of the most miscellaneous nature—such as a marriage tax, house tax and tobacco tax. Again, the tax on the forts, or killenihai, would appear, from the same evidence, to have been a tax, levied on officers and soldiers, of ½ anna on each rupee of their pay. Such, then, being the nature of the varied sources from which the sadilwar was derived, it would be impossible, I think, to regard the allowance of Rs. 350 as being derived from or charged upon land. With respect, however, to the allowance of the three khandis of grain, the case is somewhat different. It is described in the *sanad* as kherij jamabandi parbhare paiki, and it would appear, from Wilson's explanation of the term kherij jama and the evidence of witness No. 86, that these three khandis were an extra assessment in kind upon the land in the several mahals over and above the regular land assessment. The sense in which the expression "parbhare" is here used, is not so plain; but it was, I think, understood by both sides as meaning "payable at once by the officers of the local revenue,"—*i.e.*, direct from the officers collecting the land revenue in the several districts. Such being the nature of this allowance, it would appear to have been an extra charge imposed upon the land to meet a special purpose, and not a mere payment out of the local treasury, as contended for the appellant on the strength of the remarks of the Judicial Committee in *The Government of Bombay* v. *Desai Kallianrai* (1).

[327] It is to be remarked, however, that in the Toda Giras case, *Maharana Fatasangji Jaswatsangji* v. *Desai Kallianrayaji Hukamatraiji* (2) where their Lordships were pressed to act upon the last-mentioned case, they observed that the opinion there expressed as to the particular *hak*, that it was not in the nature of immoveable property, was "the expression of a doubt rather than a positive decision." Further, it is to be remarked that the Privy Council were dealing in that case exclusively with evidence, the effect of which, at the most, was to establish the simple fact that the

(1) 14 M.I.A. 551 (563, 564).

(2) 10 B.H.C.R. 281.

respondent had been paid for a number of years a certain allowance out of the revenue of certain parganas. In the present case, however, the respondents rely on a grant which imposes an extra assessment on the land in certain mahals ; and the mere fact that it is to be collected by the local officers ought not, in my opinion, to deprive it of the character of an interest in land and, as such, constituting immoveable property. It was, however, contended for the respondents that, whether or no the grant be deemed to be an interest in land by general law, the question whether it is to be regarded as immoveable property for the purposes of the Statute of Limitations must be determined by Hindu law, and that by Hindu law it was *nibandha*, and, as such, ranked with immoveable property. This contention doubtless raises a question of considerable nicety. In *Krishnabhat Hiragange* v. *Kapabhat bin Mahalbhat* (1), where the question was as to the right of the plaintiff to officiate as a priest of a temple and to receive the offerings, Couch, C.J., said that "in the absence of any interpretation clause, such as there was in the Indian Succession Act, 1865, he thought the Court ought, in applying the law of limitation between Hindus, to include in the term immoveable property whatever is in the Hindu law understood to be such." In *Balvantrav* v. *Purshottam Siddheshwar* (2) the plaintiffs claiming as mortgagees of an eight-anna share in the hereditary office of village joshi sued his mortgagor co-sharers in the office to establish their right as such mortgagees to a moiety of the joshi *haks*, which they alleged the defendants had received for some years past. Mr. Justice West disapproved of the above ruling of the **[328]** late Chief Justice, and expressed an opinion that the sense to be given to the expressions "immoveable" and "moveable" property in the Limitation Act should be gathered from the Acts of the Indian Legislature, and should not be subject to fluctuations depending on the race, caste or religion of those who have to do with the property. Gibbs, J., adhered to the decision arrived at by the Court of which he was a member in *Krishnabhat* v. *Kapabhat*. The question was, therefore, referred to a Full Court, the judgment of which was delivered by Westropp, C. J. After an elaborate discussion of the descriptions of property which were included in the term immoveable at the time of the passing of the Act of 1859, the learned Chief Justice arrives at the conclusion that there is "nothing in the Act XIV of 1859 to cut down what was the received meaning of 'immoveable property' before the Act was passed," and, further, that there is nothing "in subsequent Acts calculated to give the impression that the received doctrine as to immoveable property amongst Hindus was wrong, or that Act XIV of 1859 was intended to narrow the scope of that phrase, or to show that it is not a term elastic enough to suit itself to the law of any community to whose property it may be necessary to apply it," and the Court, accordingly, held that cl. 12, and not cl. 16, of s. 1 of Act XIV of 1859 was applicable to a suit to recover fees of an hereditary office. In *Maharana Fatesangji Desai* v. *Kalianrayaji* (3), better known as the Toda Giras case, the Privy Council were asked, upon the authority of the above cases of *Krishnabhat* v. *Kapabhat* and *Balvantrav* v. *Purshottam Siddeshwar*, to construe the Statute of Limitation by the light of Hindu law. Referring to the judgment of the Full Bench in the latter case, their Lordships say : "It fully upheld the decision in *Krishnabhat* v. *Kapabhat*, and affirmed the correctness of the rule there laid down for the interpretation of Act XIV of 1859,

(1) 6 B.H.C.R. A. C. J. 137. (2) 9 B.H.C.R. 99. (3) 10 B.H.C.R. 281.

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s. 1, cl. 12. The rule is, shortly, this, *viz.*, that inasmuch as the term 'immoveable property' is not defined by the Act, it must, when the question concerns the rights of Hindus, be taken to include whatever the Hindu law classes as immoveable, although not such in the [329] ordinary acceptation of the word. To the application of this rule within proper limits their Lordships see no objection. The question must in every case be whether the subject of the suit is in the nature of immoveable property or of an interest in immoveable property, and if its nature and quality can be only determined by Hindu law and usage, the Hindu law may be properly invoked for that purpose. Thus, in the two cases on which the appellant relies, Hindu texts were legitimately used to show that, in the contemplation of Hindu law, hereditary offices in a Hindu community incapable of being held by any person not a Hindu were in the nature of immoveables." Proceeding to consider whether the Hindu law should be applied in the actual case before it, their Lordships say; "it appears from the authorities that the Girasias were sometimes Mahomedans, and, therefore, that the *hak* may in its inception have been held by a Mahomedan. It is certain that as these *haks* now exist they may pass to, and be held and enjoyed by, Mahomedans, Parsis, or Christians, and their Lordships think that the applicability of particular sections of this general Statute of Limitation must be determined by the nature of the thing sued for, and not by the *status*, race, character or religion of the parties to the suit. The period of limitation within which the claim is barred, must be fixed and uniform, by whomsoever that claim is preferred or resisted."

In the present case the claim is by a Hindu temple based upon a formal grant or *sanad* from a Hindu sovereign whose obligations the East India Company assumed, and to which the English Crown subsequently succeeded. The claim is, therefore, by its very nature one which can only be preferred by Hindus, and does not fall within the reasoning of their Lordships in the Toda Giras case. But it was contended for the appellant that the allowance itself was of such a nature as to render it unnecessary to resort to Hindu law, and that the case, therefore, falls outside the limits which the Privy Council have placed on the rule laid down by the Full Bench decision of this Court. This reasoning, however, appears to me to proceed on too narrow a view of the intention of the Privy Council in confining the application of the Hindu law to those cases in which "the quality and nature of the subject [330] of the suit can only be determined by Hindu law." In using the expression "subject of the suit" the Privy Council intended, I apprehend, to include in it all the facts which determine the nature of the plaintiff's claim, and not merely of the allowance itself, and to confine the application of Hindu law to those cases in which the "subject of the suit" has such a distinctive Hindu character as that only Hindu law and usage can be legitimately invoked to determine its quality and nature. The case of an hereditary office is itself an illustration of this view of their Lordships' meaning. The nature of an hereditary office is capable of being determined by English law, see [Coke on Litt., 20 (*a*)], but that of an hereditary office of a distinctly Hindu character can only be properly determined by Hindu law. In the present case it is legitimate to show that a grant in perpetuity (for such must be deemed to be the duration of this grant, if not upon the express language of the grant itself, at any rate by the custom and usage of the country as uniformly stated by Mountstuart Elphinstone in his report on States conquered from the Peshwa, and by Steele in his preface to Castes and Customs, as well

as by other writers) by a Hindu government to a Hindu temple of an allowance to be levied on certain districts, is, in the contemplation of Hindu law, in the nature of immoveable property, because that law alone can be legitimately applied to the determination of its nature and quality.

I proceed, therefore, to consider the conclusions to be drawn from the Hindu law. It was contended for the respondents that the grant was by that law in the nature of *nibandha*, and, as such, ranked with immoveable property. I may remark that this question was raised in *The Government of Bombay* v. *Gosvami Shri Girdharlalji* (1), the judgment in which case was delivered by my colleague, Mr. Justice Melvill. It was there held that, even assuming that certain allowances not secured on land might be included in *nibandha* and rank with immoveable property, it was, at any rate, essential that such allowances should be derived from some express and solemn agreement or promise made by the king or other person in authority. It became unnecessary to decide the question, there being no promise or agreement proved in the case before the Court. Now *nibandha* is the Sanskrit **[331]** word which in the English translations of Hindu texts and commentaries has been interpreted by the obsolete English law expression "corrody." Its literal meaning, as appears from Sanskrit dictionaries, is "fixed," "made fast," and the illustrations of its use as a Hindu term of law enumerated in the judgment of the Full Bench Court in *Balvantrav* v. *Purshottam Siddheshwar* (2) would seem to show that it is applied in its largest sense to any fixed and permanent allowance; or payment; or as it is explained in the note to the Digest, Vol. II, p. 162, plac. xxxiv, "to a gift of a thing assigned upon a fund." An examination of the authorities referred to in the Full Bench judgment can leave no doubt, I think, that *nibandha* (of some descriptions at least) was considered as ranking with immoveables in all questions of ownership, inheritance and partition. I may also refer, in further support of that view, to Dayabhaga, ch. 2, pla. 22, 25. The former *placitum* concludes with the saying of Yajnyavalkya, "that the father is master of the gems, pearls, and corals and of all other moveable property, but neither the father nor the grandfather is so of the whole immoveable estate," and in the latter it is said, "from the express mention of immoveables, a prohibition is inferred by the analogy exemplified in the loaf and staff against the gift or other transfer of a corrody or of slaves." In other words, as explained in the note, the term, "immoveables" carries with it corrodies and slaves as well as land, in the same way as the staff being thrust through the loaves, those are necessarily brought by bringing the staff. Nor does it appear that the corrodies so included in the term "immoveables" are necessarily confined to grants by the king and rajahs and people in authority, as would appear to have been inferred from *placitum* xcii of the Digest, for it is to be remarked that the words "out of mines or the like, settled on him and his heirs by the king" are not found in the original, but have been apparently introduced into the translation from the commentary on the text, omitting however the words "or other benefactor." Ratnacara also expounding the word *nibandha* in the text says: "That which is fixed or made fast is *nibandha* or fixed pension receivable out of mines or the like." And if we look to the reason of the rule as explained in ch. ix, ss. 22 and 23 of the Dayabhaga, *viz.*, that the immoveable **[332]** property is a permanent means of maintaining the family which the Hindu

(1) 9 B.H.C.R. 222.

(2) 9 B.H.C.R. 99.

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law-givers regard as an indispensable obligation, we must, I think, come to the conclusion that it is the fixed and permanent character of the allowance, from whatever source derived, which entitles it to rank with immoveables, and that the case of a grant by the king out of mines or the like is merely an illustration of a corrody in its truest sense. However that may be, in the present case the grant was by the king or his authorized representatives. It is a grant which from the object it had in view must be deemed to be one in perpetuity; and, lastly, the fund out of which this perpetual allowance was to be paid, was derived from a permanent source. It has, therefore, all the characteristics of permanency and durability which are essential to bring it, according to Hindu law, within the term "immoveable property."

I would, therefore, dismiss the appeal with costs.

MELVILL, J.—The only question which we have to determine in this appeal is whether the subject-matter of the claim is immoveable property, or an interest in immoveable property, within the meaning of cl. 12, s. 1 of Act XIV of 1859.

In *The Government of Bombay* v. *Gosvami Shri Girdharlalji* (1) I stated, and I think that I was right in stating, that, in considering, with reference to limitation, the question whether any particular allowance (other than an allowance incidental to an hereditary office), is or is not immoveable property, this Court has generally, if not invariably, applied the following test, *viz.*, is or is not the allowance in question a charge upon land or other immoveable property?

If this test be applied in the present instance, the plaintiffs must fail. The allowance, in respect of which they sue, is not charged upon land. In the plaint it is treated merely as an annual allowance payable out of the Government treasury. Since British rule was introduced, it has never borne any other character. If we go back to the *sanad* from the Peishwa's government by which the grant is bestowed, we find that the allowance consists partly of a money payment out of certain extra cesses and transit [333] duties (the nature of which will be found described in Grant Duff's History of the Mahrattas, Vol. I, p. 26, Indian Reprint, and note, and in Mounstuart Elphinstone's Report on the Territories conquered from the Peishwa, p. 26), and partly of a small quantity of grain, described as "kherij jamabandi purbhare paiki," which term may either mean that the grain was to be taken out of the extra collections made for incidental expenses (see Wilson's Glossary under *kharij-juma* and *purbhara hak*), or else that the grain was to be received by the grantee, not from the head-quarters treasury, from which the money allowance was payable, but direct (parbhare) from the collecting officers in the revenue divisions (*suja*) named in the *sanad*, and to be debited under the head of extra collections. The Assistant Judge has rightly described the meaning of other terms used in the *sanad*, and I agree with him in holding that none of them afford any foundation for the contention that the grant was in any way a charge upon land or other immoveable property.

But then arises the consideration whether the determination of the question before us is to depend upon the general construction to be given to the terms "immoveable property" and "interest in immoveable property" as used by the Legislature, or whether it is proper that we should proceed

(1) 9 B.H.C.R. 222.

further, and ascertain whether the subject-matter of this suit would, according to Hindu law, be "*nibandha*."

In the case to which I have referred, I considered myself justified in having recourse to Hindu law as supplemental to the other grounds of my decision. I was, indeed, bound by authority to do so; for in *Krishnabhat* v. *Kapabhat* (1) it had been broadly laid down by Couch, C. J., that we ought, in applying the law of limitation between Hindus, to include in the term "immoveable property" whatever is in the Hindu law understood to be such. This principle of construction was subsequently upheld in the case of *Balvantrav* v. *Purshottam* (2) by Westropp, C.J., and four other Judges, of whom I was myself one.

The two last-mentioned cases have, however, subsequently come under the consideration of the Judicial Committee, and it **[334]** is important to ascertain to what extent they are affected by the judgment of that tribunal.

The head-note to that judgment, *Maharana Fatesangji* v. *Desai Kallianrayaji* (3), which states broadly that the principle which prevailed in *Krishnabhat* v. *Kapabhat* and in *Balvantrav* v. *Purshottam* was approved by the Judicial Committee, appears to me to be inaccurate and misleading. What their Lordships really said upon this point will be found at p. 288 of the report. They refer to the rule as laid down in the Bombay cases, and then make the following remarks:—"The rule is, shortly, this, *viz.*, that, inasmuch as the term 'immoveable property' is not defined by the Act, it must, when the question concerns the rights of Hindus, be taken to include whatever the Hindu law classes as immoveable, although not such in the ordinary acceptation of the word. To the application of this rule, *within proper limits*, their Lordships see no objection. The question must, in every case, be whether the subject of the suit is in the nature of immoveable property; and, if its nature and quality can be only determined by Hindu law and usage, the Hindu law may properly be invoked for that purpose. Thus, in the two cases on which the appellant relies, Hindu texts were legitimately used to show that, in the contemplation of Hindu law, hereditary offices in a Hindu community, incapable of being held by any person not a Hindu, were in the nature of immoveables. And those decisions receive additional support from the first section of the Bombay Regulation V of 1827, which expressly declares hereditary offices to be immoveables." Their Lordships then go on to say that, in the particular case before them, it was unnecessary to consider the Hindu law, because they were of opinion that the question whether a *toda giras hak* was an interest in immoveable property within the meaning of Act XIV of 1859 was one which ought not to be determined by Hindu law. And they then lay down this general proposition: "Their Lordships think that the applicability of particular sections of this general statute of limitations must be determined by the nature of the thing sued for, and not by the *status*, race, character, or religion of the parties to the suit. The period of limitation, within which the claim is barred, **[335]** must be fixed and uniform, by whomsoever that claim is preferred or resisted."

The conclusion at which the Judicial Committee finally arrived was that as the *hak* in that case was payable by the inamdar *virtute tenuræ*, the interest of the *hakdars* possessed the qualities both of immobility and of indefinite duration in a degree which, if the question depended on English law, would entitle it to the character of a freehold interest in, or

(1) 6 B.H.C.R. 127. (2) 9 B.H.C.R. 99. (3) 10 B.H.C.R. 281.

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issuing out of, real property, and that, upon the general principles of construction applicable to an Indian Statute, it must be held to be an " interest in immoveable property " within the meaning of Act XIV of 1859.

From the passages which I have quoted I conclude that the rule laid down by the Judicial Committee, and the rule by which, we must, therefore, be guided, is this, *viz.*, that, whenever it is possible to do so, the terms "immoveable property" and "interest in immoveable property" in Act XIV of 1859 must be interpreted on general principles of construction, with reference to the nature of the thing sued for, and not to the *status*, race, character or religion, of the parties to the suit ; but that, in exceptional cases, in which the thing sued for is of such a special and peculiar character that its nature cannot be determined without reference to the special and peculiar law of a particular sect or class, in such cases, and in such cases only, the law of such sect or class may properly be referred to, as furnishing a guide to the determination of the question.

We have thus laid down for our guidance a rule and an exception ; and the question in every case must be whether the case is governed by the rule or the exception. The application of the rule I take to be this : that the terms " immoveable property " and " interest in immoveable property " are to be held to include not only land and houses, and such other things as are physically incapable of being moved, but also such incorporeal hereditaments as issue out of, or are connected with, immoveable property, properly so called, and, therefore, to use the language of the old English lawyers, " savour of the realty." Incorporeal hereditaments, which are of a purely personal nature, and do not savour of the realty, are moveable property. If regard be had **[336]** only to ordinary principles of construction, it will not generally be difficult to say within which of these two classes the subject matter of a suit should be placed. Rights of common, rights of way, and other profits *in alieno solo*, rents, pensions and annuities secured upon land,—all these clearly constitute an interest in immoveable property. Pensions and annuities not secured upon land, houses, or the like, as clearly do not constitute such an interest. When a classification can thus be made, it ought to be so made, without reference to the character of the party claiming the right. But there may be cases in which the test prescribed by the rule fails, or is very difficult of application ; and then will come in the operation of the exception to the rule, and it may become the duty of a Court to seek for guidance in some arbitrary definition contained in the religious law of the claimant. Conspicuous among such cases (and, indeed, it is the only case in which the Judicial Committee has expressly approved of the application of the exception), is the instance of an hereditary office in a Hindu community incapable of being held by any person not a Hindu. It is clear that this is a kind of incorporeal hereditament which it would be very difficult to classify with reference merely to the connection of a particular hereditary office with land. Such a classification may be possible in the rare instances in which questions regarding hereditary offices or dignities may arise in England [Co. Litt., 20*a*] ; but the multiplication of hereditary offices of every description is a peculiarity of Hindu communities, and most of them are of such a character that it would be scarcely possible to say whether they savour of the realty or not. In every considerable Deccan village there are, at least, twelve such offices ; and a Court might well find it impossible to determine, upon general principles, and without reference to Hindu law, whether the office of an hereditary blacksmith, potter, or astrologer, is or is not immoveable property. It was doubtless

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from a sense of this difficulty that the framers of Bombay Reg. V of 1827 specified hereditary offices as immoveable property, while, in regard to all other such property, they thought that the term "immoveable" would sufficiently explain itself.

What we have to deal with in the present case is an annuity granted by a Hindu sovereign to a Hindu temple. The annuity [337] is not made a charge upon land; and it is not, therefore, according to general principles of construction, immoveable property. That being so, I do not think that we need go further. If the grant had been to a Mahomedan mosque, we should have been forced to decide the question upon the general construction of the term "immoveable;" for there would be no other ground on which we could proceed. And I do not see why we should adopt any other principle, because the grant is to a Hindu temple. That circumstance may render it more probable that the grant was intended to be in perpetuity; but, except to the extent of influencing us in coming to a conclusion as to the intended duration of the grant, I do not think that the circumstance ought to affect our judgment. Indeed, if we are to hold, by reference to Hindu law, that a grant by Hindu Government to a Hindu temple is immoveable property, while a precisely similar grant by a Mahomedan Government to a Mahomedan mosque is moveable property, we must go a step further and hold that every perpetual grant by a sovereign to an individual Hindu is of a different nature and quality from a similar grant to an individual of any other race; for no texts of Hindu law have been shown to us which put grants to temples on any different footing from that of grants to Brahmins, or any other persons. It appears to me that, were we to proceed upon a principle which would conduct us to such a result, we should be acting in direct opposition to the view expressed by the Judicial Committee in *Maharana Fatesangji* v. *Desai Kalianrai*.

For these reasons I am of opinion that the decree of the District Judge should be reversed, and that of the Assistant Judge restored.

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[338] ORIGINAL CRIMINAL—FULL BENCH.

Before Sir Charles Sargent, Kt., Justice, Mr. Justice Melvill and Mr. Justice West.

EMPRESS v. S. MOORGA CHETTY. [28th April and 3rd May, 1881.]

Jurisdiction—Receiving and retaining stolen goods within jurisdiction where the theft was committed out of jurisdiction—Indian Penal Code, ss. 410 and 411—Commission to take evidence, power of High Court to grant, on application of prisoner.

The prisoner was tried at Bombay, under s. 411 of the Indian Penal Code, on a charge of having dishonestly received and retained stolen property, knowing or having reason to believe the same to be stolen property. He was also charged under ss. 108 (expl. 3) and 109 with having abetted that offence. It appeared at the trial that the prisoner was a clerk in the employment of a mercantile firm at Port Louis, in the Island of Mauritius. On the 29th October and the 1st November, 1879, certain letters addressed by the firm to their commission agent at Bombay were abstracted from the post office at Port Louis. The letters contained six bills of exchange belonging to the firm for an aggregate amount of Rs. 26,550. On the 1st November, 1879, the prisoner sent all six bills of exchange in a letter to the manager of a bank at Bombay, requesting that the several amounts might be collected on the prisoner's own account, and remitted to him by bills on Mauritius. The sums were accordingly realised by the bank, and duly remitted to the prisoner. It was not denied that the prisoner obtained possession of the money and used it as his own. His defence was that the

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bills had been given to him in payment of a debt. The prisoner was convicted on all the charges, but, the jurisdiction of the Court having been challenged on his behalf, the question was reserved.

Held per SARGENT and MELVILL, JJ., (WEST. J., *dissentiente*) that the bills of exchange having been stolen at Mauritius, in which island the Indian Penal Code is not in force, could not be regarded as "stolen property" within the provisions of s. 410, so as to render the person receiving them at Bombay liable under s. 411; that the High Court of Bombay had, therefore, no jurisdiction, and that the conviction must be quashed.

Previously to the trial at the Sessions, the prisoner had applied to the Court for commissions to Pondicherry and Mauritius to take evidence on his behalf. The application was refused on the ground that the High Court had no authority to issue a commission in such a case, but the learned Judge (West, J.) reserved the question for the full Court.

Held that the High Court had no power to issue a commission out of the jurisdiction in a criminal case on an application by the accused.

[Overruled., 15 Cr. L. J. 207 = 22 Ind. Cas. 991; **F.**, 19 B. 105 (110); **R.**, 19 B. 72 (76); 30 P. R. 1894 (Cr.).]

UNDER s. 411 of the Indian Penal Code the prisoner was convicted, at the Criminal Sessions held at Bombay in April **[339]** 1881, of dishonestly receiving and retaining stolen property, knowing or having reason to believe the same to be stolen property.

The goods had been stolen at Mauritius, and sent by the prisoner to Bombay.

The learned Judge (West, J.) who presided at the trial, reserved the following points for the decision of the Court :—

1. Whether the property in question having been stolen at Mauritius, in which island the Penal Code is not in force, could be regarded as "stolen property" within the provisions of s. 410 of the Penal Code, so as to render a person receiving it at Bombay liable under s. 411 of the Penal Code.

2. Whether the Court had power, on the application of the prisoner, to grant a commission to Mauritius to take evidence.

The following is the statement of the case made by his Lordship (Mr. Justice West) in reserving the above points of law :—

"The prisoner in this case was charged before me with having dishonestly received and retained stolen property, and with having abetted that offence, committed in consequence of such abetment by a person not himself having a guilty knowledge or intention. The charges related to a group of five bills of exchange and to another single bill of exchange. These were variously laid as the property of Aroona Chellama, late agent in the Mauritius of a firm at Madras consisting of Chukalingam Chetty and others under the title of Venna Moona Ravana Mana, and as the property of the said Chukalingam and the other members of the firm.

"The theft or dishonest misappropriation of the bills of exchange being laid as having occurred at Port Louis in the Mauritius, the jurisdiction of this Court was challenged by prisoner's counsel, on the ground that no offence cognizable by the High Court was set forth as having been committed within the local limits of its authority. The bills alleged to have been dishonestly obtained by the accused had, according to the charges, been by him sent to a bank in Bombay for collection in Bombay from the drawees of the several amounts; but this, it was contended, implied only a possession continuous with that obtained at Port Louis, not any **[340]** new offence within the jurisdiction of the High Court of Bombay. The possession kept by a thief of property stolen by him does not, it was urged, constitute a receiving or retention of stolen property.

"I determined that the trial should proceed, subject to my reserving the point of jurisdiction, should it become necessary, for decision by a Court of two or more Judges. The jury unanimously found the prisoner guilty on all heads of the charge.

"On the trial it appeared that a letter sent to the post office at Port Louis on the 29th October, 1879, and addressed by Aroona Chellama to a commission agent at Bombay, named Pena Lena Supramanee Chetty, had been abstracted from the post office at Port Louis. A second letter posted on the 1st November, 1879, similarly addressed, was also abstracted. The first letter contained five bills of exchange drawn on persons in Bombay for an aggregate amount of Rs. 16,550; the second contained a bill similarly drawn for Rs. 10,000. Four were drawn at thirty days' and two at sixty days' sight.

"The prisoner was a clerk in the employment of the remitting firm, of which Aroona Chellama was agent. On the 1st November, 1879, he sent all the six bills I have mentioned in a letter to the Manager of the Comptoir d'Escompte in this place, requesting that the several amounts might be collected on the prisoner's own account, and remitted to him by bills on Mauritius. The sums were accordingly realized by Mons. Vouillon, the Manager, and sent to the prisoner. For the defence it was said that the bills had been transferred by Aroona Chellama to the prisoner in payment of a debt. That the prisoner had possessed and used them as his own, was not disputed.

"I thought that property stolen or criminally misappropriated at Port Louis might properly be designated "stolen property," though punishment for stealing it there could not be inflicted by this Court. A person using such property dishonestly within the jurisdiction, and by means of an agent having it at his disposal and under his control was, I thought, subject to punishment for receiving or retaining stolen property. The dishonest retention in fraud of the true owner could not, I thought, **[341]** merge for jurisdictional purposes in India, in the theft or criminal misappropriation not committed or cognizable in this country. The prisoner's possession being dishonest was itself punishable as such, unless it could be annexed to some cognizable act so as to constitute an offence of a different description, and in this case, though there had been an act of a criminal character (criminal misappropriation) yet as it was not one cognizable by the Court, the dishonest possession could not be annexed to it.

"As to the charges of abetment of receiving and retaining stolen property, I thought that, as the receipt of the bills and the dealing with them by the manager of the bank at Bombay would have constituted receipt of stolen property if he had had the same guilty knowledge and intention as the prisoner, the prisoner, according to ss. 108 and 110 of the Indian Penal Code, was subject to punishment for abetting the receiving of stolen property, though the manager of the bank had, in fact, acted without any guilty knowledge or intention.

"On behalf of the prisoner I was asked, before the trial began, to issue commissions to Pondicherry and Mauritius to take evidence on his behalf. I did not think I had authority to do this, and I rejected the application.

"I have respited sentence on the prisoner, and remanded him to gaol until the determination of the points above set forth, *viz.*—

"(1) As to the jurisdiction of this Court to try the prisoner, and

"(2) As to whether I had authority as to issue commission to take evidence, and, if I had authority, as to what should be the effect of my refusal to exercise it.

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"I request that they may be decided."

Starling, for the prisoner.—I submit that this Court has no jurisdiction to try the prisoner for the offence with which he is charged. It is admitted that he is not an Indian subject, but a native of Mauritius. The question is, whether the offence comes within the provision of s. 411 of the Penal Code. It is necessary that the property received should be stolen property as defined by s. 410. It is alleged that a theft of the property in question was committed, and that, therefore, it comes within the definition. But the theft must be theft contrary to the provisions [342] of the Penal Code and punishable by it, while in this case the alleged theft took place at Mauritius where the Code is not in force : *R.* v. *Debruiel* (1), *R.* v. *Prowes* (2), *R.* v. *Madge* (3), *Reg.* v. *Elmston* (4). The Indian Legislature had no power to affect persons residing out of India by its legislation : 3 and 4 W. IV. Where the Penal Code makes an act done outside the jurisdiction part of an offence punishable by its provisions, it does so in express words : *e.g.*, ss. 121, 125, 126. The doctrine contended for by the prosecution would lead to great confusion. Property obtained by extortion is stolen property according to s. 410, but extortion is not a criminal offence outside of India. So that a man might innocently obtain property in England, which, if he sent it to India, would immediately become "stolen property" and the receiver of it could be made liable under s. 411. In many other ways also the possession of property might be obtained by acts innocent abroad, but criminal within s. 410 and other provisions of the Penal Code. It would thus be necessary for all persons dealing with India, wherever residing, to know and to obey the Indian Penal Code, which would then be practically in force everywhere, and not limited in its operation as directed in s. 2. Counsel referred to *Reg.* v. *Advigadu* (5), Extradition Act XXI of 1872, Act XI of 1872, *Reg.* v. *Thurborn* (6), *Reg.* v. *Preston* (7), *Reg.* v. *Dixon* (8), *Reg.* v. *Christopher* (9).

As to the power of the Court to issue a commission there does not appear to be any authority upon the point. The High Court Criminal Procedure Act (X of 1875) only provides for the issue of a commission within the jurisdiction. See also Act XXI of 1879, s. 19. He also cited *Reg.* v. *Pirtai* (10).

Kirkpatrick, for the Crown.—It must be admitted that, if the Court decides in favour of its jurisdiction, the difficulties that have been suggested may possibly arise ; but, on the other hand, if the Court disclaim jurisdiction, much more serious consequences will certainly result. It will be possible for an inhabitant of Bombay to [343] employ agents in the Mauritius or in Native States for the purpose of dishonestly obtaining possession of property belonging to other inhabitants of Bombay by acts which would be criminal according to the Penal Code, but which are not criminal by the imperfect laws of the places where the acts are done. These agents will be at liberty to transmit the property to their employers at Bombay, whom the real owners will be unable to make criminally responsible for their crime.

We contend that the receiving of stolen property is a separate and independent offence. If the act of receiving be committed within the jurisdiction, the case is triable here. No doubt the criminality of that act

(1) 11 Cox 207. (2) 1 Mood. 349. (3) 9 C. & P. 29.
(4) 7 B.H.C.R. 89 (117). (5) 1 M. 171. (6) 1 Denison C. C. 387.
(7) 2 Denison C. C. 353. (8) Dearsley C.C. 580. (9) Bell C. C. 27.
(10) 10 B.H.C.R. 356.

depends upon whether the property is "stolen property" within the meaning of s. 410 of the Penal Code, but there is nothing in that section which indicates that the dishonest transference of possession which brings property within the class of "stolen property" must take place within any territorial limit. The object of the two ss. 410 and 411 is to punish the dishonest receipt and retaining of property within the jurisdiction. The main element in the offence is the dishonesty. That is not dependent on locality, and s. 410 does not intend to make it so. Conspiracy to commit an illegal act, is triable in the English Courts; although the act, illegal by the English law, may be committed abroad where that law is not in force: *R.* v. *Kohn* (1), *R.* v. *Barnard* (2).

Reg. v. *Elmston* (3) is not in point. There the offence tried was committed outside the jurisdiction; here the offence was within it. The only English case in point is *R.* v. *Debruiel* (4). That was a case tried under Stat. 7 and 8 Geo. IV, c. 29, s. 54. But that section introduces an element of locality into the offence, for it makes the receiving of stolen property a criminal act only when the theft has been a felony "by virtue of this act or at common law," so that, except the theft was committed in a place governed by that statute or by English common law, the English Courts had no jurisdiction. There is direct authority in support of the jurisdiction: *Reg.* v. *Lakhya Govind* (5), *Empress* v. *Shunker Gope* (6). **[344]** In England it has been held that a person who outside the jurisdiction instigates a crime within the jurisdiction, may be tried where the offence in committed: *R.* v. *Johnson* (7). See, also, *per* Campbell, C.J., in *R.* v. *Garrett* (8). [WEST, J., referred to *R.* v. *Brisac* (9).]

As to the power of this Court to issue a commission out of the jurisdiction in a criminal case, that is a power which must be given by the Legislature [*R.* v. *Inhabitants of Upton* (10)] and no Statute or Act has conferred this power upon the High Court (11).

JUDGMENT.

May 3. SARGENT, J.—At the hearing of this reference it was admitted that no authority could be found for granting a commission in a case like the present.

As to the objection that the possession of the bills within the jurisdiction of the High Court was only a possession continuous with that obtained at Port Louis in the Mauritius and did not constitute a new offence within the jurisdiction, it was not insisted on in argument. The remarks of my learned colleague on this point in the reference are, to my mind, quite conclusive as to its invalidity. There being no act of a criminal character of a different nature cognizable by the Court to which the possession could be annexed, it was properly punishable as a substantive offence under the Penal Code if such as to satisfy the conditions of s. 411 of the Penal Code.

The only ground on which the conviction was challenged in argument, was that the bills, having been dishonestly obtained at Port Louis, could not be designated as "stolen property" within the meaning of s. 411 of

(1) 4 F. & F. 69. (2) 4 F. & F. 240. (3) 7 B.H,C.R.Cr.Cas. 89.
(4) 11 Cox 207. (5) 1 B. 50. (6) 6 C. 307.
(7) 7 East 65. (8) Dearsley C.C., at p. 241.
(9) 4 East 164. (10) 10 Q.B. 835.
(11) When the motion for the commission was before the Court, the following authorities and statutes were referred to:—Archbold's Practice (Common Law Division), pp. 316, 317; 3 B. 334; Statute 13 Geo. IV, c. 63, ss. 40, 44; 1 W. IV, c. 22, ss. 1—4; 19 & 20 Vic., c. 113; 22 Vic., c. 20.

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the Penal Code, and that, consequently, no offence was committed cognizable by the High Court. "Stolen property" is thus defined by s. 410: "Property, the possession whereof has been transferred by theft or by extortion or by robbery, and property which has been criminally misappropriated, or in respect of which the offence of criminal [345] breach of trust has been committed, is designated as 'stolen property.'" It was contended for the prisoner that the theft, robbery, criminal misappropriation and criminal breach of trust, referred to in this section, must be construed to mean the *offences* of theft, robbery, criminal misappropriation and criminal breach of trust respectively, and that as an 'offence' is defined by s. 40 to denote "a thing made punishable by this Code," except, indeed, in chapter iv and the sections mentioned in cls. 2 and 3 of the section (in which s. 411 is not included), the circumstances under which the prisoner became possessed of these bills in the Mauritius did not give them the character of "stolen property" within the meaning of s. 411. On the other hand, it was contended for the prosecution that, as the definition of "stolen property" does not contain any territorial term, it is immaterial where the act occurred, provided it falls within the definition of theft, or of robbery, or of criminal misappropriation, or criminal breach of trust. The case of *Reg.* v. *Lakhya Govind* (1) was relied on in support of that contention. In that case the prisoner was charged with dacoity committed in the territory of His Highness the Gaikawar; the Session Judge considered that the circumstance of the stolen property being found in the Surat District gave his Court jurisdiction. On appeal, the Court, consisting of our learned colleagues, Mr. Justice West and Mr. Justice Nanabhai, quashed the conviction of dacoity, being of opinion that s. 67 of the Criminal Procedure Code did not apply, and that the offence was completed at Velanpur. They altered, however, the charge to one of retaining stolen property known to have been obtained by dacoity, and upheld the sentence. In the case of *Empress* v. *Shunker Gope* (2) the High Court of Calcutta, consisting of Garth, C.J., and Maclean, J., expressed their opinion on a reference under s. 296 of the Criminal Procedure Code, on which it is stated in the report there was no argument, that the facts were similar to those of *Reg.* v. *Lakhya Govind* (1), and sustained the conviction on the authority of that case. On neither of those occasions had the Court the advantage of hearing argument.

[346] The question has now been fully argued before us; and, much as I regret the practical inconvenience which may doubtless arise from an opposite decision (at least until it can be remedied by legislation), I feel myself unable to adopt the view of the law which was acted upon in the above cases. It is stated in the judgment in the case of *Reg.* v. *Lakhya Govind* (1) that the legal character of the retaining depended on circumstances, the definition of which does not involve a territorial term. This, I apprehend, having regard to ss. 40 and 7 of the Code, must depend upon whether the terms "theft, extortion, robbery, &c.," in s. 410 mean the several 'offences' of theft, extortion, robbery, &c., under the Code, or only the particular circumstances independent of locality which go to make up the definitions of those several terms. Now, chap. 17 of the Penal Code is headed "Of offences against property," meaning, of course, to imply that the chapter treats of those offences. Similarly the chapter contains numerous sections with the respective headings "Of theft," "Of extortion,"

(1) 1 B. 50.

(2) 6 C. 307.

showing that the terms are used to denote the several offences of the nature described in the heading of the chapter If that be so, why in s. 410, which treats of the offence of receiving "stolen property," are we to put a different meaning upon the terms "theft, extortion, robbery, &c.," from that which they have clearly had in all the previous sections of that chapter? Ought we not, when so much depended upon the accurate use of terms, to give the draftsman credit for having, in the absence of the expression of a contrary intention, intended to use terms in one and the same sense throughout the chapter. This view also derives confirmation from the language of the section itself, for we find "*the offence* of criminal breach of trust" mentioned as the last illustration of the manner in which the property may have been dealt with so as to constitute it "stolen property." Indeed, it is obvious, I think, that as the language does not contain any verb denoting the act of breach of trust, as the verb "misappropriate" denotes the act of misappropriation, the draftsman made use of a periphrasis to explain what would have been expressed by a verb if there had been a comprehensive verb at his disposal. There is no reason to suppose that the word "offence" was introduced [347] in the case of "criminal breach of trust" expressly to mark a distinction between that and previous illustrations.

Lastly, the structure of the entire Code shows that the framers of it had in their contemplation only those acts which are made punishable by this Code itself. But it may be said that the gist of the offence contemplated by s. 411 is the dishonest intention and knowledge that the property has been dishonestly taken out of the possession of the lawful owner, and that it may be presumed to have been the intention of the Legislature to treat the receiving and retaining of property accompanied by such knowledge as an offence quite independently of the question as to where the act was committed by which the property was so transferred from the possession of the legal owner. This I am unable to admit. The presumption in construing a Penal Code which by s. 2 is confined to acts and omissions within the territories of British India, would rather be, that an offence, such as receiving and retaining stolen property which is in its very nature accessory to the principal act, should be confined to those acts which are made criminal by the Code itself. This question presented itself in England in 1861 under the Act of 7 and 8 Geo. IV, c. 29, in the case of *R.* v. *Debruiel* (1). At the trial of that case the question arose as to whether the prisoner could be convicted of stealing goods in Guernsey, or of receiving stolen goods, having bought the goods in England. Byles, J., after consulting Channel, B., and after deciding that a larceny in Guernsey could not be taken notice of any more than a larceny in France, said: "Nor could the prisoner be convicted of receiving, because that crime consisted in the guilty receipt of stolen goods; that is to say, goods stolen according to the law of England, and that law does not recognize a stealing in a foreign country as a crime which it will punish." But it was said that the Act of Parliament then in force making the receiving stolen goods criminal, speaks of goods, "the stealing, taking, extorting, obtaining, embezzling or otherwise dispossessing whereof shall amount to a felony;" thereby, it was said, clearly pointing to an act cognizable by English law. But the words "amount to a felony" is only a mode of describing [348] the nature of the offence contemplated by the Act, and afford no stronger argument in support of limiting the goods stolen to goods

(1) 11 Cox 207.

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stolen according to the law of England, than the terms theft, extortion, robbery, &c. (which by the Penal Code are the names given to certain offences under that Code), afford in favour of the limitation contended for on behalf of the prisoner. Mr. Justice Byles' inference—that the goods stolen must be goods stolen according to the law of England, by which I understand him as meaning that this was necessary in order to constitute an offence in England—would appear to have been the result of general considerations.

It has been said, however, that the construction contended for by the prosecution is demanded by an enlightened view of criminal jurisprudence as well as by the great practical inconvenience which under the special circumstances of this country will result from a more limited construction of the section. I fully admit the force of this argument, but it is one of which, in my opinion, the Court cannot take notice when the proper construction of the Act upon the language of the Act itself is as entirely free from doubt as I deem it to be in the present case. To give effect to it would be to travel out of the legitimate province of judicial construction. The proper remedy for such defect as there may be, is in fresh legislation. I wish, however, to add that such legislation will require careful consideration. Theft, extortion, robbery, criminal misappropriation and criminal breach of trust are all technical offences, the definitions of which vary very differently in different countries. It is, indeed, only within the last twenty years that breach of trust has been made under certain circumstances a criminal offence in England. If s. 411 be construed as broadly as is contended for by the prosecution, a foreigner might be convicted here of retaining goods, although in his native country he would not have been criminally liable for getting them into his possession.

For the reasons I have given, I am of opinion that this Court had no jurisdiction to try the prisoner, and that the conviction must, therefore, be quashed.

[349] MELVILL, J.—I am of the same opinion.

The Penal Code (s. 40) defines the word "offence" as "a thing made punishable by this Code." The meaning of the term has been somewhat enlarged by subsequent legislation, but for our present purpose we may confine ourselves to the original definition. Having thus defined the word, and having distinctly declared (s. 7) that it is used in every part of the Code in the sense stated in the definition, and in no other sense, the Code proceeds to classify criminal acts under different chapters, which are headed "Of offences against the State," "Of offences relating to the Army and Navy," and so on. Each act constituting an offence is defined, a name is given to it, and its punishment is provided for. Having regard to the whole structure of the Penal Code as thus described, it seems to me clear that the Code only affects to deal with criminal acts, in so far as they are offences, or things punishable by the Code. It restricts itself carefully within its own province; not defining, nor even giving a name to criminal acts committed by persons for whose punishment it is unable to provide. "Whoever" does a certain act "is said to commit theft." "Whoever commits theft shall be punished" with a certain punishment. Every person, therefore, who is said to commit theft is punishable under the Code. It follows that a person who is not punishable under the Code is not even said to commit theft.

Chapter XVII is headed "Of offences against property." Sections 378 to 409 define and provide punishment for five such offences which

the Code chooses to designate as "theft," "extortion," "robbery," "criminal misappropriation," and "criminal breach of trust." Then comes the section (s. 410) with which we have now specially to deal, and which is as follows: "Property, the possession whereof has been transferred by theft or by extortion, or by robbery, and property which has been criminally misappropriated, or in respect of which the offence of criminal breach of trust has been committed, is designated as stolen property." Even if the word "offence" had not been used in this section, I should still hold that we should be disturbing the whole harmony of the Code if we were to attach to the words "theft," extortion," &c., in s. 410 a different signification from that which they bear in the sections immediately preceding. In those sections **[350]** the terms are confined to offences against the Code. It would, as it seems to me, be illogical to suppose that in s. 410 the same terms are extended to acts, which, though of a similar character, are not punishable under the Code.

There would probably have been no doubt about this question, if the framers of the Penal Code had not seen fit to adopt such familiar terms as "theft," "robbery," and "extortion." Supposing that five persons were to commit in England what is commonly called a robbery, and that the property so acquired were to find its way to India, one would certainly feel great difficulty in holding that the receiver could be convicted, under s. 412, of receiving property stolen in the commission of a dacoity. The idea of describing a crime committed in London as a dacoity would present itself to the mind as an absurdity. But when such a popular word as "theft" is used, the mind naturally, perhaps, but illogically, is inclined in a precisely opposite direction, and its first idea is that it is an absurdity to say that theft is not theft all the world over. Every one fancies that he knows what theft is. In point of fact every one does not know it, for I remember having had the greatest difficulty in making a Bombay jury understand that a person who had received a bracelet as a gift from a married woman had been guilty of theft from her husband. But no doubt the popular understanding of the word "theft" is, in general, sufficiently correct; and when any one is told that the legal definition of "stolen property" is that it is property, the possession of which has been transferred by theft, his natural impulse is to say that property purloined by a foreigner in a foreign country is just as much stolen property as if the theft had been committed in India. The fallacy seems to me to lie in using the word "theft" in its popular, and not in its legal sense, and in forgetting that it is, so to speak, a mere accident that the Indian Legislature has employed the common expression "theft," when it might have revived the obsolete word "latrociny," or used any other unfamiliar term, whereby to designate a certain criminal act. The truth is—and the whole matter is summed up in this—that the words "theft" "robbery," "extortion," and so on, as used in the Penal Code, must be regarded as purely technical terms, peculiar to Indian criminal law; and, therefore, it would be just as **[351]** incorrect to say that property dishonestly obtained by a foreigner abroad had been acquired by theft, as to say that it had been obtained by dacoity or thuggee.

I am decidedly of opinion that property is not stolen property within the meaning of s. 410, unless the act by which it has been acquired has been committed either in British India or elsewhere by a person who is liable to be tried in British India for offences committed elsewhere (Act XXI of 1879, s. 9).

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WEST, J. —The question in this case of whether there was a dishonest receipt or retention of stolen property, resolves itself practically into one of whether "stolen" is a word properly applicable to property dishonestly taken from its owner out of India. To unprofessional persons it must seem strange that a doubt can be entertained as to whether stealing is possible beyond the limits of British India: unpleasant experience has satisfied many of them that a thing is possible in other countries to which they can assign no other name. In the Indian Penal Code, s. 410, however, it is said that " property, the possession whereof has been transferred by theft or by extortion, or by robbery, and property which has been criminally misappropriated, or in respect to which the offence of criminal breach of trust has been committed, is designated as stolen property." The part of the definition " in respect of which the offence of criminal breach of trust has been committed " is one, it is said, which, as it includes the word " offence," can be satisfied only when the breach has been committed in India. In s. 40 it is said that "offence denotes a thing made punishable by this Code." Under s. 2 a person is generally " liable to punishment, under this Code, for every act contrary to the provisions thereof, of which he shall be guilty within the said territories " (*i.e.*, British India). For anything done outside those territories a person is not generally liable to punishment under the Code. He has, therefore, it is said, committed no offence. Criminal breach of trust outside British India is not an offence at all. If it has been committed with regard to any property therefore, such property does not thereby become " stolen property." The word offence is not joined, in the description of stolen property, to **[352]** the words " theft, " " extortion " and " robbery ; " but as it is annexed to " criminal breach of trust," the inference is that it is to be understood with the other designations of crime also. By " theft," for instance, must be understood the " offence of theft," by the " offence of theft " theft punishable under the Code though having been committed in British India. If property has been appropriated (let us say) elsewhere by a person not its owner, there has, consequently, been no theft, because there is no punishment prescribed for the transaction by the Indian Code ; and, as there has been no theft, there can in such a case be nothing to be " designated stolen property."

This is a rather long and subtle chain of deduction, it may be said, by which to free some men from penal liability for acts absolutely identical in their moral character with those for which other men are imprisoned and transported. But, even in the absence of the word " offence " in s. 410 at a place where it could not well be avoided without a certain awkwardness of expression, I should not have felt any doubt that by " theft " was meant the " offence of theft," and by " robbery " the " offence of robbery." " Theft " and " robbery " are words defined in the Code, and must be supposed to be used everywhere in the sense assigned to them (1). If the possession of property has been transferred by a theft which is not an offence, that property is not " designated stolen property."

The use, however, of the word " theft," into which I have thus casually fallen, shows that the conception of that crime is really satisfied by facts which may take place anywhere, and that, therefore, in itself it is independent of locality. So also in the case of robbery or criminal misappropriation. The definitions given of these offences,

(1) Penal Code, s. 7.

(as I will provisionally call them), in the Penal Code agree, as in a penal law they ought to agree, at least generally, with the popular conception. "Theft" is a moving of property with a view to take it dishonestly from its possessor; robbery is theft effected by violence. Such definitions can be satisfied anywhere where human beings exist with property of which one can deprive another. There are, on the other hand, **[353]** cases in which locality is included in the definition. Kidnapping from British India is a crime that can be perpetrated only on a person in British India. In such cases the specification of place is essential to the complete statement of the crime; in other cases it seems necessary only to show that the act imputed as an offence falls within the legislative authority and the jurisdiction which have to be applied to it. The act or conduct itself is the same wherever it takes place; the locality is important only because the Government of one country does not and cannot deal with crimes confined to another, however well their character may be recognized. Wherever, then, the mention of a particular place enters necessarily into the definition of anything as punishable under the Indian Penal Code, there is no offence if the thing has been done at a place not included in the definition; where no place is mentioned in the definition, place is not an essential constituent of the offence as an offence—a thing of which pœnality may be predicated, but conceivable apart from that pœnality. That is, locality is a separable accident which may be present or absent without effect on the substance of the thing defined.

"Offence," it is said, denotes "a thing made punishable by this Code;" that is, offence is a name by which such a thing is called; and then such things are set forth. They are punishable so far as a thing is punishable at all; a previous rule had determined who, as to person and place, were to be subject to penalties. If verbal criticism is to have a preponderating influence, I may observe that there is an inaccuracy in s. 40. "A thing", meaning an act or omission, is not susceptible of punishment. What is meant is "a thing for which he who is guilty of it is punishable." It had been provided already in ss. 2, 3 and 4, what persons in what places acting contrary to the Code might be punished under it. What remained was to define the acts themselves. They are the things which make the person punishable—"things" determined by themselves as having the particular attribute, and thus fulfilling one, not all, of the three requisites as to person, place, and quality of the act done. It is obvious, indeed, that an "act or omission" having no corporeal existence has really no locality, fills no place in space, but is merely a movement or abstinence from movement **[354]** of one who does fill such a place. Locality is, therefore, rightly connected in the Code with the person and the general conditions of possible responsibility. These being ascertained, the definitions or descriptions follow of the acts and omissions themselves, abstracted generally from time and place (and indeed from personality also), which in each case induce punishableness. These are offences, though a personal or local condition of liability may be wanting(1),

(1) The true relations of the several ideas may be presented in this way. The subject-matter of the Indian Penal Code is crimes and the punishment of those who commit crimes—

Cognizable Crime = { an act or omission contrary to the provisions of the Code = Quality of act = Offence + on the part of a person responsible = Personality + in British India (generally) = Locality.

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Thus a theft by a child of eleven and of immature understanding is declared not to be an offence in the child. It is not in him punishable and not an offence. But suppose the property taken is received by the child's father, is there no receipt of stolen property on his part? My learned brothers must say no, because theft means the offence of theft, and hence there is no offence. I, on the other hand, think that the father would be liable for an act contrary to the provisions of the Code, an act generally penal, and penal in him, because as an act the stealing was contrary to the provisions of the Code, and as an act his receipt of the property was contrary to its provisions as connected with the previous act, albeit that previous act in the particular instance could not be punished. Offence denoting a thing made punishable, the non-penality of the child's act is indicated by saying it is not an offence in him. This is a personal exception. It is as a child that the child is not subject to punishment. The act itself retains its character as an offence, because made in the abstract "punishable," and, being so, it gives a penal character to the dishonest receipt of the property by the father.

All, then, I think that the word "offence" connotes, is an attribute of punishableness belonging to the act inducing a liability of the person who does it whenever such person is in himself a proper subject of punishment under our laws. Exceptional non-penality in particular instances does not exclude the crime from this category, or make some connected act innocent **[355]** which would otherwise be penal. The definitions in each case enumerate all the elements of "the thing"—that is, the act—which *qua* act subjects to punishment, and is, therefore, called an offence. When they are realized, an offence is constituted. There may thus be an offence—that is, an act—in itself of a class to which the Code assigns punishment, though, from the fact of its having been committed abroad, a condition may intervene which in the particular instance intercepts the punishment.

This view of what is the real comprehension of the term "offence" is illustrated by the case of *Reg.* v. *Chill* (1). In that case the prisoner was charged with wrongul confinement and compelling labour in the territory of Tonk. Nothing had been done within British India; yet the learned Judge, Sir Charles Sargent, says: "The charge against the prisoner alleges an act which was undoubtedly an offence under the Penal Code." The alleged act answered to a description, and so came within a class punishable under the Penal Code; but, having been done in foreign territory, it was not in the particular instance subject to punishment under the Code. If the place, therefore, were part of the "thing" intended by s. 40, there would have been no offence; but, taking "thing" to mean the act consisting in its physical and moral ingredients apart from mere local circumstances, there was an offence. "Offence" is thus a compendious expression for an "act or omission contrary to the provisions" of the Code, which, according to s. 2, must be punished under the Code when committed within the British territories in India. By the Statute 33 Geo. III, c. 52, European British subjects are made amenable to Courts of Justice for offences in Native States in the same manner as if they had been committed within the British frontier, but this does not say what are "offences" on the part of such persons. Their misdeeds are not things made punishable by the Penal Code, if locality is of the essence of such things. The Code, however, really provides for their punishment in so far as they are acts of

(1) 8 B H.C.R. Cr. Ca. 92.

particular types; the statute says that the usual, but not essential, condition of place shall in part be dispensed with. So, in the charter of the late Supreme Court, jurisdiction was given to try crimes and **[356]** misdemeanours committed in Native States. What was the test of such a crime or misdemeanour? Simply the liability to punishment of the act, as an act, under the law prevailing in Bombay,—not its liability to punishment in the particular instance, which could not be assumed without begging the question. Thus the character of the act itself as an offence is distinguished from the capacity of our Courts to punish for it, and punishableness in one state of local circumstances is declared to be predicable of it when it is found to be predicable in another. "This Court" Sir Charles Sargent says, "has criminal jurisdiction in respect of all acts committed by British subjects in Native States which *would be* offences if committed in British territories." What the charter says is "crimes .....misdemeanours,.....&c.," not acts which *would be* crimes, misdemeanours, &c., if committed within the jurisdiction. The identity of the two classes of acts (those which *are* crimes and those which *would be* crimes) implies that an act may by the law of a country be regarded as of a particular criminal description even when committed abroad and at a place where the description or designation assigned to it could have no legal force. "It might not," the learned Judge says, "be an offence in Tonk, but that is immaterial." Having the characteristics of an offence in British India, it is an offence in British India, though wanting the local circumstances which would be necessary to make it punishable here, but for the special provisions of the statute and the charter which bear upon it when, but only when, it is otherwise an offence.

If it be said that the true sense of the statute is simply "that which is an offence in British India shall be deemed an offence if committed in a Native State," there is an express drawing of criminal acts committed abroad within the Penal Code. But this attribution of criminality to acts apart from, or even in opposition to, the local law shows that, in the opinion of the Legislature, foreign standards of pœnality may properly be discarded where there has been an injury to society which the law of India esteems a crime, and such crime is the subject of trial in a British Indian Court of Justice (1). This goes much further than saying that stolen property is stolen property in the hands of the **[357]** receiver, even though it may not have been stolen in India. If our Legislature can make that an offence which locally is no offence, much more can it recognize that theft and fraud are crimes which the commonsense of mankind condemns and punishes (2). We cannot suppose that theft is approved by the law of any civilized community, and there is, consequently, no fear that in punishing for the dishonest receipt of property stolen abroad we shall be checking any beneficial commerce, or pronouncing any act culpable which in its own country is approved. In the case of an act committed abroad, which was innocent in the country where it was done, I should think the principle ought to be applied which is stated by Cockburn, C.J., in *Phillips* v. *Eyre* (3) that "an act authorized by the law of the country in which it takes place, cannot be subject of a legal proceeding here." "Such is the conclusion of the French law on that point (4) and also that

(1) Comp. Stat. 18 & 19 Vic. c. 42, sec. 4.
(2) Story's Confl. of Laws, secs. 637, 637*a*.
(3) L.R. 4 Q.B. 225. See Story's Confl. of Laws, sec. 18.
(4) Ortolan Op. Cit. secs. 907, 918.

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of North Germany (1). But in every case it rests on the accused to plead and prove the justification which legally excused him at the place where he acted. It is not for the prosecution to prove that murder charged under s. 9 of 24 and 25 Vic. c. 100 is murder by the law of the place where the homicide was committed (2).

The generally territorial character of the Indian law however, in its active and punitive character cannot be questioned (3). An Indian Court cannot punish a foreigner for an act committed wholly abroad. This was the ground of the decision in *Reg.* v. *Pirtai* (4) in which the prisoner may not have contemplated that anything would be done in British territory. But when going beyond this it is urged that an act of a criminal nature itself committed in British India is not justiciable here because a preliminary act, on the criminal character of which the one in question depends, may not itself have been justiciable here, I cannot see that the argument is [358] founded on reason. An act having been done here which in itself our law condemns, I cannot see that it is less criminal or less within the condemnation, because a particular preparatory act, which also our law condemns, may have been done in a place to which our law does not extend. We could not deal with that preparatory act because it was done beyond the jurisdiction, but we may test its character by our own law when that becomes essential for determining by our own law the character of the subsequent act which was committed within the legal jurisdiction. It may be that an act is quite justifiable where it is begun, but being continuous or connected with one which is an offence, the whole transaction has to be looked at together. In *Reg* v. *Lesley* (5) if the prosecutors had gone on board the British ship voluntarily it would have been no crime to keep them there throughout the voyage. The Chilian Government put them on board, and so far its will was as good a justification as their own assent; yet as that assent failed, the taking of them on board, though no offence locally, was connected with the subsequent keeping them on board so as to subject the captain to punishment by the English law. The constituents of a crime are its physical nature and the intention of its perpetrator, and neither of these is varied by the circumstance that some preliminary step was taken without, not within a particular jurisdiction. Applying this principle to the construction of s. 410 of the Code, I think the words "property in respect of which the offence of breach of trust has been committed" ought to be construed "property...in respect of which an act defined as breach of trust, and, therefore, belonging to the punishable class, has been committed," rather than "property in respect of which a particular act of criminal breach of trust punishable on account of its locality in India has been committed." It is the character of the act by which the property was obtained that is morally important, not the particular place where it was done. The place of the receipt or retention of the property is essential, not to its moral character, but to its justiciability in the particular jurisdiction.

Whoever "fabricates false evidence" commits an offence designated accordingly, and punishable, if committed in British India, [359] under s. 193 of the Penal Code. Now by s. 196 whoever uses as genuine evidence

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(1) Art. IV, sec. 3, of North German Penal Code, 1870,
(2) *Per* Cockburn, C.J., in *Phillips* v. *Eyre*, L.R. 4 Q.B. at p. 234.
(3) Story's Confl. of Laws. sec. 23.
(4) 10 B. H. C. R. 356; so in Bulwer's Case, 7 Rep, 50 (Thomas and Fraser's ed., Vol. IV, p. 49)
(5) 29 L.J. M.C. 97.

which he knows to be fabricated, is punishable as if he had fabricated it. But the fabrication out of British India is not punishable under the Code. It is not then an offence. But "fabricated" means so fabricated as to constitute an offence. Evidence fabricated out of British India, consequently, is not "fabricated" in the sense of s. 196, and a person who uses such evidence, however corruptly, is not subject to punishment for it. He, in fact, commits no offence. In ordinary cases he would be liable to transportation for using such fabricated evidence to procure a capital conviction, but if the evidence has been fabricated on the other side of the frontier, he goes scot free. So, too, in the case of false evidence taken on commission in a Native State. It may be knowingly and corruptly used with impunity, because the giving of it not being punishable in British India it is not an offence, and "false evidence" means only that which is locally as well as morally and intellectually an offence under the Indian Penal Code. Such are the consequences to which the judgments just delivered seem to me to lead. In other instances the consequences would be almost too dangerous to mention. I cannot think that such results were intended by the Legislature, or that it intended anything from which such results logically follow(1). It meant, I think, that when a crime had been committed in British India, those preliminary facts which went to make it a crime were to be tested by the Indian Penal Code, though not themselves within the scope of its direct operation.

These views prevailed in the case of the Velanpur docoity case(2), and of the case at Calcutta in which it was recently followed (3). They are, I think, sufficiently founded on reason to warrant our adhering to them. From the point of view of the public interest I think it highly desirable that Bombay should not become an Alsatia of swindlers, making it a rogues' exchange for mercantile documents obtained by theft or fraud in all parts of the East. If the receipt or retention, in our territory, of property stolen on the other side of our frontier is not an offence, neither can we call it [360] an offence in any sense when robbers from our side find free reception for themselves and their plunder on the other side of the frontier. With such encouragements, dacoity is likely to flourish, and the frontier districts to become uninhabitable.

It has been said that the Legislature might and ought to interfere. It would seem that it must interfere, but I have not from experience learned any great confidence in occasional legislation. It is apt to create as grave difficulties as it removes. And as the proposed legislation would, it is admitted, be wise and beneficent, I am disposed to think that there possibly were wisdom and beneficence in the legislation we have to deal with, and to construe its creations so as to make them the best embodiment we can of these high qualities. Such cases as the one now before us could hardly have been quite overlooked even had the Penal Code been framed from the materials afforded by the English law. They were advisedly left, I think, to the operation of general principles, because the cases available afforded an insufficient ground for detailed legislation.

One of the general principles governing criminal jurisdiction is, that when a criminal transaction consists of a series of acts committed in different countries, each of these countries has jurisdiction of the acts committed within its own borders, which, taken in connexion with the rest,

(1) Comp. Abbot, C.J. *R.* v. *Burdett*, 4 B. & Ald. at p. 171. (2) 1 B. 50.
(3) 6 C. 307. Comp. Bulwer's Case, 7 Rep. 2a (Thomas & Fraser's ed., Vol. IV: p. 52.)

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amount to an offence according to its own law (1). If this were not the case, a set of confederates by dispersing their operations over several countries might escape punishment altogether. Another general principle is that an infraction of the criminal law of a state intra-territorially effected, but directed *ab extra*, makes the director, the moral author of the crime, amenable to the tribunals of the country whose law has been violated whenever he comes within the jurisdiction(2). This is the principle involved in the *dictum* of Lord Campbell in *R.* v. *Garrett*(3); and in *R.* v. *Brisac*(4)and *R.* v. *Johnson*(5) as in many other cases it was recognized that mere bodily absence does not free a man, according to the English law, from criminal responsibility for [361] acts which are done on his prompting within the jurisdiction(6). Now in the present case the mere misappropriation of the bills of exchange at Port Louis would of itself have been a trivial and ineffectual act had nothing more been done. Had they been passively retained they could have been replaced by the second or third of exchange, and the loss to the owner would have been immaterial. They were bills at thirty and sixty days' sight. It was the presentation and realization of them in Bombay which made the chief part of the prisoner's guilt(7). Is it to be said that he could thus carry out his crime with impunity, because the initial step had been taken elsewhere? According to the English doctrine of larceny, since the legal, as distinguished from the physical, possession(8) would not be destroyed by a theft, that possession continuing and continually violated by the prisoner, would make him punishable for the principal offence in his jurisdiction(9), and also for the abetment of a dishonest receipt as for such receipt itself. He employed a perfectly innocent agent. Even had the agent been a guilty one that would not have freed the prisoner from penal culpability; but the agent having been innocent, the employer is, on general principles, responsible as if he had done the act himself(10). According to the Penal Code, he is responsible as for the principal offence in his character of an abettor; just as if the agent had been guilty. I mean he is responsible if any responsibility is to be recognized at all. If not, then any unprincipled sharper may set himself up in Bombay as an agent for negotiating and realizing bills of exchange stolen anywhere else but in British India.

A possible objection to the application of such general principles as I have pointed to as necessary to a truly remedial working of the Penal Code, is answered, as I think, by the fact that both India and the Mauritius are dependencies of the same empire. The exercise of international penal jurisdiction rests on principles which stand behind the ordinary municipal law. These principles have been touched on by Grotius(11) and Locke(12), who find general [362] authority to suppress crimes as an injury to human society at large, checked only by the necessities of separate national existence. Barbeyrac adopts the views of Locke(13). On the Continent of Europe the right of a state to punish crimes directed from without its

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(1) See Wharton's Conflict of Laws, 922, 924 sec. 930 and the authorities.
(2) Op. Cit. secs. 876, 877. (3) Dearsley's C. C. 232.
(4) 4 East 164. (5) 7 East 65.
(6) 1 Hale P.C. 514, 516. Fort. C.L. 349. Story's Confl. of Laws, sec. 625 B & 625 C.
(7) Comp. *Reg.* v. *Taylor*, B. & P. 596. (8) See 16 Vin. Abr. 454, 459.
(9) See Hawkins P. C. ch. 33, sec. 9.
(10) See *Reg.* v. *Butcher*, Bell. C.C.6. (11) See De Jure B. et P. Lib II, ch. xx. 5.
(12) Civil Gov., Bk. II, Sec. 7.
(13) Note to Puff. Bk. VIII, c. iii. Wharton Op. Cit., sec. 87.

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borders seems to be now universally recognized(1). Where the crime has been wholly perpetrated abroad, there is great reserve in dealing with it, and only serious offences are noticed. This, however, arises, not from a lack of moral right, but from fear of stirring up jealousies. Amongst subjects of the same crown these should not exist. There should be no fear of wounding provincial susceptibilities by the exercise of a jurisdiction really wholesome and protective to the colony where the original offence was committed; and the dominant country is ready to correct any aberration should we give a too extended operation to our Indian Codes. I think that in taking cognizance of cases like the present we are doing only what would long ago have been done in England itself, but for the peculiar history of the criminal law there. The European Codes, to the number of twenty and upwards, framed in accordance with modern ideas, reject the notion of the strictly territorial character of crimes. In America one state recognizes or may recognize a theft committed in another, or even in Canada(2), for the purpose of dealing with a case of receiving stolen property. It is clear, then, I think, that no complaint would be made—gratitude rather would be felt—by the community of the Mauritius if in construing our Penal Code we were so daring as to hold that property stolen at Port Louis may be designated "stolen property."

Several English cases have been cited in argument which show very well the embarrassments from time to time occasioned by the remnants of the old jurisprudence which still cling to the new. The framers of the Indian Penal Code regarding the English system as "artificial," "complicated," "framed without the slightest reference to India," and very "defective," declined to make it more than any local system the ground-work of the Code. Cases decided in England, therefore, must be received in India **[363]** with a careful allowance for the great difference of the law in the two countries. By the common law a felony could be tried only in the county where the act had been done. The different counties stood to each other like different countries. This was carried so far that if a felony begun in one county, was completed in another, the felon could not be tried in either(3). This, of course, could not last, though the expedients resorted to, showed the reluctance with which any old rule was departed from (4). Larceny could be tried wherever the goods had been conveyed, because the legal possession of the owner continuing, there was a continuing offence, though robbery being momentary could be tried only where the violence had occurred (5). Offences on the sea were next made triable on land according to the common law(6), though by a special Court. In the reign of George III, thefts in Scotland were made cognizable in England if the property was brought there. Finally, under statutes of George IV (7) and Her present Majesty a thief in any part of the kingdom may be tried in any other where he has the property, and any person having such property feloniously taken may be tried as if it had been stolen where he has it (8). The question of felonious or not, has to be determined by English law, though the taking was in Scotland.

(1) Ortolan's Elements du Droit Penal, S. 884, Secs. 900—917.
(2) Wharton Op. Cit., s. 932.
(3) Com. Dig. Action (N. 9), Lord Hale cited by Abbott, C.J., in *R.* v. *Burdett*, 4 B. & Ald., p. 177.
(4) See Stat. 25 Hen. VIII, c. 3; 2 & 3 Ed. VI, c. 24, 5 & 6 Ed. VI, c. 10; 2 East's Pleas of Cr. 773; *R.* v. *Burdett*, 4 B. & Ald. at p. 172.
(5) Bulwer's Case, 7 Rep. (Thomas & Fraser's ed. Vol. IV, p. 49).
(6) 28 Hen. VIII, c. 15; 39 Geo. III, c. 37. (7) 13 Geo. III, c. 31, s. 4.
(8) 7 & 8 Geo. IV, c. 29, s. 76; 24 & 25 Vic., c. 96, s. 114.

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But, again, cases had to be provided for of offences partly within and partly without the kingdom. On the Statute 3, Jac. I, c. 4, it was held that the words " wherein such offence shall be committed" ought in such cases to be construed "where part of the offence is committed(1). For *sic interpretandum est ut verba accipiantur cum effectu.*" This is the principle of the statutes as to homicide committed partly within and partly without the kingdom (2). The English law is made the standard of guilt, though the act was **[364]** committed abroad. So also in 24 and 25 Vic. c. 94, ss. 1, 7, 9, an accessory to a felony committed out of the kingdom is subjected as to all the elements of his offence, to the law that prevails within it.

Formerly the receiving of stolen property was in England a bare misdemeanour. A misdemeanour was triable where any one of several acts constituting it had been done (3), land thus receiving could be dealt with wherever the accused had had the goods and was in custody(4). But receivers having in the time of William and Mary(5) been made accessories after the fact, the misdemeanour was held to be merged in the felony (6). The accessory could not be tried except with or after the principal felony. This necessitated fresh legislation ; and in the reign of Queen Anne it was enacted that as for a misdemeanour the receivers might be prosecuted apart from the thief, but only, as Mr. Justice Foster says(7), when the thief was not amenable to justice. Difficulties still arose through this limitation, and it was removed by Statute 22 Geo. III, c. 55 (8).

An accessory could be tried for felony under the common law only where the act of abetment, &c., had occurred (9). By modern legislation he has been made triable, as we have seen, where the principal offender could be tried ; but the character of the offence of receiving having till quite recently been regarded as simply accessory to the principal offence, the doctrine naturally prevailed that when the principal offence was not cognizable, neither was the accessory offence(10). This, indeed, followed from the wording of the commission of oyer and terminer. A receiver may now be indicted either as an accessory after the fact, or for a substantive felony if the stealing amounts to a felony(11). Felony, it was said **[365]** in argument, being a term defined only by English law, and applicable, therefore, only to acts committed in the United Kingdom, implied necessarily a stealing, &c., within the kingdom. Hence a receiving of property stolen abroad could not be punishable under the section, because such stealing could not be felony. This would account for the decisions under the statutes of George IV almost identical in language with the more recent ones. This may be so ; but the continuity of doctrine in the English Courts would cause the old ideas, to which I have referred, to operate long after the state of things in which they originated had materially changed. Felony no doubt denotes something peculiar to England and Ireland, implying a penalty common to a variable group of acts like "offence" under the Indian Penal Code. It is a thing which, if done in

(1) 3 Inst. 80. (2) 2 Geo. II, c. 21 ; 24 & 25, Vic., c. 100 and ss. 9 & 10.
(3) *Per* Abbott, C.J. in *R.* v. *Burdett*, 4 B & Ald. at p. 175.
(4) Dig. Action (N.9.) (5) 3 & 4 Wm., c. 4, s. 4.
(6) 12 East's Pleas of Cr., 744. (7) Foster's Crown Law, 374.
(8) 2 East's Pleas of Cr., 746.
(9) 2 H. Bl. 163. 2 East. 775. Bulwer's Case, 7 Rep. (Thomas & Fraser's ed. Vol. IV, 52, 53).
(10) Admiralty Case, 13 Rep. 52 (Thomas & Fraser's ed. Vol. V1 462). Vin. Abr. I 118.
(11) 24 & 25 Vic. c. 96, s. 91 ; *Reg* v. *Smith*, L.R. 1 Cr. Ca. 266.

England or Ireland, and only if done there, saving particular exceptions, is made punishable by the English law in such and such ways, just as "offence" under the Code is a thing which if done in India is made punishable by the Penal Code. Yet the thing in the minds of English lawyers and of the Legislature is distinguishable, and distinguished from the place where it is done. In s. 7 of 24 and 25 Vic., c. 94, a penalty is prescribed for being an accessory to a felony committed on sea or land, "whether within Her Majesty's dominions or without." Now felony being a thing punishable by the English law whenever it has been in England, and its punishableness being essential, could not, according to the view which prevails on this occasion, be committed out of England. The title of felony could not be applied to an act done abroad, except under a special law. The Legislature, however, thought that that might be called a felony which as a physical and moral act fell within the class so denominated as being generally of a particular punishable character in England. It regarded the place as a separable accident, not of the essence of the crime, though essential to its pœnality, and this principle was applied, where it could be applied, by the Courts at a far earlier time. When a single felony, committed partly in each of two counties, was absolutely incognizable in either, still the misprision of that felony as a substantive offence was cognizable and punishable in either county where but part of the felony was committed; and yet the jury in that case must have taken **[366]** notice of the entire felony, part whereof was committed in another county (1). To determine the character of an act within their cognizance they examined another in itself lying beyond their cognizance just as much as if it had been done in a foreign country (2). And as a receiver may now be indicted under the Larceny Act, s. 98, as an accessory to the principal felony, and his liability subsists though that felony was committed abroad, I do not see why he may not be punished for receiving goods stolen abroad. This would be an extension of the law, analogous to that made under George III, to the cases of Scotland and Ireland, and would make the law in England substantially identical with the law of India on the same point as I understand that law. Whatever in this instance the English law may be, its doctrine of accessory offences has not been received into the Indian Penal Code, and by the English law a substantive offence is generally cognizable, though that out of which it arises may escape the local jurisdiction.

Another point in the English law is instructive. In the case of *Reg.* v. *Garrett* it was recognized that he who being abroad procures the doing of a criminal act in England, is penally answerable for it; but it was held that the prisoner in getting his circular note payable in London cashed at St. Petersburg had not obtained or tried to obtain payment in London. The former principle was left untouched; but the latter appearing too narrow, s. 89 of Stat. 24 and 25 Vic., c. 96, was passed, by which it is declared that any one who by false pretences procures the payment of money to another, shall be deemed to have obtained it himself. In *R.* v. *Taylor* (3) the prisoner, who had obtained money for a forged cheque abroad, was held subject to punishment for the offence in England, because the cheque was afterwards presented there. Here the prisoner, according to the finding of the jury, procured by fraud the payment of money to the Comptoir d'Escompte. For this the English law would punish

(1) 1 Hale P.C. F. 652.
(2) See *R.* v. *Burdett*, 4 B. & Ald. at pp. 179—180. 2 Hale P.C. 163.
(3) 4 F. & F. 511.

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the prisoner, though at the time of the fraud he had not set foot in England. [367] The construction of the Penal Code, which I think the right one, would punish him in India. In *R.* v. *Munton* (1) money had been misappropriated abroad; but as false accounts intended to conceal the offence had been sent to England, Lord Kenyon held that the offence was cognizable by the English Courts.

According to the present English law, bigamy is bigamy, and punishable, though the criminal act—the second marriage—has been committed abroad. How is this? A marriage in Saxony or Roumania is not regulated as to its conditions, ceremonies or consequences by the English law; yet the English law determines that it shall under circumstances be criminal. The reason is this, that where an aggregate of acts constitutes a violation of the legislative will and an injury to society, the country of birth or the country of arrest in which any material portion of those acts has been done, may properly take cognizance of the whole series for the purpose of determining the character of those committed within its own local jurisdiction as constituting, when combined with the others, an offence against its laws. But even when bigamy could be tried only in the country of the second marriage, the jury had "jurisdiction to inquire into the other facts of the case" when the first marriage had taken place elsewhere. It was the existence and nature of that first transaction which determined the legal character of the second, and the second being under inquiry had to be investigated as a whole. Here, if I am wrong, the first transaction of two that were connected could still be looked into if it was admittedly legal, but not if it was illegal, and, according to the views of my learned colleagues, an Indian bigamist would be exempt from punishment if he stepped across the frontier to perform the second ceremony. Nor would this mischief be corrected even by the sweeping provisions of Act XX, s. 8, of 1879. That Act says that the law relating to offences shall extend to Europeans in allied states and to natives in any place; but, then, "the law relating to offences" is the Penal Code. If, therefore, by the terms of that Code itself an "offence" is necessarily something done in British India, there is no offence under it in any act done out of British India. This, of course, was not the intention of the [368] Legislature, and hence a strong argument against the narrow construction of "offence," which seems to me the wrong one.

Libel is an offence in England. Suppose, then, a libel is sent by post from England, and is published abroad. Such publication, in the ordinary sense, is necessary to complete the libel (2). It would be itself an offence if committed in England, and in a foreign country it may be an offence of a different description. Yet the Courts will take cognizance of such publication in order to establish the completion of the aggregate act in order to affix its proper character to the initial act of inchoate publication, which is directly cognizable because done within the United Kingdom. They would take cognizance of the foreign publication according to the law of England, not to punish that act itself, but to determine by the same law all the elements of another offence itself locally subject to the law. It seems that whether the connected act was prior, simultaneous, or subsequent to the one impugned, and whether it was done within or without the jurisdiction, it may, in general, for the purpose of judging of the act

(1) 1 Esp. 61.

(2) See *per* Best, J., *R.* v. *Burdett*, 4 B. & Ald. at p. 127; and *per* Holroyd, J., *ib.* 136, 137, 138.

impugned, be examined and appreciated according to the English law, and equally whether it be criminal or not.

We may gather from this review that the construction I propose is not opposed certainly to any principle of the English law or English legislation. "The common law.....has been expounded to meet the exigencies of the times as they have arisen" (1), and has, so far as traditional impediments allowed, improved the defences of society, as the weapons of its enemies have been improved. Had my learned brothers seen their way to the adoption of the views held by me and by others on the subject in controversy, we should have met at a point to which opinion and legislation in England, as elsewhere, are rapidly converging. The needs of modern society call for an enlarged jurisprudence, corresponding in a measure to that which was necessitated by the relations amongst the different components of the United Kingdom. Our Penal Code knows nothing of **[369]** offences as accessory in the sense which has governed the English decisions as to the receiving of stolen property. The jurisdiction of the Judges of the High Courts in India is not confined by the restrictive terms of the ancient commission to the Circuit Judges in England. Our jury of nine men in criminal cases is not limited in its capacity by an historical connection with the inquisitors and recognitors of the twelfth century summoned from the neighbourhood on account of their supposed personal acquaintance with the facts on which they had to pronounce. The anomalies of the English law arising from its peculiar history have no place here. It is, no doubt, an *exemplum ritiis imitable*, but we should look rather to its general and regular development than to the abnormal growths which here and there disfigure its venerable form, and which, perhaps, most strike the eye of a careless observer. The comprehensive views of Macaulay and his colleagues are manifested in their report presenting the Penal Code ; and they ought, I think, to be seconded by a corresponding method of interpretation. The suppression of ordinary crimes is the common duty and interest of every civilized community, especially amongst portions of the same empire ; and in these days, when commerce and the parasites of commerce spread everywhere, the common duty cannot be effectually performed on the old and narrow basis of the strict territoriality of crimes. The Penal Code, then, having left us a free field for the application of the most advanced and beneficial principles, I regret that in the present case we go, as it seems to me, out of our way to borrow from the English law a doctrine of limited, dwindling and capricious operation which in England itself is superannuated, and in almost every other civilized country is clean dead and buried (2).

In the individual instance I cannot but feel much relieved by the decision at which my learned brothers have arrived. I should have felt pain and misgiving in sentencing a man to whom I had been forced to refuse the aid which might be absolutely necessary to procure the evidence he needed. It is to be hoped that the deficiency of our law in this respect will soon be supplied by a **[370]** provision enabling the Indian Courts to ask the assistance which under s. 19 of Act XXI of 1879 they are bound to give. If I have rightly interpreted the spirit and purpose of our penal legislation, some measure, too, may be thought desirable to remedy what now must be thought a serious defect in the Penal Code itself. In the meantime the local Government may, perhaps, feel called

(1) Story's Confl. of Laws, s. 24.

(2) See Wheaton Inter. Law, Pt. II, ch. ii.

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on to release those who, in the Velanpur dacoity case and others like it, have been wrongly thought to have had stolen property in their possession, because in a popular sense it had been stolen. Even within a month I believe some residents in British India have been imprisoned for receiving property which could not properly be deemed "stolen," because it was taken in foreign territory. The restoration of these victims of misconstruction to what must now be pronounced their legitimate calling, will be of essential service to the other enterprising persons across the frontier (not now to be called dacoits) who, without the aid of friends on our side, must soon have been hampered by the cumbrous gains of their activity and daring.

Conviction quashed.

Attorney for the prosecution: Mr. *R. V. Hearn* (Government Solicitor).

Attorneys for the prisoner: Messrs. *Payne and Gilbert.*

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[371] ORIGINAL CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, an Mr. Justice M. Melvill.

THE GREAT INDIAN PENINSULA RAILWAY COMPANY (*Original Defendants*), *Appellants v.* RADHAKISAN KHUSHALDAS (*Original Plaintiff*), *Respondent.** [4th May, 1881.]

Railway companies—Agreement for interchange of traffic—Principal and agent—Loss of goods—Liability.

The plaintiff delivered to the Madras Railway Company a bale of cloth for carriage from B, a station belonging to that company, to S, a station belonging to the defendants, the G.I.P. Railway Company, and obtained from the Madras Company a receipt, which recited that it was granted "subjectt o the rules and regulations and charges in force on that or any other railway over which the goods might pass." The goods were lost while on the line and in the charge of the defendants, the G. I. P. Railway Company, and the plaintiff sued them for damages for breach of the contract of carriage. Between the two railway companies there existed an agreement arranging for the interchange of traffic, which provided, *inter alia* that goods should be booked through to and from all stations on both lines at certain stated rates; that in such cases one company should receive payment and should account to the other; that any claim for loss or damage should be paid by the company in whose custody the goods were then lost or damaged, or if that could not be ascertained, then by both companies rateably; and that no alteration affecting the through traffic should be made by either company without previous notice to the other. The defendants pleaded that the suit was wrongly brought against them, as there was no contract between themselves and the plaintiff.

Held, that the suit, whether or not it might also have been brought against the Madras Railway Company, was rightly brought against the defendants, inasmuch as the agreement between the two companies, if it did not actually constitute a partnership between them, showed, at least, that the Madras Railway Company became the agent of the defandants to make the contract for carriage with the pliantiffs.

Gill v. *Manchester, Sheffield and Lincolnshire Railway Company* (1) followed.

[R., 3 Bom. L.R. 260.]

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* Suit No. 400 of 1878. Appeal No. 395.

(1) L.R. 8 Q.B. 186.

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THIS was an action brought against the G. I. P. Railway Company to recover Rs. 1,250 for breach of a contract for the carriage of goods of the plaintiff, made with the plaintiff by the Madras Railway Company, acting therein, it was alleged, as agents for the defendants. The goods in question, *viz.*, a bale of cloth, were delivered by the plaintiff to the Madras Railway Company, at Bellary to be carried from that station, belonging to the Madras Railway Company, to Sholapur, a station belonging to **[372]** the defendant company. The lines of the two companies joined at Raichore, and it was between Raichore and Sholapur, and, therefore, while the goods were in the custody of the defendants, that the loss admittedly took place. The plaintiffs also founded their case in the alternative in tort, alleging that the loss was occasioned by the defendants' negligence.

The defendants (1) denied their liability *in toto*, asserting that they had entered into no contract with the plaintiffs; and (2) alleged that, if that point should be found against them, they were only liable to the plaintiffs to the amount of Rs. 825.

The other material facts of the case appear at length from the judgment.

The original hearing took place before Sir Charles Sargent, when the preliminary point of liability or no liability, raised by the defendants, was alone gone into; and Sir Charles Sargent held that the suit was rightly brought against the defendant company, and made a decretal order to that effect, and adjourned the further hearing of the case.

Against that order the defendant company now appealed; the memorandum of appeal alleging (1) that the learned Judge ought to have held the plaintiffs' cause of action (if any) was against the Madras Railway Company, and not against the defendants; and (2) that he was wrong in holding that the Madras Railway Company acted as the agents of the defendants in concluding the contract with the plaintiffs.

A preliminary question having arisen at the hearing of the appeal, as to whether the order of Sir Charles Sargent appealed from, not being an order final in form, was one properly appealable, it was suggested and agreed to by counsel on either side that that order should be amended so as to be in the form of a final decree for the plaintiffs for Rs. 1,100, the amount of damage agreed between the parties to have been suffered by the plaintiffs.

Hon. *F. L. Latham* (Acting Advocate-General) (with him *Farran*), for appellants.—No negligence has been shown: so the liability, if any, must be merely that of a common carrier, growing out of the contract of carriage. The question raised by this case is this: **[373]** when a railway company contract for carriage beyond their own line, and a loss occurs beyond their own line, who is liable to be sued, the contracting company, or the company on whose line the loss occurred, or both? The contract in this case is embodied in the ordinary railway receipt. Sir Charles Sargent decided against us on the authority of the case of *Gill* v. *Manchester Railway Company* (1), but that case is distinguishable from the present in two important particulars. First, the agreement between the two companies in that case was such as almost to constitute them partner; the agreement in this case is very different. And, secondly, in that case the contract made was to carry exclusively on the defendant company's line, and that appeared expressly on

(1) L. R. 8 Q. B. 1868.

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the contract, and was strong evidence of agency. The goods in that case were from beginning to end on the defendant's line And it is apparent that the case was considered a special one, for no earlier cases were cited. And see Chitty on Contracts (10th ed.), p. 451, where that case is treated as creating an exception to the general rule. If that case is not to be explained by its special circumstances, then it must yield to the authority of several cases inconsistent with it. It is a significant fact that in most of the cases the action has been brought against the contracting company: *Muschamp* v. *Lancaster Railway Company* (1), *Scothorn* v. *South Staffordshire Railway Company* (2), *Great Western Railway Company* v. *Blake* (3). But in two cases, *Collins* v. *Bristol and Exeter Railway Company* (4) and *Mytton* v. *Midland Railway Company* (5), the defendants were the non-contracting companies, and in both cases they succeeded in evading liability. The later cases consider the question whether the special features of each case bring it within the recognized principle or not: *Buxton* v. *North-Eastern Railway Company* (6), *Thomas* v. *Rhymney Railway Company* (7), *Foulkes* v. *Metropolitan Railway Company* (8).

The only resemblance between this case and the case of *Gill* v. **[374]** *Manchester Railway Company* (9) is that there is a written agreement between the two companies in both; but similar arrangements between the various railway companies, though not in writing, existed in other cases, *e.g.*, *Mytton* v. *Midland Railway Company* (5), *Great Western Railway Company* v. *Blake* (3). The agreement in this case does not amount to a quasi-partnership. The cases cited show that there is no contract here with the G. I. P. Railway Company, and the suit, therefore, was wrongly brought against them.

Starling (with him *Pigot*), *contra*, for respondents —In no case has it been decided that no one else besides the contracting company was liable. No doubt the cases decide that the contracting party is himself liable. In *Great Western Railway Company* v. *Blake*, at p. 993, Cockburn, C. J., says: "It is unnecessary to say whether the plaintiff would have had a right of action against the South Wales Railway Company; at all events he has against the defendants."

The only cases cited in which the company sued was not the contrating company, but the company on whose line the loss occurred, were *Collins* v. *Bristol and Exeter Railway Company* (4) and *Mytton* v. *Midland Railway Company*. In both plaintiff failed because he sought to vary the contract; here he does not. The agreement in this case is conclusive as to the agency of one company for the other. But I submit that the defendants are also liable on another ground, exclusive of contract. They were in possession of plaintiffs' goods; it was their duty to carry safely, and they did not. That is good *prima facie* evidence of negligence, and they have not disproved negligence, and are liable: *Foulkes* v. *Metropolitan Railway Company* (8), *Marshall* v. *York and Berwick Railway Company* (10) *Austin* v. *Great Western Railway Company* (11), *Martin* v. *Great Indian*

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(1) 8 M. & W. 421. (2) 8 Ex. 341. (3) 7 H. & N. 987.
(4) 11 Ex. 790; 1 H. & N. 517 (Cam Sc.); 7 H.L.C. 194. (5) 4 H. & N. 615.
(6) L.R. 3 Q.B. 549. (7) L.R. 5 Q.B. 226; L.R. 6 Q.B. 266.
(8) L.R. 4 C.P.D. 267; 5 C P.D. 157. (9) L.R. 8 Q B. 186.
(10) 11 C.B. 655. (11) L R. 2 Q B. 442.

Peninsula Railway Company (1), *Berringer* v. *Great Eastern Railway Company* (2).

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Cur. adv. vult.

JUDGMENT.

[375] May 4, 1881.—The judgment of the Court was delivered by WESTROPP, C.J.—This is an appeal from a decretal order made by Sir Charles Sargent, J.

In August, 1877, the plaintiffs' agent at Bellary, a station on the Madras Railway, delivered there to the Madras Railway Company a bale of cloth belonging to the plaintiffs to be conveyed thence to Sholapur, a station on the G. I. P. Railway, and there to be delivered to the plaintiffs. The bale was conveyed safely from Bellary past Raichore, where the Madras Railway terminated, and was lost between Raichore and Sholapur on the defendants' (the G. I. P. Railway Company's) line, and was never delivered to the plaintiffs, who, by their present suit, claimed damages to the extent of Rs. 1,250 as the value of the bale. The fifth para. of the plaint alleged "that the defendants (the G. I. P. Railway Company) through their agents in that behalf, the Madras Railway Company, agreed with and promised the plaintiffs to safely carry the aforesaid bale from Raichore and deliver the same to the plaintiffs at Sholapur." The following receipt for the bale was given by the goods clerk at Bellary to the plaintiffs' agent:—

"Madras Railway.

T. (79).
Goods Receipt Note No. 135.
Traffic Department.
Co. 101.
Bellary Station, 11-8-77.

Received from Balmookund.
Consigned to Radhakisan Ganeshdas,
Sholapur Station.
* Number and description of goods—
1 B. cloth.

(Signed) RUGANLAL, Clerk.

N.B.—This receipt is granted subject to the Rules and Regulations in force on this Railway or any other Railway over which the goods may pass, and must be produced before the goods can be delivered.

[376] The defendants by their written statement (after a general denial of their liability to pay the sum of Rs. 1,250 in the plaint claimed, or any part thereof) submitted that the plaintiffs' cause of action (if any) was against the Madras Railway Company and not against the defendants; and that, if the action did lie against the defendants, the plaintiffs are entitled to recover Rs. 825 only, such sum being the full value of such part of the goods as is not comprised in s. 10 of Act XVIII of 1854.

The issues were:—

1. Whether the defendants promised and agreed with the plaintiffs as in the 5th paragraph of the plaint alleged? and

2. Whether the plaintiffs are entitled to maintain this suit.

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* Number to be expressed in words as well as in figures.

(1) L.R. 3 Ex. 9.

(2) L.R. 4 C.P.D. 163.

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Both of those issues Sir Charles Sargent, J., found in the affirmative, and so stated in his decretal order of that date, and he adjourned the further hearing of the suit.

The present appeal is against that order. For the purpose, however, of avoiding any question as to the jurisdiction of this Court to hear this appeal, the parties, by their respective counsel, agreed that Sir Charles Sargent's order should be amended by making it a decree for the plaintiffs for Rs. 1,100, as damages for the bale of goods, the subject of this suit, with costs, reserving to the defendants the right to appeal against the ruling of Sir Charles Sargent on the issues 1 and 2 as to the liability of the defendants to pay any damages or costs; and that so much of his order as directed the adjournment of the cause should be struck out.

At the time of the occurrences the subject of this suit, there was in force an agreement in writing between the Madras Railway Company and the Great Indian Peninsula Railway Company intituled "A Memorandum of Agreement between the Madras and the Great Indian Peninsula Railway Companies for interchange of Traffic and Rolling Stock."

By the second of its provisions the joint station at Raichore was erected and maintained at the joint expense of both companies. The 16th, 17th, 18th and 19th clauses of the agreement were as follows:—

[377] "16. That goods and parcels be invoiced and booked through to and from all stations on both lines where such traffic is dealt with. The traffic managers of both Companies to supply to each other, from time to time, the names of such small stations of their respective Railways as do not book goods and parcels.

"17. That the through rates and fares be in all cases the sum of the local rates and fares of the two Companies to Raichore, including terminals and cartage of both Companies, but that no terminal be charged by either Company for Raichore station on through traffic.

"18. That each Company be responsible for collecting the proportion due to the other Company on all through traffic, and that on goods traffic, invoiced through 'to pay,' the receiving Company check the invoices, and be responsible for collecting any amounts that may be undercharged by the forwarding Company, but the receiving Company not to reduce below the charge mentioned in the invoice or through way-bill without the consent of the forwarding Company.

"19. That the mileage to Raichore from stations on each line be taken for the purposes of this agreement, as per appendix annexed, the G. I. P. mileage to include in all cases (except as mentioned in cls. 32, 33, and 34) 20 miles for the Thull Ghat and 32 miles for the Bhore Ghat extra, as sanctioned by Government."

The 22nd clause was as follows:—

"22. The exchange of stock, both passengers and goods, between the two Companies, to extend to the whole of the lines of either Company, and to branches that may be worked by them respectively."

The 24th clause was as follows:—

"24. The division of the receipts on the through traffic to be carried out monthly by the audit officers of the two Companies, and each Company to have, in division, its own local rates and fares, except in the case of minimum charges, as provided in cl. 23."

The 40th clause was as follows:—

[378] "40. That goods claims be settled by the Company in whose custody the loss or damage occurred; that, when this cannot be ascertained with certainty, the claim be paid in mileage proportion, but in such

cases the consent of both Companies is to be obtained before settlement is made."

The 44th clause was as follows:—

"44. No alteration of rate or fare, or classification affecting the through traffic is to be made by either Company without one month's previous notice to the other." The contention of the appellants (the G.I.P. Railway Company) is that the contract to carry the bale was made by the plaintiffs (respondents) with the Madras Railway Company and not with the G. I. P. Railway Company. It may be that, according to the law as laid down in *Great Western Railway Company* v. *Blake* (1); *Buxton* v. *North-Eastern Railway Company* (2). and *Thomas* v. *Rhymney Railway Company* (3), the Madras Railway Company, if sued, would have been liable for the loss of the bale of cloth; but it is unnecessary for us to say, and we do not say whether or not that company is so liable.

In our opinion the written agreement between the two companies, of which we have above quoted the material clauses, brings this case within the authority of *Gill* v. *Manchester Railway Company* (4), upon which we understand Sir Charles Sargent to have acted in arriving at his decision upon the issues; and albeit that agreement may not have actually constituted a partnership between the two companies, yet it rendered the Madras Railway Company the agents of the G. I. P. Railway Company for the purpose of making a contract for carrying the bale of cloth over, at least, so much of the line of the latter company as forms part of the distance from Bellary (the place of booking) to Sholapur (the place of delivery,) *i.e.*, from Raichore to Sholapur. The G. I. P. Railway Company have by that agreement made the Madras Railway Company their agents for the purpose of, at least, so much of the traffic as benefits the G. I. P. Railway Company. We think that we may in this case adopt, *mutatis mutandis*, the **[379]** following passage from the judgment of Mellor, J., in *Gill* v. *Manchester Railway Company* (4):—"The action was rightly brought against the defendants, inasmuch as if the provisions of the agreement of the 17th June, 1857, did not constitute an actual partnership between the respective companies as to all the matters embraced by it, still they came within the rule expressed by Lord Cranworth in *Cox* v. *Hickman* (5) —'The real ground of liability is that the trade has been carried on by persons acting on his (the defendant's) behalf;' and *per* Lord Wensleydale to the same effect in the same case (5). In our opinion the Great Northern Railway became, by virtue of their agreement with the defendants, the agents of the latter for the carriage of the cow with the plaintiff." And, during the argument of the same case, Blackburn, J., said: "We need not consider whether the two companies are partners; the traffic is carried on for the joint benefit of the two, so that they are joint principals, and either may be sued (6)."

A passage from the judgment of Grove, J., in *Foulkes* v. *Metropolitan District Railway* (7), when that case was in the Common Pleas Division, was cited to us as supporting the principle on which *Gill* v. *Manchester Railway Company* was decided, although that case does not appear to have been cited to the Common Pleas Division. It was this: "Were it necessary to decide this case upon the question of agency, the inclination of my opinion is that the South-Western Company were, as regards the

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(1) 7 H. & N. 987.
(2) L.R. 3 Q B. 549.
(3) L. R. 5 Q. B. 226.
(4) L. R. 8 Q. B. 186 (191).
(5) 8 H.L.C. 306 (315).
(6) At p. 188.
(7) L.R. 4 C.P.D 280.

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plaintiff, the agents of the Metropolitan District Company, and that there was a kind of mutual agency for their mutual convenience, each Company undertaking to act when it was most convenient for them to issue tickets for their own benefit and the benefit of the South-Western Company." Since the present case was argued, an appeal lodged in *Foulkes* v. *Metropolitan Railway Company* has been decided (1). On the appeal the case assumed, to some extent, a different aspect from that which it had borne in the Common Pleas Division. The decision of that Division was affirmed. There Thesiger, L.J., refers with approbation to *Gill* v. *Manchester Railway Company*. He said (2): "If the right of the plaintiff to [380] maintain his judgment depended solely on his establishing a contractual relation between him and the defendants, I should not dissent from the view that such relation has been proved. The affidavit of Mr. Forbes is not in itself inconsistent with the notion that the London and South-Western Railway Company, in issuing tickets at their Richmond station for stations on the defendants' line, so issue them as agents for, or as partners with, the defendants. The notion, too, receives sanction from the decision in *Gill* v *Manchester Railway Company* (3). There the contract of carriage purported to be made with the Great Northern Railway Company; but the animal, which was the subject of the contract, was to be conveyed upon the defendants' line, and there were traffic arrangements between the two companies, under which their rolling stock was treated as one stock, their traffic was interchanged, and the receipts from through traffic were divided by mileage. It was held that by virtue of those arrangements the Great Northern Railway Company, whether as partners with the defendants or otherwise, became the agents of the latter to make the contract of carriage with the plaintiff. In the present case, under the traffic arrangements between the two railway companies, the defendants supply the rolling stock and carry, in the exercise of their running powers, the whole of the through traffic, taking a mileage proportion of the receipts from such traffic with an allowance for working expenses. It is admitted that traffic between Richmond and the defendants' station at Hammersmith constitutes through traffic, and it may therefore be urged with force that, in booking such through traffic at Richmond, the London and South-Western Railway contract, either as agents for the defendants, or for the defendants jointly with themselves. This view is further strengthened by the form of the ticket issued at Richmond to passengers travelling from Richmond on to the Metropolitan District line when contrasted with that issued to passengers travelling elsewhere, and by what is written over the booking office; and although I am by no means prepared to hold that, under traffic arrangements similar to those which exist between the two companies, it is not open to a company in the position of the London and South-Western [381] Railway Company to make the contracts of carriage in such a way as to make itself exclusively liable upon them, or to deny that, in most cases, it must be a question for the jury whose the particular contract may be, I think that, under the peculiar circumstances of the present case and upon the materials before us, the Court would not be justified in disturbing the judgment for the plaintiff, and sending that question down for trial."

Mytton v. *Midland Railway Company* (4) was cited to us on behalf of the appellants. But that case seems irreconcileable with the subsequent

(1) L.R. 5 C.P.D. 157.
(2) L.R. 5 C.P.D. 166.
(3) L. R. 8 Q. B. 186.
(4) 4 H. & N. 615.

decision in *Gill* v. *Manchester Railway Company* (1) already mentioned, and also with the passages which we have quoted from *Foulkes* v. *Metropolitan Railway Company* (2). And in a case of *Hooper* v. *London and North-Western Railway*, decided in the Common Pleas Division on the 2nd December, 1880, and reported in the *Times* of the 3rd December, 1880, Denman, J., is reported as saying: "The case of *Mytton* v. *Midland Railway* does not appear to have been cited in the subsequent case of *Foulkes* v. *Metropolitan Railway*, but it was really overruled by it." Lindley, J., seems to have concurred in that view.

Amongst other cases relied upon for the appellants was *Bristol and Exeter Railway* v. *Collins* (3) which, in its various stages, afforded a strong example as to the possible variety of judicial opinion (4). Neither its facts, however, nor those of any other case cited for the appellants, tally so closely with those in the present case as the facts in *Gill* v. *Manchester Railway*, which appears to us to have been a just and reasonable decision, and recognized [382] as such in *Foulkes* v. *Metropolitan Railway* (2) by the Court of Appeal.

For these reasons we concur with Sir Charles Sargent in his finding on the issues.

The defendants have not excused their non-delivery of the bale. The plaintiffs were not bound to prove negligence: *Ishvardas Golabchand* v. *G.I.P. Railway Company* (5). There must, therefore, having regard to the amendment (made by consent of the parties) of Sir Charles Sargent's decretal order, be a decree for the plaintiffs for Rs. 1,100 damages, and for the costs of the suit, and of this appeal.

Solicitors for the plaintiffs :—Messrs. *Lynch and Tobin.*

Solicitors for the defendants :—Messrs. *Hearn, Cleveland and Little.*

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Before Mr. Justice West and Mr. Justice Pinhey.

SAYAD NASRUDIN (*Original Plaintiff*), *Appellant v.* VENKATESH PRABHU (*Original Defendant*), *Respondent.**

[26th March, 1879.]

Act XXIII of 1861, *s.* 11—*Procedure—Execution—Possession—New cause of action.*

A plaintiff who has obtained a decree declaring him entitled to the possession of immoveable property must, under s. 11 of Act XXIII of 1861, proceed by execution of the said decree, and not otherwise; if he neglect to do so till he is time-barred, he cannot any the more on that account bring another suit for

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* Appeal No. 184 of 1877.

(1) L.R. 8 Q.B. 186. (2) L.R. 5 C.P.D. 157. (3) 7 H.L.C. 194.

(4) The Court of Exchequer decided in favour of the defendants, the company (11 Exch. 719). The Exch. Chamber (Coleridge, J.; Wightman, J.; Cresswell, J; Erle, J.; Williams, J.; Crompton, J.; Crowder, J and Willes, J.); unanimously reversed that decision, and entered a verdict for the plaintiff (1 H. & N. 517). The House of Lords consulted the Judges; of these four Byles, J.; Crompton, J.; Williams, J. and Wightman, J.—were in favour of the plaintiff, and two only—Watson, B., and Martin, B.—were in favour of the defendants. The case was decided against the opinion of the majority of the Judges in favour of the defendants by the House of Lords, there being present Chelmsford, C, and Lords Cranworth, Wensleydale, and Kingsdown, which two last Lords gave their judgments with much doubt.

(5) 3 B. 120.

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possession of the same property, whether founded on the old decree in his favour, or on the continued occupation of the said property by the defendant.

[F., 28 M. 338; R., 5 B. 387; 6 B. 7.]

THIS was a second appeal from the decision of A. L. Spens, Judge of the District Court of Kanara, affirming the decree of the Second Class Subordinate Judge of Karwar.

The facts of the case fully appear from the judgment of the High Court.

Farran (with him *Shantaram Narayan* and *Pandurang Balibhadra*), appeared for the appellant.

[383] *Macpherson* (with him *Shamrav Vithal*), appeared for the respondent.

JUDGMENT.

The following is the judgment of the Court, delivered by

WEST, J.—The plaintiff's uncle, Padsha, sued for restoration of mortgaged property, on the ground that the mortgage-debt had been fully satisfied. His suit was successful, and in appeal he was declared entitled to possession on the 7th December, 1865.

The plaintiff, Padsha, then died, and, after some delay in obtaining a certificate of heirship, the present plaintiff applied for execution to the Principal Sadar Amin who had originally decided the suit.

This application was properly made, but, on the ground apparently that the lands were within the local jurisdiction of the Munsif's Court at Karwar, the applicant was referred by the Principal Sadar Amin to that Court. He went there accordingly, and the Munsif placed him in possession on the 22nd October, 1869.

This execution, however, of a decree of the Principal Sadar Amin by the Munsif was, on the complaint of the defendant, pronounced irregular. The District Judge set it aside, and restored the defendant to possession, which he recovered on the 23rd June, 1871. On special appeal the High Court affirmed the order of the District Court.

The present plaintiff then went a second time to the Court of the Principal Sadar Amin, now become that of First Class Subordinate Judge, and on the 16th July, 1872, his application for execution was granted. The District Court, however, held on appeal that the application was barred by the Limitation Act, and on special appeal this decision was affirmed by the High Court.

The defendant then sued the present plaintiff to recover as damages the mesne profits realized by the plaintiff during his possession from 1869 to 1871. After passing through the lower Courts the case came up to the High Court, which decided that the present plaintiff, having a decree for possession, could not be regarded as a trespasser, and rejected the claim.

This was on the 17th July, 1876; and the plaintiff, on the 2nd December following, filed the present suit for possession of the [384] land which he had thus failed to obtain in execution of the decree awarding it to him. The Courts below have held the suit barred as brought on a cause of action already once heard and determined, and as opposed to the purpose of s. 11 of Act XXIII of 1861, which prescribes that questions

arising in execution between parties to a decree shall be disposed of by the Court executing the decree and not by a separate suit.

The general principle that a judgment recovered bars a further suit on the same cause of action, does not, according to the English, any more than by the later Roman law, serve as a safeguard to a defendant against whom the judgment was pronounced, and who has not satisfied the judgment for a thing certain, such as a particular piece of land or an aggregate of defined lands constituting the object of a suit and decree. It might well be a question whether by itself s. 2 of Act VIII of 1859, which expresses in general terms the doctrine of the English law, ought to be construed literally so as to embrace a class of cases to which the English rule does not extend, and thus enable a defendant to rest his title on a decree not for, but against, him. But s. 11 of Act XXIII of 1861 and the decisions under that section seem to shut out a plaintiff, who has failed to obtain execution of a decree in his favour, from making that decree the basis of a further suit, or from obtaining, by means of a subsequent suit, that which, by adopting the proper means, he might have obtained in execution. It has been properly said that the recognition of such suits would tend to prolonged and possibly endless litigation, and so defeat the purpose of the Limitation Acts; and the general conclusion arrived at appears to have been that, failing to give effect to the means placed at his command by way of execution, a judgment-creditor loses his remedy altogether.

It was urged by Mr. *Farran* in his able argument that as the title to land sued for does not, as in the case of damages awarded, arise from the decree, the right remains what it was before the decree; and that the continued occupation by the defendant is a continued infringement of the right, enabling a plaintiff, whose claim has been pronounced good, to sue on the cause of action thus from time to time renewed. The declaration in the first decree may, according to this argument, serve as evidence of the **[385]** right, albeit the relief awarded has become incapable of execution. A piece of land adjudged to be the plaintiff's subsists, and admits of recovery, of delivery, while the mere right to damages, without a definite substance as the object of its incidence, perishes with the lapse of the time allowed for its enforcement. The distinctive character of a judgment in ejectment as compared with one on which a writ of *fi-fa* issues, is recognized in the English law (1); but whether the ownership and right to possession of a house or field, once declared by a Court to subsist, thenceforward adheres to it, notwithstanding the failure of the owner to take possession under his decree within the time limited by law, may itself admit of question. The opposing possession, which would, in a certain time, have ripened into ownership without a suit, may equally, by the operation of the law, ripen into ownership in a different and a shorter time after there has been a suit and a decree against the possessor. From motives of public policy, and on grounds of general probability, the law may raise the presumption on which prescription rests sooner in the latter case than in the former. Section 11 of Act XXIII of 1861 does not distinguish between the cases of suits for land and suits for other property. In the present instance the order of the Court in 1865 for the restoration of the land to the plaintiff was one that he could have forthwith got executed by a delivery to him of exactly the same property that he seeks in the present suit. He dates his cause of action as having arisen when he obtained his

(1) See Com. Dig. Execution (A. 5); *Doe dem. Taggert* v. *Butcher*, 3 M & S 557.

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decree in 1865, and it has been contended that down to that time the relation of the parties was contractual, which then became strictly antagonistic. But if the decree of 1865 did change the relation of the parties, that decree is itself the foundation of the suit, as the old relation and the right involved in it could not then any longer subsist. It is evident that the plaintiff seeks, by means of a new suit, to gain what the law, equally in the case of land as of money, binds him down to obtain by execution, and in no other way.

Then it is said that the decree, by which this Court in 1876 refused to pronounce the plaintiff a trespasser, during the two years of his possession irregularly obtained under his decree, **[386]** necessarily implies, that, not being wrongfully, he was rightfully in possession from 1869 to 1871; and if so, it is contended, then his dispossession in 1871 constituted a cause of action on which he can maintain the present suit. The implication may perhaps be logically necessary; but still, while the order of this Court stands, by which the plaintiff was turned out, his ouster cannot possibly constitute a cause of action. The order under which he had been put into possession was set aside, and he was thus thrown back on the decree, and, seeing this, sought execution a new on the decree, though after a lapse of time by which his remedy had become barred. His fresh application for execution in 1872 implied a decree still in force and unexecuted (1), which was inconsistent with his having obtained the fruit of that decree in a possession of which, by a new wrong, he had afterwards been deprived; and the argument now raised was seen at that time in all probability to be unsustainable

The position of the plaintiff is a most unfortunate one, since, while adopting the ordinary means and obeying the directions of the Courts, he has by that very obedience shut himself out from the enjoyment of a right to which he was adjudged to be fully entitled. His proper remedy, however, as he did not appeal against the first erroneous order of the Principal Sadar Amin, would seem to have been an application based on the judgment of this Court in 1876 for a review of its prior judgment of 1871. On such an application anything that could have been done would have been done to give the applicant substantial justice (2). It might possibly have been held in such a case that the Munsif, in giving possession to the plaintiff, had acted ministerially, or quasi-ministerially, under a judicial or authoritative direction of the Principal Sadar Amin; or that the plaintiff, having entered without any wilful abuse of process, was entitled to retain the possession which he had thus united to his right under the decree. Or again, on the principle *actus curiæ neminem gravabit* (3), the plaintiff might possibly have succeeded in getting the order of 1875 revised, and the **[387]** application for execution of the 9th May, 1872, treated as made at the date of his earlier application of 1868, since the intermediate delay had arisen from a misdirection on the part of the Principal Sadar Amin. Whether such an application would or could succeed now, after so great a lapse of time, and the creation perhaps of new interests, we cannot undertake to say.

The decree of the District Court must be confirmed with costs.

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(1) Com. Dig. Execution (A 3). (2) 8 B.H.C.R.A.C.J. 245.
(3) See Shelly's Case, 1 Rep. at p. 106. *Taylor* v. *Cole*, 1 Sm.L.C. (6th ed.) 115. *Brinsmead* v. *Harrison*, L.R. 7 C.P. 547, *Ex parte Drake*, W.N. 1877, 119. Printed Judgments for 1874, p. 279.

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APPELLATE CIVIL.

Before Mr. Justice West.

LILLU BIN RAGHUSHET (*Plaintiff*), *Appellant v.* ANNAJI PARASHRAM (*Defendant*), *Respondent.** [21st March, 1881.]

Mamlatdar's finding as to possession—Magistrate's finding as to possession—Code of Criminal Procedure, Act X of 1872, *s.* 530—*Actual possession—Dispossession—Cause af action*—Res judicata.

A Mamlatdar's finding as to the point of actual possession is not conclusive.

A Magistrate's finding is so under s. 530 of Act X of 1872.

Possession actually taken by a person having a right to it is not the less effective, as perfecting his title, by reason of an irregularity in taking it. Subsequent ouster will give rise to a new cause of action.

[**R.**, 15 B. 238 (241); 20 B. 270 (276); 36 B. 185 (188) = 13 Bom. L.R. 1200 (1203) = 12 Ind. Cas. 913 (914); 9 C W.N. 1061; **Expl. & D.**, 26 B. 353 = 3 Bom. L.R. 919 (920).]

THIS was an appeal from an order of R. F. Mactier, District Judge of Satara, reversing a decree of Achyut Jagannath Ghate, Second Class Subordinate Judge of Karad, and remanding the case for re-trial.

The plaintiff, Lillu, sued for possession of certain land, alleging that he held a mortgage of the land; that he filed a suit against the defendant, Annaji, and others for possession of the land as mortgagee, and obtained a decree awarding such possession in 1871; that he obtained possession under the decree; that in 1874 a first class Magistrate confirmed his possession; that subsequently, the defendant, Annaji, filed a possessory suit before a Mamlatdar, who decided against Lillu and ousted him from possession in 1877; and hence the present suit.

The defendant, Annaji, answered that he had purchased the land in 1864, and had been in uninterrupted possession since then; **[388]** that he had no notice of the former suit; and that the plaintiff had never obtained possession under it.

The Subordinate Judge held that the plaintiff, Lillu, had obtained a decree and possession thereunder against the defendant; that the sale to the defendant, being prior to the decree, must be considered to have been adjudicated upon in the former suit, and that the defendant could not be allowed to set up that title again in the present suit. He, therefore, decreed in favour of the plaintiff.

From this decree, the defendant, Annaji, appealed to the District Judge of Satara, who held that it was right that the defendant, Annaji, should have a chance of proving his purchase of 1864 in this case, as he was stated to have been in jail during the pendency of the last suit. He, therefore, reversed the Subordinate Judge's decree and remanded the case for re-trial, to allow Annaji to prove his purchase of 1864 and his possession.

From this order of remand the plaintiff, Lillu, appealed to the High Court.

Ganesh Ramchandra Kirloskar, for the appellant, Lillu.
Shantaram Narayan, for the respondent.

* **Review in Appeal No. 27 of 1878 from order.**

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JUDGMENT.

The case was heard by WEST and PINHEY, JJ., on the 3rd March, 1878, and the following judgment was delivered by

WEST, J.—The former decision in the suit between Lillu and Annaji was *res judicata* as between them, albeit Annaji was a prisoner in the criminal jail at the time of the suit. If he was subjected to any wrong through proceedings fraudulently taken during his incarceration, his proper course was to get those proceedings set aside. While the decree stands unreversed, it is conclusive of the right of Lillu as mortgagee. The Subordinate Judge has pronounced Lillu entitled to possession in this character, and his decree to this effect must be restored; that of the District Court being reversed with costs throughout on Annaji.

The defendant, Annaji, applied for a review of this judgment on the ground that the plaintiff, Lillu, bad admitted before the Mamlatdar that he had never obtained possession, and that being **[389]** so, there was no new cause of action on which to found the present suit, his only proper course being to proceed by execution of the former decree.

A *rule nisi* having been granted on these grounds by a Bench composed of the same Judges as above, it came on for argument before West, J., alone, the other member of the Bench having been absent on leave for more than six months.

Ganesh Ramchandra Kirloskar, for the plaintiff, Lillu, showed cause.—There is no evidence before the Court as to the alleged admission of Lillu. The Mamlatdar's judgment is not even admissible for such a purpose. On the other hand, there is the conclusive finding by the Magistrate of the actual possession of Lillu in 1874. The Magistrate's finding under s. 530 of Act X of 1872 is conclusive so far as the determination of the question of actual possession is concerned. The plaintiff, moreover, had executed the former decree as far as he could, and had actually taken possession under it. His old cause of action was thus at an end; any fresh disturbance would give him a fresh cause of action: *Bindobashinee Dossee* v. *J.R. Rainey* (1), *Gobind Mundal* v. *Bhoopal Chunder Biswas* (2), *Umbika Churn* v. *Madhab Ghosal* (3). Even if the objection taken be in itself a good one, it is not rightly taken in review of the appeal in the High Court.

Shantaram Narayan, for the defendant, Annaji, in support of the rule.—Plaintiff, having himself put in the Mamlatdar's judgment, cannot object to its admissibility. Even if it be not conclusive evidence, it was sufficient to show that he had a *prima facie* case. The dispute before the Magistrate shows that Lillu had not peaceful possession. Then the Mamlatdar declared that we were in possession. My contention is that plaintiff never executed his decree, and never obtained real possession; *Sayad Nasrudin* v. *Venkatesh* (4) The cases quoted for the plaintiff do not apply, as they relate to execution against land which tenants had a right to hold in spite of the decree.

The Court took time to consider its judgment, which was delivered on the 21st March, 1881, by—

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(1) 15 W.R. 307.
(2) 19 W.R. 101.
(3) 4 C. 870.
(4) Printed Judgments for 1879, p. 89.

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[390] WEST, J.—The rule for review in this case was granted upon an apparent admission of the plaintiff, Lillu, in the inquiry before the Mamlatdar, that, although he had obtained a decree for possession, in 1871 of the property in dispute, yet he had never actually obtained possession under it. And his statement, as given by the Mamlatdar in his judgment in the possessory suit, does say that, at the time when he was taken to receive possession, the person who should have delivered it did not actually do so. There was a crop on the land, and he told the plaintiff merely that when that crop was removed he was to enter on possession and enjoyment. Still, however, in other parts of his deposition as set forth, Lillu, as I find, does assert that he is in possession of the land awarded to him. The assumption, therefore, on which the rule was granted, is not supported by Lillu's deposition as a whole. The original deposition has not been produced; but the defendant, Annaji, who moved the Court on the Mamlatdar's summary of it, cannot object to that summary being taken as correct. It was by way only of indulgence to him that notice was taken of the apparent admission in his favour indicated by the Mamlatdar's judgment, and, on the failure of the admission, the reason for the rule is gone. Lillu stands now in this position, that he has a decree for possession as mortgagee, and an order of a Magistrate in 1874 pronouncing him in possession; while, by a Mamlatdar's order of 1876, Annaji was declared to be in possession, and Lillu was thus driven to his present suit in the Civil Court. By an express provision of the Mamlatdar's Act, the decision of the Mamlatdar is not conclusive as to the point of actual possession in any subsequent suit. The decision of a Magistrate under the Code of Criminal Procedure, is conclusive as to the possession; but it is contended that a possession available to Lillu for perfecting his title under the decree must have been a peaceable possession, and that the dispute before the Magistrate in 1874 implies that his possession was not a peaceable one. As to this, the general principle is that a man who acquires possession is remitted, as it is said,—that is, he may rely for the support of his possession on any still subsisting title vested in him, and for which a legal remedy is still open to him (1): *Brassington* v. *Llewellyn* (2). Of two persons entering **[391]** simultaneously, the English law assigns possession to him that has the right, by a rule identical in substance with that of the Hindu law on the same subject] (3). Consistently with this, a person having a right to possession may enter peaceably, and may then maintain the possession thus acquired: *Taylor* v. *Cole* (4). This, as Lord Kenyon said, " will not break in upon any rule of law respecting the mode of obtaining the possession of lands" (5). If there is a breach of the peace in attempting to take possession, that affords a ground for a criminal prosecution, and, if the attempt is successful, for a summary suit also for a restoration to possession under s. 9 of the Specific Relief Act I of 1877—*Dadabhai Narsidas* v. *The Sub-Collector of Broach* (6); but an unlawful act in entering does not make the owner a trespasser *ab initio* (7); the law will still annex the right to the possession. In *Doe dem. Stephens* v. *Lord* (8) a mortgagee,

(1) Coke Lit. 349 *a*.
(2) 27 L.J. Ex. 297.
(3) Perkins Prof. Bk., 213. Narada I; 4; 12, 13.
(4) 1 S. L. C. (6th ed.) 115. So also *Brinsmead* v. *Harrison*, L.R. 7 C.P. 547. *Ex parte Drake*, L. R. W. N. for 1877, p. 119.
(5) See 3 T. R. at p. 295. (6) 7 B.H.C.R. A.C.J. 82.
(7) I Hilliard on Torts, p. 600. See 1 & 2 Vic., c. 74, s. 6. That a landlord entering by force is answerable for an injury to the tenant's property, see *Beddall* v. *Maitland*, L. R. W. N. for 1881, p. 43.
(8) 7 A. & E. 610.

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whose writ of possession was set aside as irregularly obtained, was ordered to restore the possession he had acquired under it. It was declared an abuse of the process of the Court that the mortgagee should have entered with an appearance of authority to which he was not really entitled (1). A similar principle is involved in the case of *Sayad Nazruddin* v. *Venkatesh Prabhu* (2). If, therefore, there was on Lillu's part an abuse of the process of the Court in obtaining the possession which he was found to have in 1874, he would not probably be allowed to benefit by that possession. But what occurred was merely this, that, having what was equivalent to a writ of possession, he was not put into possession by immediately ousting the tenant, but was told by the officer of the Court to enter after the crop was removed. If he did enter afterwards, his entry could not be deemed an unlawful one; he would be doing only what he had a right to do, and what the officer, if present, would have compelled his adversary to submit to. If he used violence, the person injured [392] should have prosecuted him; if he, notwithstanding the decree, took possession otherwise than "in due course of law," the person dispossessed should have sued him on this ground. *Prima facie*, his possession was justified; it fulfilled the decree of 1871, and, completing his right, gave him a new action if he was again dispossessed. Now the Magistrate in 1874 adjudged that Lillu was in possession, and gave, or secured, him possession even if he had it not before. There may have been a dispute down to that time; but then, at any rate, Lillu's possession could no longer be called unlawful. It was a lawful possession until Lillu should be "ousted in due course of law"; and a possession already decreed to him by the Civil Court. Any mere irregularity on the part of the Magistrate would not prevent the legal consequences, for he had authority to determine the question of possession, and his order has never been set aside. It was not like the case of an authority being invoked and exercised which did not legally subsist, and which, therefore, coerced the defendant by an unlawful compulsion; nor was it an order like that of the Mamlatdar, expressly deprived of effect for the purpose of any ulterior proceedings on the question of possession. A proviso to that effect is annexed to s. 534 of the Code of Criminal Procedure, but not to s. 530; and the Magistrate's inquiry is a judicial proceeding binding for its intended purpose, even though the reasons for the order should be weak and insufficient. There was, thus, nothing to prevent the possession acquired by Lillu from adhering to his right under the decree. The fact subsisted; and its results were not vitiated by any misconduct on his part. His supposed admission in 1876, that he had not acquired possession, turns out not to be well founded. He says, or seems to say, that he did not at once get possession under his decree; but he says also that he was told to go in and take possession, and that, in fact, he is in possession. There is thus nothing conclusive to set against the Magistrate's adjudication in his favour.

The rule must be discharged with costs.

(1) See 7 A. & E., pp. 613, 614.

(2) 5 B. 382.

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[393] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Birdwood.

NARAYAN, SON AND HEIR OF SADANAND RAMCHANDRA, DECEASED (*The Original Judgment-debtor*), *Appellant v.* CHINTAMAN AND MORESHVAR, SONS AND HEIRS OF BALAJI NARAYAN NATU, DECEASED (*The Original Judgment-creditor*), *Respondents.** [22nd February, 1881.]

Religious endowments—Alienation—Peldge—Hereditary turstee—Bombay Act II of 1863, s. 8, cl. 3—Common law of the country.

Religious endowments in this country, whether they are Hindu or Mahomedan, are not alienable; though the annual revenues of such endowments, as distinguished from the *corpus*, may occasionally, when it is necessary to do so in order to raise money for purposes essential to the temple or other institution endowed, but not further or otherwise, be pledged.

Bombay Act II of 1863, s. 8, cl. 3, contained no new law, but merely declared the pre-existing common law of this country.

Prosunno Kumari Dubija v. *Golabchand Baboo* (1) referred to and distinguished.

[**F.**, 37 C. 179=11 C.L.J. 317=14 C.W.N. 535=3 Ind.Cas. 353; 27 M. 465 (**F.B.**)=14 M.L.J. 81; **R.**, 6 B. 546 (552); 8 B. 432; 15 B. 625 (635); 20 B. 495 (501); 22 B. 475; 27 M. 435 (439)=14 M.L.J. 105; 34 M. 535=9 Ind. Cas. 281=20 M.L.J. 969=9 M.L.T. 83=(1911) 2 M.W.N. 154 (156); **D.**, 25 A. 296=23 A.W.N. 50.]

THIS was an appeal in an execution proceeding against the order of W. H. Newnham, the Governor's Agent for Sardars in the Deccan, dated the 2nd January, 1880.

The following are the material facts of the case:—On the 23rd October, 1851, Balaji Narayan Natu (deceased), father of the respondents, Chintaman and Moreshvar, obtained a decree, giving effect to a previous award, for Rs. 12,000 (being the amount due for principal and interest on various loans) against Sadanand Ramchandra Gosavi, father of the appellant, Narayan, in the Court of the Governor's Agent for Sardars in the Deccan. The decree further declared the said amount to be a charge upon two *inam* villages, Dehu and Kinhai, granted many years previously by the Satara Government for the support of a Hindu temple, of which Sadanand was, at the time of the transactions alluded to, hereditary trustee and manager. In so doing, the decree purported to give effect to various mortgages of the said villages which Sadanand had given to the said Balaji to secure the sums of money from time to time lent by him to the said [394] Sadanand. The decree further directed payment of the money by half-yearly instalments of Rs. 400 each, and allowed interest at 9 per cent. on any instalment due and not paid. It was executed from time to time against the revenues of the two *inam* villages, the last application for execution being made on the 23rd August, 1878. The amount which the respondents sought to recover by that application was Rs. 3,772-5-0, being the aggregate amount of interest accrued due in respect of instalments which had been allowed to get in arrear. The appellant, Narayan, objected—(1) that the application was time-barred,

* Miscellaneous Appeal No. 15 of 1880.

(1) 11 B.L.R. 332; 2 I.A. 145=14 B.L.R. 450 (P.C.)

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and (2) that the property, being *devasthan*, was not liable for the debts of Sadanand. He also disputed the correctness of the amount claimed by the respondents. The Agent granted execution for the whole amount claimed, holding that the decree was not barred, and that the property was liable. The following are his reasons regarding the second objection :—

"As to the second objection, it is based upon s. 8, cl. 3 of Bombay Act II of 1863, and the words relied on are, that lands held on behalf of religious or charitable institutions shall not be transferable by sale,—judicial, public, or private,—gift, decree or otherwise howsoever.

"But in the present case there is no question of any permanent transfer of the land or its revenue. The decree which was passed on the award merely provides for the payment of a certain debt by instalments from the revenue, and there is no question of sale. Moreover, the decree continued to be executed against the revenue for eleven years before the passing of the above Act, and for no less than sixteen years after it, without any objection being raised by the judgment-debtor on this point, and I do not think that he can fairly raise this objection after so long a time."

Narayan appealed to the High Court.

The remaining material facts of the case appear from the judgment of the High Court.

Manekshah Jehangirshah, for the appellant.—The property in dispute having been dedicated to the worship of a Hindu deity, Sadanand, as manager for the time being, had no right to mortgage **[395]** it. At all events, any mortgage by him could not bind the property in the hands of his successor. The learned pleader cited the following cases in support of his argument :—*Raja Varma Valia* v. *Kottayath Kiyaki* (1), *Konvar* v. *Ramchandra* (2), *Dubo Misser* v. *Shrinivas Misser* (3), *Goluck Chundar* v. *Raghunath* (4), *Prosunno Kumari Dubija* v. *Golobchand Baboo* (5), *Motisha* v. *Hiresha* (6).

M. C. Apte and *G. R. Kirloskar*, for the respondents.

JUDGMENT.

The following is the judgment of the Court delivered by—

WESTROPP, C.J.—The three *sanads*, respectively bearing dates equivalent to the Christian years 1703, 1725 and 1738, show, in terms as distinct as possible, that the villages Dehu and Kinhai were granted by the Satara Government for the support of the temple of the Hindu deities Vithoba and Rakhmadevi, and not for any mere family idol. The decree, which is the subject of the *darkhast* (application) upon which the learned Agent for Sardars made the order in execution now under appeal, is alleged by the respondents to be duly charged upon the revenues of those villages. It was a decree for Rs. 12,000 of the 23rd October, 1851, or rather an award of that date entered, according to the Civil Procedure of that time, as a decree of the Agent for Sardars. The award was made by Moro Trimbak Sahasrabudhe, as arbitrator between the late Balaji Narayan Natu, the father of the present respondents, and the late Sadananda Ramchandra Gosavi, the father of the present appellant. That appellant, who is the present hereditary trustee of the villages, and who has been so since his father's death, was not a party to the submission

(1) 7 M.H.C.R. 210 ; 1 M. 235=4 I.A. 76.
(2) 2 C. 341 ; 4 I.A. 52.
(3) 5 B.L.R. 617.
(4) 11 B.L.R. 337, note.
(5) 11 B.L.R. 332 ; 2 I.A. 145=14 B.L.R. 450 (P.C.)
(6) See Printed Judgments for 1877, p. 3.

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to arbitration or to the proceedings thereupon, or to the award, or the decree into which it was converted. The arbitrator, so far as we can perceive from his award, does not appear to have raised any issue as to the nature or purpose of the loans to the late Gosavi Sadanand Ramchandra, which were the subject of the arbitration; or to have considered whether, or called **[396]** for evidence to show that, those loans, or any of them, were made for the benefit of the temple or its service; or that there was any necessity to raise loans for the repair of the temple; or that the full revenues arising from the villages were not adequate for the due support of the temple and its services. So far, then, as the award and decree are concerned, this case does not coincide in its circumstances with *Prosunno Kumari Dubija* v. *Golabchand Baboo* (1), and the award and decree are not such as can bind the villages or their revenue in the hands of the present hereditary trustee.

Religious endowments in this country, whether they be Hindu (*devasthan*) (2), or (*sevasthan*)(3), or Mahomedan (*wakf*), are not alienable, though the annual revenues of such endowments, as distinguished from the corpus, may, for purposes essential to the temple or other institution endowed, be occasionally pledged: *ex. gr.*, "for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them" (4). Amongst the authorities as to the general rule against the alienability of religious or charitable endowments, and as to the exceptions to that rule, are those collected in 4 Bom. H. C. Rep., pp. 7, 8, A.C.J.; 1 Morley Dig., pp. 550, 553, 554; and Morley Dig., N.S., 351, 353, and *Mir Sadrudin Khan* v. *Kazi Mirun* (5); *Khusalchand* v. *Mahaddevgiri* (6); *Motisha* v. *Hiresha* (7); *Konwar* v. *Ramchandra* (8); *Raja Varma Valia* v. *Kottayath Kiyaki* (9); *Tayabunissa* v. *Kuwar* (10); *Dubo Misser* v. *Shriniwas Misser* (11); *Kalicharan* v. *Bangshi Mohandas* (12); *Goluck Chander* v. *Ragunath* (13); *Prosunno* **[397]** *Moyee* v. *Kocnjo Behari* (14); *Maharani Shibessawree Debea* v. *Mothooranath Acharjo* (15); *Mohunt Burm* v. *Kashee Jha* (16); *Syud Asheeroodin* v. *Sreemutty Drobo Moyee* (17); *Rumonee Debea* v. *Baluck Doss* (18); *Goluck Chander Bhose* v. *Rughoonath Sri Chandan Roy* (19); *Arruth* v. *Juggurnath* (20); *Fegredo* v. *Mahomed Mudessur* (21); *Juggut Mohini Dossee* v. *Mussamat Sokheemoney Dossee* (22). Under the award and decree the sum of Rs. 12,000 was payable in half-yearly instalments of Rs. 400, and, in the event of any instalment being in arrear, interest at 9 per cent. *per annum* was payable upon such instalment. It is admitted that the whole sum of Rs. 12,000 has been paid, and the present *darkhast* was presented to recover Rs. 3,772-5-0 in respect of accumulations of interest

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(1) 11 B.L.R. 332; 2 I.A. 145=14 B.L.R. 450 (P.C.).
(2) Etymol. "Deva"; *vide* Wilson's Gloss. 133; Elph. Rep. on the Dekkhan, Appx., p. xxv, ed. of 1872.
(3) Etymol. "Seva" worship, service. Wilson's Gloss. 475; Elph. Rep. on the Dekkhan, Appx., p. xxv, ed. of 1872, corruptly "suwasthan."
(4) *Per* Sir M. Smith for the P.C. in 2 I.A. 151.
(5) 2 Borr. 741 reprint of 1863. (6) 12 B.H.C.R. 214.
(7) Printed Judgments of 1877, p. 3. (8) 4 I.A. 52.
(9) 7 M.H.C.R. 210; affd. 4 I.A. 76. (10) 7 B.L.R. 621.
(11) 5 B.L.R. 617. (12) 6 B.L.R. 727. (13) 11 B.L.R. 337, note.
(14) W.R. Sup. Vol. for 1864, p. 157.
(15) 13 M.I.A. 270=13 W.R. 18. (16) 20 W.R. 471.
(17) 25 W.R. 557. (18) 14 W.R. 101. (19) 17 W.R. 444.
(20) 18 W.R. 439. (21) 15 W.R. 75. (22) 14 M.I.A. 289.

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which are said to have accrued due upon the instalments when in arrear. The Agent for Sardars has made an order allowing the levy of that interest from the revenue of the villages, against which order the present appeal has been preferred. It appears that the original transaction between Sadanand the plaintiffs' father, Balaji Natu, was a mortgage (dated the 27th June, 1833), by Sadanand to Balaji Natu, of the above mentioned two village for Rs. 10,000 at interest of 12 per cent. *per annum*. That mortgage contained a recital that the Rs. 10,000 were borrowed for the purpose of paying off two prior mortgages of these villages made to other persons. It may be that these prior mortgages were for purposes necessary for the temple. There is not any evidence that such was the fact; but we are, for the purposes of this application, willing to assume that such was the fact. There were thirteen other loans made between the years 1834 and 1841 by Balaji Natu to Sadanand, amounting in the whole to Rs. 4,227, of which sums all, except the last (which was for Rs. 35) were made (so far as Sadanand could make them) further charges on the two villages; but there is not any evidence whatever to show that those sums, or any one of them, were required for or applied to purposes necessary for or **[398]** beneficial to the temple. The point that the *sevasthan*—*i.e.*, the two villages and their revenue constituting the religious endowment of the temple—could not lawfully be taken in execution for the private debts of Sadanand, the late incumbent, as trustee and manager of the temple, was made before the Agent for Sardars; but it does not seem to have been very well argued before him, as that objection appears to have been based merely upon Bombay Act II of 1863, s. 8, cl. 3, which was not passed until many years after the latest of the loans by Balaji to Sadanand. The learned Agent for Sardars, moreover, appears to have thought that a mortgage or mortgages would not fall within the scope of the prohibition of alienation contained in that enactment, but in that opinion we cannot concur. However, unless that enactment were clearly made retrospective, it could not affect alienations made prior to it; so, if this case rested on that enactment alone, it would not invalidate the mortgage and further charges. But, in fact, that enactment contained no new law, and it was merely declaratory of the pre-existing common law of this country which (as established by the authorities already mentioned) does not ordinarily permit the alienation of religious or charitable endowments. And, in furtherance of that common law, Bombay Reg. XVII of 1827, s. 38, cl. 2 (since repealed) enacted that "all land held exempt from the payment of public revenue, if such exemption was granted in consideration of service to be performed, or for the support of religious or other establishments, or for other special purposes, shall be liable to be assessed, if the conditions of the grant are not fulfilled." That Regulation applied to the Deccan (Bom. Reg. XXIX of 1827, ss. 2 and 6) with certain exceptions not affecting the present question. In the plaintiff's memorandum of appeal, as at first framed, the objection as to the validity of Sadanand's alienations was not taken; but, with the permission of this Court, it was added afterwards. Hence, in order to prevent any surprise of the plaintiffs, we offered to their pleaders to direct an inquiry or issue as to whether or not the loans, granted by Balaji to Sadanand subsequently to the mortgage of 1833 for Rs. 10,000, were made for purposes essentially requisite for the temple. Those learned pleaders declined the offer, as they stated that they would be unable to produce evidence **[399]** in the Court below upon such an inquiry or issue to show that these loans had been granted for such purposes. From the kabulayat signed

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by the village officers (endorsed upon and of even date with the mortgage of 1833 for Rs. 10,000), and from the recitals in the award itself, it appears that Balaji Natu, immediately upon the execution of the mortgage, entered into the management (*vyvhat*) of the villages, and so remained in the receipt of their revenues at least until 1841, if not much later. Those revenues were stated by the pleader for the respondents, in reply to a question from this Court, to be mentioned in the evidence as amounting to about Rs. 3,700 *per annum*, so that, in the eight years extending from 1833 to 1841 alone, the plaintiffs' father, Balaji, might, at that rate, have received Rs. 29,600. It is admitted that, since the making of the decree, the plaintiffs or Balaji have received Rs. 12,000 upon it. It is, therefore, quite clear to us, that, even assuming that the mortgage of 1833 for Rs. 10,000 was for purposes essential for the temple, that amount and all interest in respect of it must have been, at the least, more than fully paid off long ago. And, under the circumstances already mentioned, the award and decree not being binding on the appellant in his capacity of hereditary trustee of the villages, and it being impossible for us to hold that the further alleged loans amounting to Rs. 4,227 constitute any valid incumbrance on the villages or their revenues, it is evident that we cannot permit the amount of interest sought by the present *darkhast* to be levied from the villages constituting the endowment of the temple or their revenues.

However, the decree of 1851 was binding on Sadanand in his individual capacity, as distinguished from his capacity as trustee of the temple; and his heir, the defendant, is liable in respect of any property of Sadanand which has come into his possession, other than the villages or other property held by him as trustee of the temple, to pay his debts: Colebrooke's Dig., Bk. I, cap. v, pl. clxvii, clxix, ccxxix; *Girdharlall* v. *Kantoolall* (1); and Mr. White's Act (Bombay Act VII of 1866).

For the reasons above given, we vary the order of the Agent for Sardars of the 2nd January, 1880, by directing that none of **[400]** the amount thereby awarded is to be levied from the villages, or either of them, above mentioned, or from the revenues thereof; but that the said amount may be levied from the other property (if any), whether ancestral or self-acquired, of the defendant's father Sadanand which may have come into the possession of the defendant. The parties must respectively bear their own costs of the application and of this appeal.

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5 B. 400 = 6 Ind. Jur. 650.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Birdwood.

NAGU (*Plaintiff*) *v.* YEKNATH (*Defendant*).* [22nd March, 1881.]

Written statement—Court fee—The Code of Civil Procedure, Act VIII of 1859, *s.* 120—*Act X of* 1877, *s.* 110—*Court Fees Act VII of* 1870, *s.* 19.

A written statement of his case, tendered by a party to a suit at any time before or at the first hearing of the suit, is not liable to any Court fee, and may be written on plain paper (s. 110 of Act X of 1877).

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* Civil Reference No. 8 of 1881.

(1) 1 I.A. 321; and see 11 B.H.C.R. at pp. 83, 84.

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A written statement called for by the Court after the first hearing, is also exempt from stamp duty (s. 19 of Act VII of 1870).

[F., 12 C.L.R. 367; 2 L.B.R. 186.]

UNDER s. 617 of the Code of Civil Procedure, Rao Saheb Vaman Bodas, Subordinate Judge of Yevla, submitted the following statement of a case for the orders of the High Court:—

"This action is instituted by the plaintiff to recover from the defendant Rs. 25 due on an account.

"Under s. 111 of Act X of 1877, which is applicable to Courts of Small Causes, the defendant tenders a written statement on plain paper in which he admits the plaintiff's claim, but wants to set off, against the plaintiff's demand, Rs. 12.

"Before entering into the merits of the defendant's claim for set off, the first point that arises is, whether the written statement, being on plain paper, can be admitted and filed in the case. Hitherto the practice in this Court, as well as in the other Courts in this district, has been to require Court fees on written statements as in the case of applications filed by a party to a suit. **[401]** In the Court Fees Act VII of 1870 there is no *express* provision charging such statements with any fees. In fact, the term 'written statement' is nowhere used in the Act except in s. 19, in which certain documents are mentioned for which no fee should be charged. Among these are 'written statements called for by the Court after the first hearing of a suit.' From this it can be argued that written statements other than those that are 'called for by the Court after the first hearing of a suit' require a fee. But the Court Fees Act, being a fiscal enactment, should be construed strictly and in favour of the subject. Therefore, what is not *expressly* provided for in it, cannot be supplied by implication. Perhaps it can be said that applications are sufficiently treated of in this Act, and the term 'application' is quite comprehensive enough to include a written statement. But I cannot think so; and I think that the Legislature also, at the time of passing this Act, held written statements to be quite distinct from applications.

"Before the Act VII of 1870 became law, there was not any enactment devoted solely to regulating and fixing the Court fees chargeable on all documents filed in the Civil Courts. In the case of some of the documents, provision for the fees or stamps was incorporated at appropriate places in the body of the enactments under which those documents were required, or left, at the option of the parties, to be filed in the Courts or used as evidence: *e.g.*, in s. 119 of Act VIII of 1859 it was enacted that an application to have an *ex-parte* decree set aside should 'be written upon stamp paper of the value prescribed for petition to the Court where a stamp is prescribed for petitions'; so also in s. 122 of the same Act, which treated of written statements, it was enacted that 'when such statements are called for by the Court, they shall be received on plain paper.' Many other similar instances could be pointed out.

"Act VII of 1870 repealed these provisions, and collected the whole law as to levying Court fees in one Act. Section 122 of Act VIII of 1859, was repealed and re-enacted in s. 19 of this Act. Section 120 of Act VIII of 1859 treated of written statements to be tendered by parties at the first hearing of a suit. **[402]** The same section further enacted that 'such statements shall be written on stamp paper prescribed for petitions to the Court where a stamp is required for petitions.' It is very important to observe that this latter provision was left unrepealed

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and untouched by the Court Fees Act when similar provisions in other parts of the same Act VIII of 1859 were repealed. It cannot be said that this was due to any oversight. On the contrary, it seems that, when passing the Court Fees Act, the Legislature thought that some fee should be chargeable on written statements tendered by parties at the first hearing of the suit, and, as this was not expressly provided for by that Act in any place, left the provision in s. 120 of Act VIII of 1859 unrepealed. This shows that there is nothing in the Court Fees Act which makes written statements chargeable with any fee, and also that, while Act VIII of 1859 was in force, such statements were chargeable with a fee under s. 120 of that Act.

"Act VIII of 1859 is wholly repealed by Act X of 1877. Chapter VIII of the latter Act treats of written statements. There is nothing in it, or in the whole Act, which enacts expressly, or by implication, that such statements are chargeable with any certain fee. I cannot help, therefore, coming to the conclusion that there is no law now in force under which such statements can be charged with any fee. But as I have reasonable doubt on this point, which I think is a very important one, and as the practice in the Courts in this district is to charge such statements with the fees prescribed for applications by the Court Fees Act, I beg to submit the following point for the decision of the High Court:—

"Whether written statements tendered by parties at the first hearing of the suit are chargeable with any Court fees?

"For the reasons given above, my opinion is, that such statements are not chargeable with any fee."

There was no appearance on either side.

JUDGMENT.

The judgment of the Court was delivered by

BIRDWOOD, J.—The Court Fees Act, 1870, contains no express provision for the levy of a fee on written statements tendered at the first hearing. It is true that written statements called for by the Court after the first hearing are specially exempted from a fee **[403]** by s. 19 of the Act. But it cannot, therefore, be inferred that statements tendered at the first hearing are chargeable with a fee. For the Legislature, by expressly providing in s. 120 of Act VIII of 1859 that such written statements should be written on the stamp paper prescribed for petitions, and by leaving such provision unrepealed and unaltered by Act VII of 1870, did not then leave the liability to stamp duty to mere implication. So long as Act VIII of 1859 was in force, a stamp was properly levied on written statements tendered at the first hearing, on the authority of s. 120 of the Act, and not on the authority of any provision of Act VII of 1870. But so much of Act VIII of 1859 as had not been previously repealed was expressly repealed by Act X of 1877, s. 3, and sch. I; and Act X of 1877, s. 110, is substituted for s. 120 of Act VIII of 1859, which s. 110 contains no provision for the levy of a Court fee. Written statements tendered under s. 110 may therefore be written on plain paper.

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APPELLATE CRIMINAL.

Before Mr. Justice Melvill and Mr. Justice Nanabai Haridas.

EMPRESS *v.* SHANKAR.* [2nd March, 1881.]

Rape—Attempt to commit rape—Indecent assault—Indian Penal Code, ss. 354, 375 *and* 511.

An indecent assault upon a woman does not amount to an attempt to commit rape, unless the Court is satisfied that there was a determination in the accused to gratify his passions at all events, and in spite of all resistance.

Reg. v. *Lloyd* (1) followed.

THIS was an appeal against a sentence passed by W. Wedderburn, Session Judge of Ahmednagar. The accused was tried on the charges of rape and an attempt to commit rape, and, being convicted of the latter, was sentenced to rigorous imprisonment for a term of three years. The prisoner appealed.

[404] *Inverarity* (with him *Shivshankar Govindram*), for the appellant, contended that the evidence could not be relied on as establishing more than an indecent assault. The object of the prisoner was no doubt to have sexual intercourse; but there was no evidence of such a determination to effect that object at all hazards as was held in *Reg.* v. *Lloyd* (1) to be necessary to support a conviction of an attempt to commit rape.

Hon. *V. N. Mandlik* (Govt. Pleader) for the Crown, supported the conviction.

JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—The only point on which we entertain any doubt in this case is whether the prisoner's conduct amounted to an attempt to commit rape. In *Reg.* v. *Lloyd* (1), Patterson, J., in summing up, said: "In order to find the prisoner guilty of an assault, with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part." We believe that in this country indecent assaults are often magnified into attempts at rape, and even more often into rape itself; and we think that a conviction of an attempt at rape ought not to be arrived at, unless the Court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events and in spite of all resistance. In the present case, having regard to the medical evidence, and to the varying statements made at different times by the complainant, we find it impossible to place entire reliance upon her statement; and, as to the extent of the violence to which she was subjected, there is no evidence except her own statement. The Sessions Court has not believed her allegation that penetration took place, and has consequently refused to convict the prisoner of rape. We feel a similar hesitation in coming to the conclusion, on the complainant's unsupported statement, that the prisoner's conduct amounted to an attempt to commit rape. He seems to have desisted before he was interrupted; and no evidence has been given to show that the complainant's person showed marks of violence, (while the **[405]** Civil

* Criminal Appeal, No. 2 of 1881.

(1) 7 Car. & Pay. 318.

Surgeon's evidence is to the contrary effect), nor that the clothes, either of the complainant or the prisoner, showed any stains which would indicate to what point the prisoner's criminality had proceeded. In saying this it is not necessary that we should impute dishonesty or intentional exaggeration to the complainant. The unsatisfactory nature of the evidence on this point may perhaps be attributed to ignorance, arising from youth or innocence; for she is stated never to have had sexual intercourse, and she may therefore, possibly, be unable to describe, with any intelligence or accuracy, the nature and extent of acts directed to that purpose.

For these reasons we find the prisoner Shankar Gyanu not guilty of attempt to commit rape, but guilty of using criminal force to a woman intending to outrage her modesty—an offence punishable under s. 354 of the Indian Penal Code: and as we consider the assault to have been one of an aggravated character, we sentence the said Shankar Gyanu to rigorous imprisonment for two years.

Order accordingly.

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5 B. 405=6 Ind. Jur. 37.

APPELLATE CRIMINAL.

Before Mr. Justice Pinhey and Mr. Justice Nanabhai Haridas.

THE GOVERNMENT OF BOMBAY *v.* SHIDAPA.* [13th April, 1881.]

The Code of Criminal Procedure, s. 147—Dismissal of compiaint—Revival of complaint.

A person made a complaint to the police that the accused had enticed away his wife (a non-cognizable offence), and committed theft (a cognizable offence). The police inquired into the latter offence only; and finding no *prima facie* case made out, reported to that effect to a Magistrate, who directed that that offence be expunged from the list of reported offences.

Held that under the circumstances, there had been no dismissal of the complaint in respect of the former offence; and that there was no bar to the complaint into that offence being taken up and proceeded with.

THIS was an appeal by the Government of Bombay against the order of C. F. H. Shaw, Sessions Judge of Belgaum, reversing the conviction and sentence of one year's rigorous imprisonment **[406]** recorded by R. B. Balkrishna Devrav, Magistrate (First Class) against the accused, charged with enticing away a married woman, under s. 498 of the Indian Penal Code.

The facts of the case fully appear from the judgment of the Court.

Hon. *V. N. Mandlik* (Govt. Pleader), for the Government.

Pandurang Balibhadra, for the accused.

JUDGMENT.

PINHEY, J.—This is an appeal by Government from an order of the Court of Sessions at Belgaum reversing, on appeal, a conviction and sentence recorded by Mr. Balkrishna Devrav, First Class Magistrate in the Belgaum District, against Shidapa Basapa.

Shidapa Basapa was convicted by the First Class Magistrate, under s. 498 of the Indian Penal Code, of enticing away with criminal intent a married woman, an offence triable by a Magistrate of the First or Second Class. The Court of Session reversed the conviction, on the

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* Criminal Appeal, No. 18 of 1881.

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5 B. 405 = 6 Ind. Jur. 37.

ground that the First Class Magistrate had no jurisdiction to try the case, as the complaint against the accused had been already dismissed by a Second Class Magistrate under s. 147 of the Criminal Procedure Code and the First Class Magistrate was not authorized to re-hear the complaint, and try the case, under s. 298 of the Code of Criminal Procedure.

We are of opinion that the Court of Session was in error in disposing of the appeal of Shidapa Basapa, and reversing the conviction and sentence recorded against him by the First Class Magistrate, for the following reasons.

We are of opinion that the complaint, against the accused, of an offence punishable under s. 498 of the Indian Penal Code, was never dismissed by the Second Class Magistrate under s. 147 of the Criminal Procedure Code. Under that section, a Magistrate, before whom a complaint is duly made, may, if, after examining the complainant, there is in his judgment no sufficient ground for proceeding, dismiss the complaint. No complaint of an offence under s. 498 of the Indian Penal Code was ever duly made before the Second Class Magistrate, nor was any **[407]** examination of the complainant in respect of such an offence held by the Second Class Magistrate. There could, therefore, have been no dismissal of the complaint by the Second Class Magistrate.

What happened before the case came before the First Class Magistrate was this: the complainant made a complaint to the Superintendent of Police, alleging that accused had enticed away the complainant's wife, and taken away some ornaments. The enticing away the woman was a 'non-cognizable' offence; but the alleged stealing the ornaments, was one of which the Superintendent of Police could take cognizance. The Superintendent of Police sent the complaint to a subordinate policeman (a chief constable) for inquiry. The chief constable scarcely noticed the allegation as to the enticing away of the woman, but inquired into the alleged offence of theft under s. 379 of the Indian Penal Code, and considering that no such offence was even *prima facie* made out, he so reported to the Third Class Magistrate at Chikodi, under s. 117 of the Code of Criminal Procedure. The report came before the Second Class Magistrate at Chikodi, who, concurring with the chief constable, directed him to strike off the offence complained of from the list of reported offences. It is clear that the chief constable could not legally, and did not, inquire into the alleged enticing away of the complainant's wife, mentioned in the petition. The chief constable could not, under s. 110 of the Code of Criminal Procedure, have investigated such an offence without an order from the Second Class Magistrate. There was then, for the reasons above given, no dismissal, under s. 147 of the Code of Criminal Procedure, of the complaint of an offence punishable under s. 498 of the Indian Penal Code to bar the proceedings taken by the First Class Magistrate, which resulted in the conviction of the accused Shidapa Basapa. In the judgment of the Court of Session the case of *Imperatrix* v. *Gowdapa bin Venkangavda* (1) is cited as governing the present case, but it does not do so. In that case it was held that, "when an accused person has been discharged by a Subordinate Magistrate under s. 215 of the Code of Criminal Procedure, and the Magistrate of the district, after calling for the proceedings, considers that the order of discharge was improper, the proper course for the **[408]** Magistrate of the district to adopt is to refer the proceedings for the

(1) 2 B. 534.

orders of the High Court, and not to order a new trial by another subordinate Magistrate." Whereas, in the present case, the evidence of the complainant and his witnesses was not taken, and the accused was not examined by the Second Class Magistrate, and, therefore, the accused could not have been discharged under s. 215.

The order made by the Court of Session on appeal in this case must be reversed, and the appeal remitted to the Court of Session for disposal on its merits.

We notice that in the judgment of the First Class Magistrate he appears to consider that the facts proved would maintain a charge of adultery, an offence cognizable by the Court of Session only.

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5 B. 408 (P.C.) = 8 I.A. 77 = 5 Ind. Jur. 380 = 4 Sar. P.C.J. 230.

PRIVY COUNCIL.

PRESENT:

Sir B. Peacock, Sir M. E. Smith, Sir R. P. Collier, Sir R. Couch and Sir A. Hobhouse.

[*On appeal from the High Court of Bombay.*]

MAHARAVAL MOHANSINGHJI JEYSINGHJI (*Plaintiff*) *v.* THE GOVERNMENT OF BOMBAY (*Defendant*). [8th March, 1881.]

Toda-giras hak—The Pensions' Act XXIII of 1871.

In part of Western India annual payments, known as *toda-giras hak*. made by village communities and commuted by them into liabilities to *girasias*, have been recognized as a species of property, however unlawful their origin.

In 1862 a resolution of the Government of Bombay described the position of the *girasias* at that time, and gave them the option of resuming the collection *of* the *toda-giras hak* formerly levied, resorting only to legal proceedings to enforce their claims, or of receiving, from the Government, allowances of an equivalent amount ; the collections, in the latter case, being discontinued on all hands. The ancestors of the adoptive father of the plaintiff formerly levied *toda-giras hak* ; and after 1862 the Government in respect thereof made payments under the resolution, to three brothers, of whom one was the plaintiff's father ; the latter receiving a one-third share; which, on his death in 1865, was no longer paid.

Held that a suit against the Government for payment of this third share with arrears fell under the Pensions' Act XXIII of 1871, s. 4, which prohibits cognizance, save as in the Act provided, " of any suit relating to any pension or grant of money or land revenue conferred or made by the British, or any former government, whatever may have been the consideration **[409]** for such pension or grant, or whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted."

Held that there was no reason, either in the language of the Act itself or in any antecedent legislation, for construing these words as applicable only to rights in the nature of pensions.

[R., 17 A. 1 = 4 M.L.J. 272 = 21 I.A. 148 = 6 Sar. P.C.J. 489 ; 4 B. 432 ; 16 B. 537 ; 22 B. 496 (499) ; 29 B. 480 = 7 Bom. L.R. 497 ; 4 M. 341 (343) ; 31 M. 12 = 17 M. L.J. 549 = 3 M.L.T. 104.]

APPEAL from a decree of the High Court of Bombay (10th October, 1877), affirming that of the District Judge of Surat (1st December, 1876).

The question raised on this appeal was whether the Civil Courts were prohibited by the Pensions' Act, 1871 from taking cognizance of the suit, without having first received from the Collector of the district the certificate required for the institution of claims falling under that Act.

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The Courts below decided that they were so prohibited, and that they, consequently, had no jurisdiction.

The ancestors of the plaintiff's adoptive father, Maharaval Jeysinghji, deceased, levied *toda-giras hak* from certain villages in the Broach Collectorate of the Surat District. After 1862, in accordance with a resolution, dated 27th November of that year, relating to *toda-giras hak*, the Bombay Government made payments to three brothers, of whom Maharaval Jeysinghji was one in consideration of their relinquishment of the collection of this *giras*. Maharaval Jeysinghji, after adopting the plaintiff, died in 1865, since which time the Government had ceased to pay his share. This suit was brought by the plaintiff, as his adopted son entitled to inherit it, for a declaration of his right, and to recover the arrears.

The following is the judgment of the High Court (Chief Justice Sir M. R. WESTROPP and Mr. Justice M. MELVILL) in which are set forth the paragraph of the Resolution of the Government of Bombay, dated 27th November, 1862, relating to *giras*:—

"The District Judge of Surat having held that by the Pensions Act (XXIII of 1871) he was deprived of jurisdiction to entertain this suit against Government for *toda-giras*, the plaintiff, Mohansinghji, has appealed to this Court.

"The plaint states as follows:—'In the villages of Pargana Ankleswar, in the Collectorate of Broach, in the Surat District, [410] there are lands belonging to the *vantas* of my ancestors (meaning *vanta*-lands which belong to my ancestors). Likewise there has continued (to us) from ancient times the yearly cash *hak* (right) of *toda-giras* as (our) private property. The same having descended as an inheritance from the original owner of the family, came down to be shared by lines (families) of three sons. These (*i.e.*, the members) of each of the (said three) lines used to collect (levy) separately (the) *toda-giras* of their respective shares from the villages (mentioned above). Sometime after the introduction of the English Government, the Government made an arrangement (*bandobast*) to pay (moneys) from the Government treasury in lieu of the *toda-giras haks* which the *girasias* used to collect (levy) directly from the village.' The plaint then proceeded to state that up to its date the payments of *toda-giras* continued to be regularly made by Government to two out of the three branches of the family of the original proprietor, but that the last payment made to the third branch was made to its representative, Jeysinghji, who died on the 5th December, 1865, having first adopted the plaintiff as his son and heir. The plaintiff alleged that the *vanta*-lands and other property of Jeysinghji had come into his (the plaintiff's) possession, but the Collector of Broach stopped the payment of Jeysinghji's share of the *toda-giras* ever since his death; and that, on the 16th of July, 1873, Government, by a resolution of that date, refused to recognize the plaintiff as adopted son of Jeysinghji, and, as Jeysinghji had not left a widow, resumed his share of the *toda-giras*. The plaintiff next alleged in the plaint that, assuming that he was not the adopted son of Jeysinghji, he nevertheless was now his heir, inasmuch as his natural father, Chandersinghji, was the next heir, as cousin of Jeysinghji, whom he survived until Samvat 1929 (A.D. 1873-74), when he died, leaving the plaintiff, who, if not then adopted son, and, as such, heir of Jeysinghji, was his heir as son of Chandersinghji. The plaint claimed for the plaintiff (as Jeysinghji's share of the *toda-giras hak*) Rs. 2,694 *per annum* thenceforward, and ten years' arrears thereof with interest. He alleged

the cause of action to have accrued on the 16th of July, 1873, the date of the Government resolution resuming the *toda-giras*. The plaint was presented on the 27th February, 1876,—*i.e.*, about eleven years **[411]** after the last payment made to Jeysinghji,—and there is nothing to show that since the death of Jeysinghji, in 1865, either Chandersinghji or the plaintiff took any legal proceedings to recover the *toda-giras* from Government until the filing of the present plaint.

"The written statement filed in defence pleaded—first, that Act XXIII of 1871 prevented the Civil Court from having jurisdiction to hear the suit. Secondly, that this *toda-giras hak*, having originated in wrong and violence, a suit for it would not lie.

"It will be observed that the plaint does not aver that Government undertook to collect *toda-giras*, or had collected it, but simply asserted that, after the introduction of the English Government, that Government made an arrangement (*bandobast*)—*i.e.*, an agreement,—to pay moneys from the Government treasury in lieu of the *toda-giras haks* which the *girasias* used to levy directly from the villages. This statement of the nature of the claim against and liability of Government appears to coincide exactly with the language of Her Majesty's Privy Council in *Maharana Fatesangji* v. *Desai Kallianraiji* (1), where it is said that the *toda-giras* annual payments 'were recognized by the British Government, which took upon itself the payment of such of them as were previously payable by villages paying revenue, and left the liability to pay such of them as were payable by *inam* villages to fall on the *inamdar*.' Similarly, in *The Collector of Surat* v. *The Heiresses of Kuverbai* (2) Forbes, J., said: 'By an arrangement with the *girasias*, the Government has agreed to satisfy their claims from the public treasury, on the condition of their abstaining from making a direct levy on the villagers. If, then, this description of the nature of the liability of Government given by Her Majesty's Privy Council and Mr. Justice Forbes, and put forth by the plaintiff himself in his plaint, be correct, it would seem to us to fall within the prohibition, contained in s. 4 of the Pensions' Act (XXIII of 1871), to Civil Courts to entertain any suit relating to any grant of money made by the British Government, whatever may have been the consideration for such grant, and whatever may have been the nature **[412]** of the payment, claim, or right for which such grant may have been substituted—enlarged as the term 'grant of money' is by the third section, which brings within the scope of that term 'anything payable on the part of Government in respect of any right,' &c. That word 'right,' although it well may be limited to claims *ejusdem generis* with the objects of the Act, would appear to us to include a *hak* or periodical payment by Government in respect of such an arrangement as that alleged by the plaint to have been substituted for the levy, by *girasias*, on their own account, of black mail from villagers. This was the view taken in *Parbhudas Rayaji* v. *Motiram Kaliandas* (3), and, as we think, correctly taken, and we are of opinion that the same view holds good here if the plaintiff's claim has been rightly set forth in his plaint. As there set forth, what he seeks, as of right, is an annual payment from the Government treasury, which annual payment he substantially treats as the purchase-money or consideration for the abstinence, by his ancestors, himself, and his successors, from the levy of *toda-giras* in the villages of Anklesvar.

(1) 1 I. A. 34 (47) = 10 B. H. C. R. 281.
(2) 2 B. H. C. R. 239 (242).
(3) 1 B. 203.

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There is between the present case and that of *Vasudev Sadasiv Modak* v. *The Collector of Ratnagiri* (1) this distinction. that the inception of the *deshmukh's* right to his percentage on the revenue collected by him was legal, whereas *toda-giras*, having generally been black mail, can scarcely, whatsoever it may have since become, be regarded as of lawful origin; but Her Majesty's Privy Council, having first given their opinion in the Ratnagiri case upon the *deshmukh's* claim, as it stood in its inception, and upon the *sanad*, proceeded, in the latter part of the judgment, to view that case independently of the origin of the claim and of the *sanad*, and stated their opinion to be that the plaintiff Modak had put forward his claim in such a manner as to show that what was payable to him by the British Government was so 'in respect of a right, privilege, perquisite, or office within the meaning of s. 3 of the Pensions' Act, and to negative a statement in his plaint to the effect that, since 1842, the British Government has received the *deshmukh's* allowances, as something distinct from revenue, from the rayats on his behalf and as his agent under circumstances which would make them liable to him as for money **[413]** had and received,' and accordingly their Lordships affirmed the decision of the High Court, which held the case to fall within the third section of the Pensions' Act and, therefore, not within the jurisdiction of a Civil Court. In the present case the plaintiff has put his case so as to bring it within that enactment, and has not incumbered his plaint with any allegation as to the agency of Government.

"The learned counsel for the plaintiff, however, endeavouring to take this case out of the scope of the term 'a grant of money,' as defined or described in the Pensions' Act, contended, at the hearing of the appeal before us, that Government merely filled the position of agent to collect *toda-giras* from the villagers on behalf of the plaintiff, and assumed that position for the purpose of recovering that black mail, or whatsoever else it may be, in an orderly and peaceable manner, and preventing the riotous and violent mode of levy by the *girasias* themselves which had preceded the intervention of Government. Assuming that argument to be historically true, it presents a case quite different from that stated in the plaint, which contains no allegation of agency on the part of Government. The plaint neither avers that Government ever promised to collect *toda-giras* on behalf of the plaintiff, or asserted that it would collect it on its own behalf; nor does it aver that Government had hitherto collected *toda-giras* from the villagers, or that any moneys of that nature have since the death of Jeysinghji in 1865, as heir to whom the plaintiff claims, been received by Government from the villagers on behalf of and to the use of the plaintiff. It was not very clear, in the argument on behalf of the plaintiff, whether the agency contended for was a perpetual agency, or an agency determinable at the pleasure of either party, or of Government alone on reasonable notice. But whichever species of agency it be, if agency at all, it is manifest that, if the plaintiff seriously intended to rely upon such a case, it was incumbent on him to have amended—in fact reframed—his plaint. An application for liberty so to do ought to have been made to the District Judge. The plaintiff had, from the written statement in defence filed by the Collector on behalf of Government, timely notice that, at the hearing before the District Judge, the Pensions' Act would be relied on **[414]** as a bar to the maintenance of this suit in a Civil Court; so there cannot

(1) 4 I. A. 119.

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have been any surprise in the matter. It does not appear that, even when the District Judge announced his opinion that the case comes within the prohibition contained in the Pensions' Act, the plaintiff made any application for leave to amend. Even here, on appeal, the amendment of the plaint was rather suggested than formally applied for. Looking, however, at what was said as intended to amount to an application, we could not perceive any good ground for allowing an indulgence of that nature to the plaintiff at so advanced a stage of the litigation. Ten years have elapsed since the death of Jeysinghji, who, of his branch of the family, was the last recipient of the Government commutation for *toda giras*. If the plaintiff's claim be regarded as a *hak* or other immoveable property, it may not be barred by the law of limitation (see Act IX of 1871, sch. II, arts. 131, 132, 145; and L.R., 1 Ind. App., 34; S. C., 10 Bom. H. C. Rep., 281). But, if it be a *hak*, it would seem to come within the Pensions' Act. If the true nature of the claim be a contract for a perpetual agency, and we were asked to permit the plaint to be converted into a suit for a specific performance of such a contract, we not only doubt that a suit for its specific performance would lie—Fry on Specific Performance, pp. 22, 245; *Fitzpatrick* v. *Nolan* (1)—but we doubt that any such contract could be proved. So far as we can perceive, it has not been alleged, in any of the *toda giras* cases hitherto decided, that Government was bound perpetually to act as agent for collection of *toda giras*. In *The Collector of Surat* v. *Pestanji Ratanji* (2) where the history of *toda giras* was examined very fully by Mr. W. E. Frere, then Zilla Judge of Surat, who had considerable experience in Gujarat, he seems to have thought that Government could only be liable when it had collected the *giras*; and the case of *SambhulalGirdharlal* v. *The Collector of Surat*(3) does not seem to go beyond that. Lord Kingsdown said (p. 40): 'The question here is not whether the Government can be compelled to receive and hand over these sums, but whether, actually receiving them, and having been in the receipt of them for [416] very many years, it is entitled to say that it will not pay them to the alienee of the person to whom, but for the alienation, they would have been paid.' Agencies alleged to be undeterminable have been discountenanced by the Court: *Rhodes* v. *Forward*(4); *Kavasji Nanabhai* v. *Lalbhai Vallabhai* (5); *Shaw* v. *Lawles* (6). To a suit for specific performance the period of limitation would be three years from the denial of the right; Act IX of 1871, sch. II, art. 113, Again, if the suit be converted into an action for the recovery of damages for misconduct as an agent in ceasing to make the collection of *toda giras*, the period of limitation would be three years from the time when the neglect or misconduct occurs (Act IX of 1871, sch. II, art. 91). Lastly, if the suit were transformed into an action for money had and received to the use of the plaintiff, it is manifest from an exhibit put in evidence by the Advocate-General on behalf of the Government, with the consent of counsel for the plaintiff, that such an action must fail, inasmuch as Government has, since the introduction of the survey into Gujarat, declined to collect *toda giras* from the villages.

"In *Sambhulal Girdharlal's* (3) case it was established, to the satisfaction of Her Majesty's Privy Council, that the *toda giras* had been collected by, and was in the hands of, Government. In *Umedsangji* v. *The*

(1) 1 Ir. Chan. Rep. 671.
(2) 2 Morris's S.D.A. Rep, 291.
(3) 8 M.I.A. 1.
(4) 1 Ap. Ca. 256.
(5) 3 I.A. 200.
(6) 5 Cl. & F. 129.

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Collector of Surat (1) the High Court limited its decree against the Collector to the *toda giras* admitted to have been collected by Government, *i.e.*, up to 1862, the date of the survey; and Couch, C.J., said: 'We cannot declare the plaintiff to be entitled in perpetuity, because, if Government were to cease to collect the *giras*, it might be that his remedy would not lie against the Government but against the villagers.' We have not any doubt that, in the case before us, the plaint was filed in its present form without any averment that Government had collected the *toda giras* sued for, because it is notorious that Government had long since ceased to collect *toda giras* in Gujarat; and that, although payments are made out of the Government treasury to many of the ancient recipients of *toda giras*, there **[416]** is not, since the new revenue survey, any assessment in respect of *toda giras* in Government villages made upon the villagers or their lands, and, accordingly, no collection made by Government in that respect. The exhibit to which we have referred, as put in by consent, contains extracts (paragraphs 17 to 19 inclusive) from a resolution, No. 4309, dated 27th November, 1862, of the Government of Bombay, and is as follows:—

"'17. Government did not initiate these payments, but found them, on obtaining possession of the country, generated by the disorder of the previous rule. The holders were treated with unexampled indulgence, but the peace of the country called for the policy then adopted, and faith should now be kept with their descendants, although they are no longer dangerous to the State. This the Governor in Council is prepared in the strictest sense to do; but he cannot allow that a tax, at first so irregularly imposed on the community, should now be extorted by the aid of legal proceedings from the public purse by others than those in whose favour the original arrangements were made, or that Government should be compelled to continue its good offices between the *girasias* and the village communities in a manner to which it never pledged itself. It should therefore, be publicly declared in every taluka, as the revenue survey settlement is introduced, that the new rules of assessment do not include any such collections, and that Government will, in future, not aid or take part in the collection of *giras*.

"'18. In thus placing the *girasias* in the same position with respect to the village communities which they originally held, the Governor in Council cannot allow them to resort to other than legal means to enforce their claims, and if any village communities decline to accede to the *girasia's* demands, the latter must resort to the Civil Courts. At the same time the Governor in Council is not unwilling to make some sacrifice of revenue in order to relieve the *girasias* from the necessity of resorting to law, and he is prepared, whenever the *girasia* may be willing to receive from Government his present income instead of collecting it direct from the villages, to continue that income to him under such reasonable rules and restrictions as may seem fit to Government to impose.

[417] "'19. The conditions on which the arrangement will be entered into, are that the *girasia* shall consent to abandon for the future his claims against the village communities, and in return the allowances he has hitherto enjoyed shall be continued by the State hereditarily (during good behaviour) to the male issue of the first person who received the *giras* from the British treasury. The *giras*, or any portion of it, may further be continued to the lineal male issue of a brother of the first

(2) 7 B.H.C.R.A.C.J. 50.

British recipient in any case in which, on inquiry, the Revenue Commissioner may find that hardship would be felt by the discontinuance of the *giras*. If in any case, however, the allowance has been enjoyed on condition of service, that condition will not be abandoned, although it is not expected that such service can now be taken with advantage to the public.'

"For the reasons which we have above assigned, we think it is doubtful whether we should confer any benefit upon the plaintiff by granting to him permission to amend his plaint. Whether, however, those reasons deserve much weight or not, we are of opinion that we ought not to grant to him any such permission, he not having made any application for leave to amend in the Court of first instance, although he had timely warning, before the hearing of the cause there, that the Indian Pensions' Act would be pleaded as excluding the jurisdiction of that Court.

" We affirm the decree, and direct the parties respectively to bear their own costs of this appeal."

Leith, Q.C., and *R. V. Doyne*, for the appellant.

Scoble, Q.C., and *J. D. Mayne*, for the respondent.

The argument for the appellant was: that this suit was one to enforce a contract made by the Government which had agreed to pay to the predecessors in estate of the appellant, an equivalent for the *toda giras* formerly levied. This contract was founded on the consideration of the *girasias* ceasing to levy *giras*. On this contract the suit was based, and was, therefore, not a suit relating to " any pension or grant of money or land revenue " within the meaning of the Pensions' Act XXIII of 1871 The construction of that Act, which was in restraint of the right conferred by the regulations, of resort to the Civil Courts for redress **[418]** in claims against the Government, should be strict. According to its true construction, the Act should be limited to suits *ejusdem generis* with " grants and pensions " taken in the sense indicated by the context.

Reference was made to *Maharana Fatesangji Jasvatsingji* v. *Desai Kallianraiji Hekoomutraiji*(1), *Parbhudas Rayaji* v. *Motiram Kaliandas*(2), *Vasudev Sadasiv Modak* v. *The Collector of Ratnagiri* (3), *Shahzadee Hazara Begum* v. *The Collector of Burdwan*(4).

Counsel for the respondent were not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR M. E. SMITH.—This is a suit brought by the appellant in the District Court of Surat, claiming, as the adopted son of Maharaval Jeysinghji Bhagvansinghji, to recover from the Government of Bombay certain payments in respect of a *toda-giras hak* formerly levied by his ancestors upon certain villages in the Surat District. It appears that the Government has for many years made payments on account of this *toda-giras hak* (divided into three parts) to three different branches of the appellant's family; his adoptive father, through whom he claims, being paid one-third. The father died in 1865, and upon his death the Government either refused to recognize the plaintiff as the adopted son, or considered that, as an adopted son, he was not entitled to receive the payments, and discontinued them. The action is brought, in consequence

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(1) 1 I.A. 34=10 B.H.C.R. 281.
(2) 1 B. 203.
(3) 4 I.A. 119.
(4) 23 W.R. 378.

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of that discontinuance, to recover the arrears from the time of the father's death.

The Government denied the right of the appellant to bring this suit in the Civil Courts, relying upon the Pensions' Act of 1871. The Courts below, both the District Judge of Surat and the High Court on appeal, have held that the Government is entitled to rely upon that Act, and that the Civil Courts can take no cognizance of the suit.

It is unnecessary to enquire at any length into the origin of these *toda-giras hak*. It would appear that they had their origin [419] in arbitrary exactions made by strong and powerful persons, who obtained the name of *girasias*, upon the village communities; that those arbitrary exactions were in some way commuted into fixed payments by the villagers, in consideration of which the *girasias* gave up their claim to make arbitrary exactions, and also undertook to defend the villagers against the exaction of others. The nature of these *haks* has been defined in two cases by this Board, the latter of which only it will be necessary to refer to. In the case of *Maharana Fatesangji Jasvatsingji* v. *Desai Kallianraiji Hekoomutraiji* (1) there is this description of them :—The determination of this question "involves the consideration of the nature of a *toda-giras hak*. A good deal of learning on this subject is to be found in the case of *The Collector of Surat* v. *Pestanji Ratanji* (2), and in the case of *Sambhulal Girdharlal* v. *The Collector of Surat* (3), to which their Lordships have been referred. They do not think it necessary to go at any length into this. It is sufficient to state that these annual payments, although originally exacted by the *girasias* from the village communities in certain territories in the west of India by violence and wrong in the nature of black mail, had, when those territories fell under British rule, acquired by long usage a quasi legal character as customary annual payments; that, as such, they were recognized by the British Government, which took upon itself the payment of such of them as were previously payable by villages paying revenue, and left the liability to pay such of them as were payable by *inam* villages to fall on the *inamdar*. And since the decision of the before-mentioned case in the 8th volume of Moore, p. 1, it cannot be questioned that the *toda-giras haks* of the former class constitute a recognized species of property capable of alienation, and of seizure and sale under an execution." It must, therefore, be taken, after the two decisions of this Board, that these *haks* have been recognized as a species of property, however unlawful their origin may have been. The plaintiff bases his claim upon that view of the *hak*. The plaint states that his ancestors had certain lands, and "likewise there has continued to us from ancient times the yearly cash *hak* (right) [420] to *toda-giras* as our private property." Then it goes on: "Some time after the introduction of the English Government the Government made an arrangement (*bandobast*) to pay from the Government treasury in lieu of the *toda-giras haks* which the *girasias* used to collect or levy directly from the village." It seems that there was a resolution of the Government of Bombay in 1862, which described the position of the *girasias* at that time, and gave them the option of resuming the collection of the former *haks* from the villages, or of receiving from the Government allowances of an equivalent amount, the Government in that case discontinuing the further receipt of the *haks*. The resolution says: "It should, therefore, be publicly declared in every taluka, as the revenue survey settlement is

(1) 1 I.A. 34 (46). (2) 2 Morris's S.D.A. Rep. 291. (3) 8 M.I.A. 1.

introduced, that the new rates of assessment do not include any such collections, and that the Government will, in future, not aid or take part in the collection of *giras*. In thus placing the *girasias* in the same position with respect to the village communities which they originally held, the Governor in Council cannot allow them to resort to other than legal means to enforce their claims, and if any village communities decline to accede to the *girasias'* demands, the latter must resort to the Civil Courts. At the same time the Governor in Council is not unwilling to make some sacrifice of revenue in order to relieve the *girasias* from resorting to law; and he is prepared whenever the *girasias* may be willing to receive from Government his present income, instead of collecting it direct from the villagers, to continue that income to him, under such reasonable rules and restrictions as it may seem fit to Government to impose." Then: "The conditions on which this arrangement will be entered into, are that the *girasia* shall consent to abandon for the future his claims against the village communities; and in return the allowances he has hitherto enjoyed shall be continued by the State hereditarily (during good behaviour) to the male issue of the first person who receives the *giras* from the British treasury." The arrangement with the plaintiff's ancestors, stated in the plaint, is of the kind described in this resolution, though it appears to have been made before 1862. Payments of money in lieu of the *hak* were made before that year, and were continued by the Government down to the **[421]** death of the plaintiff's father, with regard to the three shares, and since that time the Government has apparently continued to pay the two other sharers, though they have discontinued the payment to the plaintiff.

The nature of *toda-giras hak* having been adverted to, their Lordships have now to refer to the Statute upon which the question, and the only question, in the appeal turns. The 4th section is this:—"Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may be the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted." It has been shown that this *hak*, whatever it originally was, had acquired the character of a right, and the plaint bases the claim of the plaintiff upon its being a right. That being so, it appears to their Lordships that the present suit is one of those which fall directly and plainly within the language of this clause. It is a suit relating to a grant of money conferred by the British Government; and the Civil Courts are prohibited from entertaining any suit relating to such a grant, whatever may have been the consideration for it, and whatever may have been the nature of the payment, claim, or right for which such grant may have been substituted. There is in this case a grant of money by the Government, and a right for which it was substituted. It, therefore, falls within the language of the fourth clause. The right of the *girasias* was of a peculiar and precarious kind; and allowances in respect of rights of this nature are clearly contemplated by the Act, and intended to be included in it. If there were any doubt, the previous clause, the third, which is explanatory of the expression "grant of money or land revenue," may be looked at. It is as follows:—"In this Act the expression 'grant of money or land revenue' includes anything payable on the part of the Government in respect of any right, privilege, perquisite, or office." Even if the arrangement made by the Government was not strictly a grant, the

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suit relates to money payable by the Government in respect of a right. It was argued that the construction should be limited to rights *ejusdem generis* [422] with pension. But there is no sufficient ground for so limiting the language; and it is to be observed that the words of the Pensions' Act of 1871, which include this case, are not found in the former regulations relating to pensions. There is no reason, therefore, either in the language of the Act itself, or in the antecedent legislation, for construing these words as applicable only to rights of the nature of pensions.

It was contended, further, that this case is founded upon a contract, and it was said that, if it is embraced by the Act, all contracts for the payment of money must be held to be included in it. But that is not so. The Act applies to grants of money in respect of, or in substitution for, some right, privilege, perquisite, or office. Undoubtedly, in some sense, it may be said that the arrangements made between the Government and the *girasias* were in the nature of contract; but that contract, if it were one, resulted in the abandonment, on the part of the *girasias*, of their claim to make collections from the villagers, and in the allowance of money by the Government in lieu of them. It is that allowance which falls within the operation of the Statute.

It was contended in the Courts below, and appears to have been the principal contention there, that the Government were in the position of agents for the appellant to receive the collections, and were, therefore, bound to pay over to him the amount of the former *hak*. But this argument entirely fails of foundation, for the Government since 1862 have abandoned the collection of the *hak* from the villagers; therefore, having received no money, they have nothing to account for to anybody. Their Lordships think it right to observe that this argument was not pressed at the bar to-day, though it appears to have been very strongly relied upon in the Courts below.

This is not the first time that the Pensions' Act of 1871 has come before this Board. In the case of *Vasudev Sadasiv Modak* v. *The Collector of Ratnagiri* (1) an action was brought to recover certain payments on account of a grant which had been made to a *deshmukh* in consideration of some ancient dues which his ancestors had received. It seems that the *deshmukh* was a collector [423] of Government revenue, the office being hereditary, and that the *deshmukhs* had been accustomed to receive a certain share of the revenue which they collected. The suit was brought against the Government for payment representing the old allowances, which it appears the native Government undertook to make; but the Board held that, by the terms of the Act in question, the Civil Courts were prevented from taking cognizance of the suit. It is said in the judgment: "Their Lordships are of opinion that, whatever the foundation of the *deshmukhs*' rights originally was, the *sanad* must now be treated as the foundation of those rights as they exist. At the date of that document the receipt of the old allowances had long been interrupted. The whole of what was received from rayats went into the coffers of the State, which paid its collectors by salaries; and, consequently, the restoration of the old allowances by the Peishwa was, in substance, a grant by him of part of his land revenue, and, therefore, falls within the terms of the fourth section, without the aid of the third, as a grant of money or land revenue conferred by a former Government." It seems to their Lordships that this decision very nearly

(1) 4 I A. 119.

governs this case, if any authority were wanted for an interpretation of the plain language of the Act.

Their Lordships find that the High Court of Bombay, in the case of *Parbhudas Rayaji* v. *Motiram Kaliandas* (1), give a like construction to the Act. The observations, however, of the Judges can only be treated as *dicta*, since they decided the case upon the ground that, the suit having been brought upon a decree obtained before the Act had come into operation, it was not a bar to the suit.

The only case which at all looks the other way is one in the High Court of Bengal (*Shahzadee Hazara Begum* v. *The Collector of Burdwan and another* (2)). The head-note is: "One Khajah Anwar Shahad, a servant of the Delhi emperor, having been killed in Burdwan while fighting for his master, the emperor built a tomb over his remains, and made a grant of land (five mouzahs) to his family for the purpose of maintaining it in the manner usual amongst Mahomedans. This grant was subsequently confirmed to a descendant of Shahad and his heirs. Some years later the **[424]** land came into the possession of the Rajah of Burdwan, who paid to the grantees a certain sum of money annually. When the perpetual settlement was made, the British Government continued the payment on account of the rajah, in whose zemindari four of the five mouzahs were incorporated." It seems that the yearly payment was a sum of Rs. 3,690. Mr. Justice Glover says: "It is an admitted fact that this annual payment was made by the rajah on account of these mouzahs," — that is, the five mouzahs referred to—"and it seems to us that such payment was, to all intents and purposes, the rent of the land transferred." After the permanent settlement the Government continued this payment, whether as of right or as an act of generosity, may be a question. However, supposing the payment to have been obligatory, the nature of the obligation is treated by Mr. Justice Glover as an obligation to pay rent. He says: "And if the Rs. 3,690 paid to the family of Anwar Shahad by the zemindar of Burdwan was the rent of the five mouzahs, how was the payment changed in its nature by being made through the British Government?" Their Lordships cannot help saying that it was a violent assumption that the Government were paying rent for these mouzahs. However, having made that assumption, the learned Judge decided that the payments were not within the Act. The decision, thus explained, does not affect the question in the present appeal.

For these reasons their Lordships think that the judgments below are correct; and they will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

Solicitors for the appellant: Messrs. *West, King, Adams & Co.*

Solicitor for the respondent: Mr. *H. Treasure.*

(1) 1 B. 206.

(2) 23 W.R. 378.

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[425] EXTRAORDINARY ORIGINAL CIVIL JURISDICTION.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice M. Melvill.

THE GUZERAT SPINNING AND WEAVING COMPANY *v.* GIRDHARLAL DALPATRAM AND ANOTHER.* [13th March, 1880.]

Indian Companies Act X of 1866, *s.* 22—*Member of company*—"*Subscriber of the memorandum*"—"*Agreement to become a member*"—*Company not in existence*—*Rescission*—*Liability for calls.*

The defendant, amongst others, subscribed (for 101 shares) a copy of the memorandum and articles of association of the plaintiff company then in process of formation, but subsequently, and before registration, gave notice to the persons most active in the promotion of the said company, that he would withdraw his signature, and would have no connection thenceforth with the proposed company. His withdrawal, however, was not accepted. Subsequently to the receipt of the said notice the memorandum and articles of association, so signed by the defendant and others, were presented for registration: but registration was refused, on the ground that the said documents were not printed. A printed copy of each was then procured and registered. The registered copies differed, in respect of the signatures subscribed thereto, from the copies signed by the defendant. The defendant's name was put upon the register of the company as the holder of 101 shares, but without the defendant's assent or knowledge, and two calls were made upon him in respect of the said shares. The defendant denied that he was a member of the said company, or liable for calls.

Held, that the defendant was not a member of the plaintiff company; either (i) as a "subscriber of the memorandum of association" under the earlier part of s. 22 of the Indian Companies Act, inasmuch as the memorandum there referred to was *the registered* memorandum, of which the document signed by the defendant was not even a true copy; or (ii) by reason of an "agreement to take shares" under the latter part of that section, inasmuch as the agreement there alluded to was an agreement *with the company*, and the agreement (if any) entered into by defendant was not, and could not have been, an agreement with the company, the company not being at that time in existence.

Quære—whether it is enough, to constitute a person a member of a company under the earlier part of s. 22, to subscribe a true copy of the registered memorandum of association.

[F., 12 B. 647 (655); R., 13 B. 1; 13 B. 415 (422).]

THIS suit was brought originally in the District Court of Ahmedabad, where the chief offices of the plaintiff company were situated; but, on the application of the defendants, it was transferred to the High Court at Bombay under its extraordinary jurisdiction.

[426] The case had been heard during several days before Green, J., all the evidence had been taken, and judgment reserved. Before judgment could be given, however, Green, J., became suddenly ill, and was obliged to proceed to Europe; and there being no prospect of his speedy return, an order was made, by consent of both parties, that the case should be heard by two Judges on the evidence taken before Green, J., and the appeal (if any) be directly from their judgment to the Privy Council.

The suit was brought to recover Rs. 53,341, the amount of two calls made on the defendants on the 21st February, 1877, and 15th July, 1877, being, respectively, calls of Rs. 250 a share in respect of 101 shares of the company alleged to have been subscribed for by the first defendant, Girdharlal Dalpatram.

* Suit No. 45 of 1877.

The second defendant was sued on the ground that he was the real owner of the shares, the first defendant having subscribed for them, it was alleged, merely as his nominee and trustee ; but in the course of the hearing before Green, J., the case against the second defendant was abandoned.

The facts of the case, so far as material, are as follows :—

The plaintiffs were a company formed for the purpose of erecting and working a spinning and weaving mill at Ahmedabad, under the following circumstances :—In 1876 it was resolved, by certain persons living in Ahmedabad, to form a new spinning and weaving company in that city, and a memorandum and articles of association were accordingly drawn and engrossed (but not printed) in Bombay, and sent up to Ahmedabad, in that form, for subscription. On the 2nd September, 1876, these were signed by the first defendant in Ahmedabad for 101 shares, and numerous other signatures were added thereto both in Ahmedabad and, subsequently, in Bombay. The memorandum of association provided, *inter alia*, that the firm of Jamnabhai Munsookbhai and Company, of Ahmedabad, merchants, (who were the chief promoters of the company), should be, on its formation, its treasurers and agents. On the 13th of December, in the same year, the defendant gave notice to a member of the said firm that he was no longer willing to become a share-holder in the said company, and would thenceforth **[427]** repudiate all connection with it. At the date of the said notice all the signatures subscribed to the original memorandum and articles of association had been already affixed. To this notice the said firm of Jamnabhai Munsookbhai and Company replied that they had no authority to release the defendant from the liabilities of a shareholder. In the month of January, 1877, the original memorandum and articles of association, so signed by the defendant and others, were taken to the Registration Office in Bombay, and presented for registration. Registration, however, was refused, on the ground that they were not printed, in accordance with the requirements of s. 16 of Act X of 1866. Printed copies of the memorandum and articles of association were then in existence ; and a copy of each was procured from Ahmedabad, and on the 16th January, 1877, these were registered in Bombay. The registered copies contained seven signatures, but the signature of the defendant was not one of them. Six of the said seven signatories of the registered copies had not been signatories of the original manuscript memorandum and articles of association, and the seventh appeared in the registered copy as a shareholder for a smaller number of shares than he had signed for in the original manuscript copy. The defendants' name was put upon the register as the holder of 101 shares, and subsequently the two calls in question were made upon him ; but the defendant refused to pay them, alleging that he was not, and never had been, a shareholder of the plaintiff company. Thereupon this suit was brought.

Starling (with him *Pigot*) for plaintiffs :—The defendant is liable to pay calls as a shareholder of the plaintiff company on three grounds : (i) on the ground that a signature to a copy of the memorandum and articles of association is as good as a signature to the memorandum and articles themselves ; (ii) that the terms of the memorandum and articles signed by the defendant amount, at least, to an agreement to become a member and take shares, which agreement will enure to the benefit of the company, when registered ; (iii) that the memorandum and articles so signed constitute the defendant a person who must be "deemed to have become a

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member of the company " under s. 22 of the Indian Companies Act X of 1866.

[428] As to the first point, Lindley, J., (1) commenting on s. 23 of the English Companies Act, 1862 (2), which is identical with s. 22 of the Indian Act, says: " the Act in substance declares that the subscribers of the memorandum of association and all persons who have agreed to become members, and whose names are entered in the register of members, shall be deemed members of the company. It is conceived that persons who sign copies of the memorandum before it is registered, are members under this Act, as they were held to be under the Act of 1856." And Mr. Buckley is of the same opinion: " the signature of a person," he says (3), " attached to a duplicate of the memorandum of association, and not being the copy which is actually registered, is sufficient to bind him." The authority cited in both cases is *New Brunswick Railway Company* v. *Boore* (4). That was a decision, it is true, on s. 11 of the Act of 1856 (19 and 20 Vic., c. 47), which is not identical with s. 23 of the Act of 1862 and s. 22 of the Indian Companies Act (5).

But it could not have been intended by the Legislature, when passing the later Act, to make any alteration in the practice in this [429] respect. If there had been any such intention it would have been clearly expressed. Having then signed a copy of the memorandum of association it was too late, on the 13th of December, for the defendant to withdraw; all the signatures had been then appended: *Kidwelly Canal Company* v. *Raby* (6); *Burke* v. *Lechmere* (7). Nor was it competent for a single signatory to withdraw without first obtaining the assent of the other signatories. *In re Oola Lead Companies*; *Palmer's Case* (8); *Smyth's Case* (9). In *Anandji Visram* v. *Nariad S. and W. Company* (10), where also a copy was signed before the memorandum was registered, the judgment proceeded on the ground that the two documents materially differed from one another, and it was on that ground that the defendant was held not to be liable as a shareholder.

Then, secondly, the articles of association of this company, especially the 10th and the 11th (11), constituted an agreement, on the part of all who

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(1) Lindley on Partnership (3rd ed.), p. 174. (2) 25 & 26 Vic., c. 29.
(3) Buckley on the Companies Acts (3rd ed.), p. 40. (4) 3 H. & N. 249.
(5) 19 & 20 Vic., c. 47, s. 11:—

" The Memorandum of Association and the Articles of Association shall respectively bear the same stamps as if they were deeds. Any person signing a printed copy of the Memorandum of Association or Articles of Association shall be deemed to have signed such Memorandum and Articles respectively; and where the proper stamp has been duly fixed on such Memorandum of Association or Articles of Association it shall not be necessary to stamp any printed copy so signed: the execution by any person of the Memorandum of Association or Articles of Association shall be attested by one witness at the least; and attestation by one witness shall be sufficient attestation in Scotland as well as in England and Ireland."

Indian Companies Act, X of 1862, s. 22:—

" The subscribers of the Memorandum of Association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned: and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company."

(6) 2 Price, 93. (7) L. R. 6 Q. B. 297. (8) Ir. Rep. 2 Eq. 573.
(9) *Ibid*, p. 603. (10) 1 B. 320.
(11) Articles 10 and 11 of Articles of Association referred to above:—

" 10. An application signed by or on behalf of the applicant for shares in the Company followed by an allotment of any shares therein, or the signing of the provisional Memorandum of Association of the Company by any person previously to these

had signed the articles and the memorandum of association, with the company to take shares, of which agreement, when registered, it could take advantage; and that apart, altogether, from the provisions of the Indian Companies Act. And, in this view, it matters not at all that the copy of the articles signed is not the copy which was registered. The memorandum and articles, when signed, amounted to an authority to the promoters to register the company, and an undertaking, on the part of [430] the signatories, to become shareholders of the company, when registered, to the extent of the shares subscribed for.

Then, thirdly, the defendant is to be "deemed to be a member of this company" under the latter part of s. 22 of the Indian Companies Act (1), since he is "a person who has agreed to become a member of the company, and whose name is entered on the register of members." The Act says nothing as to the time when such an agreement must have been made. The agreement may be made at any time before, as well as after, registration. All that is necessary is, first, that there should be such an agreement; and, secondly, that the name of the person so agreeing should be afterwards entered on the register, which was done in this case. If agreements entered into before registration are not to be held binding, promotion of companies will become impossible. Signatures to documents of this kind involving agreements are irrevocable (*In re London Coal Company* (2)); and this is a contract which the company, and not only, as was argued below, the other signatories can enforce: *Currie's Case* (3).

Lang (with *Macpherson*), for defendant.—There are only two ways by which, under s. 22 of the Indian Companies Act, a man can become a member of a company: (i) by signing the memorandum of association, and (ii) by agreeing to take shares. Now, as to the first mode of becoming a member, it cannot be said that the defendant became a member of this company by signing its memorandum, unless it is held that the memorandum and a copy of the memorandum are one and the same thing. There is only one "memorandum," which is the registered memorandum, and that the defendant did not sign. There is no authority for saying that, under the English Companies Act of 1862, or the Indian Act of 1866, signing a copy of the memorandum is enough. In the earlier Acts, both English (4) and Indian (5), it was expressly provided that the signing of a printed copy of the memorandum or articles of association should suffice. That provision [431] is omitted in the later Acts now in force, thereby showing the intention of the respective Legislatures that it should not be enough thenceforth to sign a copy, even a printed copy: here the copy signed was not even printed, but in manuscript. It is clear from other sections of the Indian Act that "the Memorandum of Association" talked of, is

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presents, shall be an acceptance of shares within the meaning of these Articles; and every person who thus, or otherwise, accepts any shares, and whose name is on the register, shall, for the purpose of these Articles, be a share-holder.

"11. The money (if any) which the Directors shall, on the allotment of any shares being made by them, or after the signing of the provisional Memorandum of Association, require or direct to be paid by way of deposit, call, or otherwise in respect of any shares allotted by them, shall immediately on the inscription of the name of the allottee in the register of members as the name of the holder of such share or shares, become a debt due to and recoverable by the Company from the allottee thereof, or the signatory of the provisional Memorandum of Association, and shall be paid by him accordingly."

(1) See note 5 B. 428.
(2) L. R. 5 Ch. Div. 525.
(3) 3 DeG. J. & Sm. 367 (377).
(4) 19 & 20 Vic. c. 47, s. 11. See note 5 B. 423.
(5) Act XIX of 1857. s. 9, identical with 19 & 20 Vic., c. 47, s. 11.

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the registered memorandum and no other. Section 11 says "the memorandum shall, when registered, bind the Company, &c." Section 7 says: "the Memorandum and the Articles of Association shall be delivered to the Registrar, who shall retain and register the same." Section 18: "Upon the registration of the Memorandum of Association, &c." And that is the view of the Act taken in *Anandji Visram* v. *Nariad S. and W. Company* (1). The only case in which this point was directly considered was *Palmer's Case* (2). There, no doubt, signing a copy, *with other circumstances*, was held to make a man a member; but it is clear, from the judgment of the Master of the Rolls (3) in that case, that signing alone would not have been enough. As for the passages cited from Lindley (4) and Buckley (5), those opinions were founded on the case of *New Brunswick Railway Company* v. *Boore* (6), a case under the old Act of 1856 (7), which permitted signing a printed copy.

[M. MELVILL, J.—Supposing the signed document had been registered, do you say that you had withdrawn in time, and would not, in that case even, have been bound?]

Even in that case we should not have been bound. We may withdraw any time before registration. In *Duke's Case* (8), Jessel, M. R., says: "Before registration the contract contained in the memorandum may be varied, rescinded or modified." It is merely a contract; we may break it if we choose; perhaps we may be liable to an action; but, at any rate, we cannot, after rescinding it, and against our will, be put on the register. However, that point does not arise in this case, as the copy signed, was never registered. And, moreover, in this case the registered memorandum **[432]** was not even identical with the copy signed. The signatories to the two documents were different; most of the names on the registered memorandum were those of unsubstantial people, mere nominees of the secretaries, treasurers and agents.

Then, as to the second mode of becoming a member of a company, *viz.*, by agreeing to take shares, under the latter part of s. 22 (9) of the Indian Act. The agreement there talked of is an agreement with the company. There can be no agreement with a company made at a time when the company has no legal existence. Our agreement (if any) was made when the company did not exist; it was an agreement with certain persons to take shares in the company when it should have come into existence. That was not an agreement with the company; the company cannot sue on it; if there is any right of action against us, it must be in our co-signatories. If we are bound to the company to take shares, the company must be bound to us to give us shares; but where is there evidence of any such obligation on the part of the company? It is not contended that we communicated with, or recognized, the company in any way after it came into existence; we were put on the register without our knowledge or assent, and when a call was made on us we at once repudiated liability for it. Nor did the company ever communicate with us: so, if we did ever offer to take shares, the company never accepted that offer, and without such acceptance there is no contract: *Pellatt's Case* (10).

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(1) 1 B. 320. (2) Ir. Rep. 2 Eq. 573. (3) At p. 603.
(4) On Partnership (3rd ed.), p. 170. (5) On Companies Acts (3rd ed.), p. 40.
(6) 3 H. & N. 249. (7) 19 & 20, Vic. c. 47.
(8) L. R., 1 Ch. Div. 623. (9) See note 5 B. 428.
(10) L.R. 2 Ch. 527.

An application for shares may be withdrawn before allotment: Buckley on Companies Acts, pp. 46, 47; *Ramsgate Hotel Company* v. *Montefiore* (1); *Ritso's Case* (2). The company was not bound to have allotted us shares if we had applied; how, then, can we be bound to take them?—*Wolverhampton Company* v. *Hawkswath* (3). *Kidwelly Canal Company* v. *Raby* (4) turned altogether on the precise terms of the Act of Parliament incorporating the plaintiff company, and *Burke* v. *Lechmere* (5) on the meaning of the words "subscribers" as used in the Companies' Clauses Consolidation Act, 1845 The document we signed might possibly, if we had not withdrawn our signature, have amounted to an authority to **[433]** apply for shares on our behalf; but, even then, we should have had a *locus penitentiæ* until notice of acceptance of our application, or actual allotment. And neither can the company found their case on the terms of ss. 10 and 11 of the articles of association(6) that we signed, for they were not parties to that document, nor was the document we signed the "provisional memorandum" referred to in those articles. That is clear; for the memorandum the defendant signed was intended to have been registered, and was, therefore, not provisional. In *In re London Coal Company*(7) the memorandum signed was the one registered; so that case does not apply. In no way could we be treated as shareholders after our notice of withdrawal on the 13th December, 1876.

Starling, in reply.—A company can take advantage of agreements made prior to its formation: *Touche* v. *Metropolitan Warehousing Company* (8), *Spiller* v. *Paris Skating Rink Company* (9). The offer to accept shares could not be withdrawn, and was therefore still in existence when the company was formed: *Palmer's Case* (10). The Company, when formed, accepted that offer, and treated defendant as the owner of the number of shares applied for, and he is, therefore, liable for the calls. The agreement contemplated by s. 22 (11) of the Indian Companies Act is not necessarily one made after the company has come into existence. The words used are "has agreed," and not "shall agree."

JUDGMENT.

The judgment of the Court was delivered by

WESTROPP, C. J.—We think that this case may be decided at once in a few words. It is unnecessary to do more than consider the provisions of s. 22 of the Indian Companies Act X of 1866, as explained and illustrated by reference to other sections of the Act, especially ss. 17 and 18, and apply these provisions to the facts before us. Section 22 defines the persons who are to be considered to be members of a company. The first branch of the section says: "The subscribers of the Memorandum of Association of any company under this Act shall be deemed to have become members of the company whose memorandum they have subscribed, and upon registration of the company they shall **[434]** be entered as members in the register of members hereinafter mentioned." Now, it is clear from reference to other sections, especially ss. 17 and 18, that the memorandum of association, of which s. 22 is conversant, is the registered memorandum. That was the view of s. 22 taken in

(1) L. R. 1 Ex. 109. (2) L.R. 4 Ch. Div. 774. (3) 6 C.B. N. S. 336.
(4) 2 Price, 93. (5) L. R. 6 Q. B. 297.
(6) See note 5 B. 429. (7) L.R. 5 Ch. Div. 525. (8) L. R. 6 Ch. Ap. 671.
(9) L. R. 7 Ch. Div. 368. (10) Ir. Rep. 2 Eq. 573.
(11) See note 5 B. 428.

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the case of *Anandji Visram* v. *Nariad S. and W. Company* (1), where it was said " s. 22 of the Companies Act of 1866 provides that the person signing the memorandum of association shall be regarded as a member; and, taking the 17th and 22nd sections together, the memorandum here spoken of must be the registered memorandum of association." To that view we adhere. In this case the document which the defendant signed is not the registered memorandum. It has been argued that the signing of a copy of the registered memorandum is equivalent to signing the registered memorandum, and two cases have been cited in support of that proposition. But the first (*Smyth's Case*(2) is apparently against and not for that contention, and in the second (*Palmer's Case*(3)) Palmer had, by many acts subsequent to his signature of a copy of the memorandum of association, identified himself with, and treated himself as a member of the company; and he was, on all those grounds together, and not merely because he had signed a copy of the memorandum, held to be estopped from denying the membership. But even supposing, though not by any means deciding, that this contention is well founded, it does not help the plaintiff in this case, for the document signed by the defendant is not a copy of the registered memorandum of association, and, in fact, materially differs from it.

The 22nd section then continues: " Every other person who has agreed to become a member of a company under this Act, and whose name is entered in the register of members, shall be deemed to be a member of the company." By these words we understand that every other person who has agreed *with the company* to become a member, and whose name is entered in the register, shall be deemed to be a member; and we think that s. 18 supports this view. These two sections indicate that the agreement which is to bind a party must be an agreement with the company itself. **[435]** Neither the memorandum nor the articles of association which the defendant signed, which are the documents on which the plaintiff's case against the defendant is founded, form an agreement with the company. There was no company in existence, at the time those documents were signed, to agree with. The company had not then been incorporated, the memorandum of association not having been registered. If these documents formed a contract with the company, the company could have been compelled to allot 101 shares to the defendant, but we fail to see how defendant could have compelled them to do so. *Kidwelly Canal Company* v. *Raby* (4) has no bearing on this case: the Act of Parliament there involved contained the words " *have subscribed* or may hereafter subscribe."

We, therefore, hold that the defendant was not a member of the company, and was, therefore, not liable to pay calls, and dismiss the plaintiff's suit with costs.

With the consent of both parties the Registrar of the High Court, Appellate Side, was directed to ascertain the amount of defendant's costs payable by the plaintiff in the manner and according to the scale regulating costs in suits in the Mofussil Courts.

Solicitors for plaintiffs.—Messrs. *Bhaishanker and Dinsha.*

Solicitors for defendant.—Messrs. *Rimington, Hore, Conroy, and Brown.*

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(1) 1 B. 320 (328).
(2) Ir. Rep. 2 Eq. 603.
(3) Ir. Rep. 2 Eq. 573.
(4) 2 Price, 93.

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Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F.D. Melvill.

KALU NARAYAN KULKARNI (*Original Plaintiff*), *Appellant* v. HANMAPA BIN BHIMAPA (*Original Defendant*), *Respondent.**

[4th August, 1879.]

Regulation XVI of 1827, *s.* 20—*Alienation of vatan property—Bombay Act III of* 1874.

A mortgage by a *vatandar* of *vatan* property, executed at a time when Reg. XVI of 1827 was still in force, was, in its inception, void against the heir of the said *vatandar* ; nor did it become in any way validated against the heir by reason of the repeal of that Regulation by Act III (Bombay) of 1874.

[Appr., 24 B. 556 ; R., 5 B. 437 ; 18 B. 22 (32) ; 34 B. 175=12 Bom. L.R. 143=5 Ind. Cas. 866; 15 Bom. L.R. 266 (272)=19 Ind. Cas. 558.]

[436] THIS was a second appeal from the decision of C. F. H. Shaw, Judge of the District Court of Belgaum, affirming the decree of the Second Class Subordinate Judge of Saundatti.

The plaintiff, Kalu Kulkarni, sued to recover possession of a field, alleging that the property was a *vatan* attached to the office of *kulkarni* of his village, and that he was entitled to the possession of it, as he performed the duties of the *kulkarnishiip*. The plaintiff's father died on the 16th September, 1874, and he brought the present suit in 1877.

The defendant, Hanmapa, answered, *inter alia*, that the field had been mortgaged to him by the plaintiff's father for Rs. 900, under a deed dated the 12th July, 1871, and that, under it, he was to remain in possession of the mortgaged property for a period of twenty years.

Both the lower Courts found the mortgage proved, and rejected the plaintiff's claim, on the ground that he was not entitled to the possession of the property till the satisfaction of the mortgage-debt. They were of opinion that, Reg. XVI of 1827 having been repealed by Bombay Act III of 1874, it no longer now in any way affected the mortgage in question.

The plaintiff thereon appealed to the High Court.

Gokaldas Kahandas, for the appellant.—Both the lower Courts were wrong in holding that the alienation of the field was valid against the plaintiff. The alienation of *vatan* property by an incumbent of a hereditary office cannot endure beyond his lifetime in favour of the alienee. The mortgage became extinguished, by the death of the mortgagor, on the 16th September, 1874 : *Krishnarav Ganesh* v. *Rangrav* (1). The defendant, therefore, has no right to the possession of the property.

The respondent did not appear.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTORPP, C.J.—The mortgage relied upon by the defendant was executed in 1871, when Reg. XVI of 1827 was yet in force ; consequently that mortgage was, in its inception, void as against the heir of the then *vatandar* (the mortgagor). The subsequent [437] repeal of Reg. XVI of 1827 cannot validate the mortgage against the heir. It

* Second Appeal No. 171 of 1879.

(1) 4 B.H.C.R. A.C.J. 12, (13).

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may be that the heir is, in respect of property of his father other than that annexed to the *kulkarnishup*, liable to pay his father's debts; but the Regulation exonerated the *vatan* appendant to the *kulkarnishup* from the mortgage, or other alienation, by the father for any period beyond his own life (1). We, therefore, must reverse the decree of the District Judge, and direct that the plaintiff do recover the land mentioned in the plaint from the defendant. We refuse to give mesne profits, but the defendant must pay to the plaintiff his cost of the suit and both appeals.

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5 B. 437.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

RAVLOJIRAV BIN TAMAJIRAV (*Original Defendant*), *Appellant v.* BALVANTRAV VENKATESH (*Original Plaintiff*), *Respondent.**

[25th August, 1880.]

Reg. XVI of 1827, *s.* 20—*Alienation of vatan property by a hereditary vatandar—Bombay Act III of* 1874—*Limitation—Adverse possession.*

A sale by a *vatandar* of *vatan* property, executed at a time when Reg. XVI of 1827 was still in force, was, in its inception, void against the heir of the *vatandar*; nor did it become in any way the more valid against such heir by reason of the repeal of that Regulation by Act III (Bombay) of 1874.

Adverse possession only begins to run against the heir from the time when he is entitled to succeed to the possession of the *vatan* property, *i.e.*, from the date of the death of the *vatandar*.

[F., 10 B. 372; R., 9 B. 198; 14 B. 404 (407).]

THIS was an appeal from the decision of A. M. Cantem, First Class Subordinate Judge of Belgaum, in Original Suit No. 954 of 1877.

The plaintiff Balvantrav brought this suit to recover possession of a village and a house therein, alleging that the property had been sold to his father Venkatesh by Tamajirav, father of the defendant, for Rs. 14,001, on the 29th November, 1840; that he had been in possession of it and paid the Government dues on it; that he had been dispossessed of it in execution of a decree to which he was no party.

[438] The facts of the case, which it is necessary to state here, are these: In 1871, the defendant Ravlojirav brought a suit (No. 899) in the Subordinate Court of Belgaum for possession of the estate of one Tamajirav, deceased, on the ground that he (Ravlojirav) was the adopted son of the said Tamajirav, who died on the 3rd September, 1869, and as such, entitled to the whole property of his adoptive father. Ravlojirav's claim was opposed by his two adoptive mothers and by the widow of a son of Tamajirav, who had predeceased his father. The said three widows, together with one Jotiajirav (a minor), who was joined with them on the application of the widow of Tamajirav's predeceased son—she alleging her adoption of the said Jotiajirav—were made defendants to the suit. Jotiajirav denied the adoption of Ravlojirav by Tamajirav, and set up his own adoption by the widow of Tamajirav's predeceased son with the permission of Tamajirav. The plaintiff Balvantrav was no party to that

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* Appeal No. 19 of 1880.

(1) See the remarks on Reg. XVI of 1827 in 4 B.H.C.R.AC.J. 12 and 13.

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suit. The Subordinate Judge, on the 20th July, 1875, decided in favour of Ravlojirav's claim, holding that he was the adopted son of Tamajirav, and entitled to the whole estate of his adoptive father. He held the adoption of Jotiajirav by the widow of Tamajirav's predeceased son disproved. That decision was upheld by the High Court on appeal (No. 56 of 1876), on the 10th January, 1878. In the meantime, the defendant Ravlojirav executed the decree of the Subordinate Judge, dated the 20th July, 1875, and obtained possession of the property awarded to him under it, including the village and house in dispute. The plaintiff Balvantrav was, consequently, dispossessed, on the 11th September, 1877. He, therefore, brought the present suit for possession of the property.

The defendant Ravlojirav denied the sale of the village and house by Tamajirav, and contended that it was not competent to him (Tamajirav) to sell the property, as it was a portion of the ancestral family *vatan*; that the sale was invalid under Regulation XVI of 1827, s. 20.

The Subordinate Judge, on the 29th September, 1879, allowed the plaintiff's claim, holding that the sale was proved, and that it was not open to the Civil Courts to inquire into the validity of an alienation of *vatan* property, as Regulation XVI of 1827 was repealed by Bombay Act III of 1874.

[439] The defendant Ravlojirav thereupon appealed to the High Court on the 22nd January, 1880.

Inverarity (with him *Manekshah Jehangirshah*), for the appellant.—The property in dispute being part of a *vatan*, its alienation by the defendant's father is not binding on him after the death of his father. The alienation being made while Regulation XVI of 1827 was in force, is invalid against the defendant, as held in *Kalu Narayan* v. *Hanmapa* (1). Such alienation was valid only during the lifetime of the alienor, under the interpretations of the late Sadar Adalat on Regulation XVI, s. 20, as observed by the High Court in *Krishnarav Ganesh* v. *Rangrav* (2).

Branson (with him *Gokaldas Kahandas*), for the respondent.—Regulation XVI of 1827, s. 20, which rendered the alienation invalid after the death of the alienor, was repealed by Bombay Act III of 1874. The validity of the transaction, therefore, remained unaffected after the repeal of that enactment. Moreover, the property had been in the adverse possession of the plaintiff for more than twelve years before he was dispossessed in execution of a decree to which he was no party.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—The Subordinate Judge should have considered what was the law as to alienation of their *vatans* by hereditary officers at the time of the alienation by Tamajirav, *viz.*, the 29th November, 1840, and not what it may be now. In 1840, Regulation XVI of 1827 was in full force, and invalidated, as against the heirs of the alienor, any alienation of *vatan* property : *Kalu Narayan* v. *Hanmapa*. See also the interpretations of Regulation XVI of 1827 made by the Sadar Adalat on the 23rd February, 1831, and the 5th December, 1834, which show that such an alienation was effective during the lifetime of the alienor only, and the observations in 4 Bom. H. C. R. 12 and 13, *et seq.*, and Ind. L. R., 1 Bom. 536, 537. The alienor in the present case, Tamajirav, died in A.D. 1869, as was established in Regular Appeal 56 of 1876, decided here on the 10th January 1878, when the adoption of the present defendant and

(1) 5 B. 435.

(2) 4 B.H.C.R. A.C.J. 1 (12, 13, 14).

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[440]appellant Ravlojirav, *alias* Dinkarrav, was upheld. The present plaintiff Balvantrav was dispossessed on the 11th September, 1877: so he cannot have had twelve years' adverse possession of the village as against the appellant, whose title accrued in 1869 on the death of his adoptive father Tamajirav. It is unnecessary for us to say anything as to the state of the law at present with respect to alienation of *vatan* property, or of property which has been *vatani* in its nature. It is not denied that in 1840, when the alienation here took place, the village of Umbrani was a *deshgati vatan*. Tamajirav could only alienate it for his life. The alienation was, in its inception, void as against his heirs. We must, therefore, reverse the decree of the First Class Subordinate Judge, and make a decree for the defendant, with costs of suit and appeal. The plaintiff must refund to the defendant any mesne profits realized from the village (after allowing all proper expenses) since the plaintiff was put into possession of the village under the decree of the First Class Subordinate Judge, and the defendant (appellant) must be reinstated in possession.

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5 B. 440.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

BHIKHA (*Original Plaintiff*), *Appellant v.* SAKARLAL (*Original Defendant*), *Respondent.** [22nd March, 1881.]

The Code of Civil Procedure, Act VIII of 1859, *ss.* 268 *and* 269—*Order—Limitation.*

A purchaser of immoveable property at a Court sale, having been obstructed by the defendant, made an application to the Court, under s. 268 of Act VIII of 1859, for the removal of the obstruction, but subsequently withdrew his application. The Court thereupon made an endorsement upon the application to the effect that, as the applicant did not wish to proceed further, no investigation was made.

Held that no such order had been made as was contemplated by s. 269 of Act VIII of 1859, that section contemplating, at least, an order against one party or the other, and that, therefore, the provisions contained in the same section as to the time within which a suit must be brought, did not apply to the case of the plaintiff.

[R., 22 B. 875 (883).]

THIS was a second appeal against the decision of E. Cordeaux, Judge of Khandesh, confirming the decree of R. S. Bodas, Subordinate Judge of Shirpur.

[441] The facts sufficiently appear in the judgment of the Court.

Yashvant Vasudev Athlye, for the appellant, the original plaintiff.

Shivram V. Bhandarkar, for the respondent, the original defendant.

JUDGMENT.

The judgment was delivered by

MELVILL, J.—The plaintiff is a purchaser of immoveable property at a Court sale. Having been obstructed by the defendant, he made an application to the Court in 1873, under s. 268 of Act VIII of 1859; but, subsequently, he presented a petition, saying that he did not wish to proceed with the application. The Court thereupon made an endorsement on the application, to the effect that, as the applicant did not wish to proceed further,

* Second Appeal No. 410 of 1880.

no investigation was made, and the application was treated as disposed of. The question is whether this endorsement is such an order as brings the plaintiff within the provisions of the last paragraph of s. 269, and rendered it necessary for him to bring a suit within one year. After providing that "the Court shall inquire into the matter of the complaint, and pass such order as may be proper in the circumstances of the case," the section goes on to say, in the last paragraph, that "the order shall not be subject to appeal, but the party against whom it is given shall be at liberty to bring a suit to establish his right at any time within one year from the date thereof." The authorities are conflicting as to whether an order passed without a previous investigation, is such an order as is contemplated by the section; and on this point we do not think it necessary to give any decision. But we consider that the order contemplated must, at all events, be an order given against one party or the other; and in the present case we find it impossible to regard the endorsement of the Subordinate Judge, acquiescing in the plaintiff's request that his application should not be further proceeded with, as an order given against the plaintiff. On these grounds we reverse the decrees of the Courts below, and remand the case for retrial. Costs to follow the final decision.

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5 B. 442.

[442] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Nanabhai Haridas.

KANITKAR (*Original Defendant*), *Appellant v.* JOSHI (*Original Plaintiff*), *Respondent.** [29th March, 1881.]

Registration, compulsory, optional—Priority—Act XX of 1866—*Act VIII of* 1871, *s.* 50—*Act III of* 1877, *s.* 50.

Section 50 of Act III of 1877 is not retrospective in its application; and, therefore, a deed of sale registered under Act VIII of 1871, and not having, under that Act, priority over unregistered documents relating to the same property, acquires no new rights of priority by the passing of Act III of 1877, though coming within the larger class of registered documents which, by s. 50 of the later Act, have priority over unregistered documents.

[F., 6 B. 495; **R.**, 5 B. 653; 6 B. 168 (192); 13 B. 229; 20 B. 158 (164).**]**

THIS was a second appeal against the decision of C. B. Izon, Judge of Ratnagiri, confirming the decree of Rao Saheb Atchut Jagannath Ghate, Subordinate Judge of Chiplun.

The material facts are as follows:—

On 18th March, 1867, one Ganu Gopal mortgaged some property to the plaintiff's father for a sum a little less than Rs. 100. The instrument of mortgage was optionally registrable, and was not registered. No possession passed to the mortgagee at the time of executing the mortgage. But on 4th May, 1873, the plaintiff entered into possession of the mortgaged premises.

On 19th March, 1877, the proprietor passed a deed of sale of the property to the defendant for Rs. 297. This was compulsorily registrable under Act VIII of 1871, and was duly registered on the 20th March, 1877, a few days before the day (1st April, 1877), on which the Registration Act III of 1877 came into force.

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* Second Appeal No. 345 of 1880.

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Immediately afterwards the defendant went to the Mamlatdar's Court and, obtaining a possessory decree, dispossessed the plaintiff in July, 1877.

The plaintiff thereupon brought this suit in August, 1877, to recover possession of the mortgaged property from the defendant.

The defendant contended that the plaintiff's mortgage was collusive; but said that, even if genuine, it must be deferred to the defendant's deed of sale, as the mortgage was unregistered, and not accompanied with immediate possession.

[443] The Subordinate Judge of Chiplun found that the plaintiff was entitled to possession, and his decision was confirmed, on appeal, by the District Judge of Ratnagiri. The defendant appealed to the High Court.

Ganesh Ramchandra Kirloskar, for the appellant.—The defendant's registered deed of sale has priority over the plaintiff's unregistered mortgage not accompanied with immediate possession. The deed of sale was registered just before the present Registration Act III of 1877 came into force, and during the operation of Act VIII of 1871. At the time it was tendered in evidence, however, Act III of 1877 was in force. Section 50 of that Act gives, to documents of the class to which the sale deed belongs, a priority, if registered, over *every* unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not. This section does not confine the priority it gives to documents registered under that Act. That section is, therefore, intended to have retrospective effect: *Raju Balu* v. *Krishnarav Ramchandra* (1); *Fuzludeen Khan* v. *Fakir Mahomed Khan* (2); *Gangaram* v. *Bansi* (3); *Lachmandas* v. *Dipchand* (4).

Manekshah Jehangirshah Taleyarkhan, for the respondent, the original plaintiff.—Section 50 of Act III of 1877 should not be construed as having any retrospective effect: it does not apply to the defendant's deed of sale, which was registered while Act VIII of 1871 was in force, and no section of that Act gives any such priority as has been contended for. Before Act III of 1877 became law, a compulsorily registrable document had no priority over a document the registration of which was merely optional. Section 50 of that Act ought to be so read as not to affect rights acquired and existing under previous Acts. Unless the language of an Act is clear and positive, the general rule is that no retrospective effect should be given to it; Maxwell on Statutes, 191-2. In the explanation attached to s. 50 the word "unregistered" is expressly given a retrospective effect, This shows that the word "registered" in that section ought not to have that effect. The effect of the decisions in the cases cited **[444]** is to give priority to documents registered since the new Act came into force.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—The plaintiff claims under a mortgage execu ted by Ganu Gopal in 1867. It has been found that the plaintiff obtained possession under his mortgage; but, being for an amount less than Rs. 100, his mortgage-deed was not compulsorily registrable, and was not registered. In 1877 the plaintiff was dispossessed by a decree in the Mamlatdar's Court in favour of the defendant, whose claim (so far as we need at present consider it) was founded upon a deed of sale executed by Ganu Gopal in March, 1877, for a consideration of Rs. 297. This deed was registered a few days before Act III of 1877 came into operation. At

(1) 2 B. 273. (2) 5 C. 336. (3) 2 A. 431. (4) 2 A. 851.

the time, therefore, when this registration took place, the rights of the parties, under their respective title-deeds, were governed, so far as registration could affect them, by Act VIII of 1871; and, inasmuch as s. 50 of that Act conferred precedence only upon such registered documents as were of the kinds mentioned in cls. (1) and (2) of s. 18, the defendant, whose deed of sale was of one of the kinds mentioned in s. 17, did not immediately gain anything by his registration. At the time, however, when this suit was brought, Act III of 1877 was in full operation; and it is now contended that, by virtue of s. 50 of that Act, the defendant's deed of sale takes effect against the plaintiff's mortgage-deed. That section provides that "every document of the kinds mentioned in cls. (*a*), (*b*), (*c*) and (*d*) of s. 17, and cls. (*a*) and (*b*) of s. 18 shall, if duly registered, take effect, as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not." The preference, given by Act VIII of 1871 to voluntarily registrable documents only, is here extended to compulsorily registrable documents also, and there can be no doubt that, if the defendant's deed of sale had been registered under Act III of 1877, it would, unless fraud were proved, take effect against and supersede the plaintiff's deed of mortgage. The question is, whether the same result ensues in the case of a document registered **[445]** before Act III of 1877 came into force. We do not think that we ought to hold it to be so, unless it be perfectly clear, from the language of s. 50 of the Act, that a retrospective effect was intended. Under the law in force at the time of the registration, the plaintiff's title was good against that of the defendant. If we apply s. 50 of the new Act, the plaintiff loses his right, and the defendant acquires a title to which, when he registered his deed, he had no claim. It is to be presumed that the Legislature did not intend, by a retrospective operation, to destroy one existing title and to set up another. *Nova constitutio futuris formam imponere debet, non præteritis*; where an enactment would prejudicially affect vested rights, or the legal character of past acts, the presumption against a retrospective operation is very strong. "Every Statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation (1)." In the case of *Williams* v. *Smith* (2) the question decided was very similar to that which arises in the present case. Previously to the passing of 19 and 20 Vic., c. 97, the mere issue of a writ of *fi. fa.* gave to the judgment-creditor, as against a subsequent purchaser for value, the right to have his writ operate upon the goods of his debtor. The first section of that Statute enacted that "no writ of *fieri facias* or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bona fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ." It was held in *Williams* v. *Smith* that this section did not apply where the writ had been delivered to the Sheriff before the Act was passed. Under the circumstances of the case, the creditor had, under the old law, a good title against the purchaser; under the new law, if it was applicable, the purchaser had a good title against the creditor. The Court of Exchequer

(1) Maxwell on Statutes, p. 192.

(2) 28 L.J. Ex. 286.

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refused to apply the Statute, because the words were not sufficiently clear to rebut the presumption that the Legislature [446] could not have intended to take away a vested right. Section 50 of Act III of 1877, by the alteration which it makes in the previous law, effects a mutation of title between two conflicting claimants precisely analogous to that which was caused by the first section of the English Statute; and the words of the latter section which were held not to be sufficiently clear and express to authorize a retrospective application of the section are at least as clear and express as those of the Indian Act. Indeed, they appear to us to be more so; for the express provision contained in the explanation to s. 50 of Act III of 1877, by which retrospective effect is given to the word "unregistered," in some measure suggests the inference that such retrospective effect was not intended to be given to the word "registered."

For these reasons we have come to the conclusion that the defendant's deed of sale is not, by virtue of registration, entitled to take effect against the plaintiff's deed of mortgage.

The decrees of the Courts below are confirmed with costs.

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APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

SAYAJI BIN NIMBAJI (*Original Defendant*), *Appellant v.* RAMJI BIN LANGAPA (*Original Plaintiff*), *Respondent.**

[26th January, 1881.]

Mortgagee in possession—Forcible dispossession by mortgagor—Suit for possession—Specific Relief Act, I of 1877, s. 9—Fraud—Appeal.

It is no answer to a suit for possession under s. 9 of the Specific Relief Act, brought against a mortgagor by a mortgagee who has been forcibly dispossessed by the mortgagor, to allege that the mortgage and possession under it were obtained by the fraud of the mortgagee. The mortgagor's proper remedy was by way of a suit to set aside the mortgage and recover possession.

[R., 2 C.P.L.R. 173; 7 C.P.L.R. 3.]

THIS was a second appeal from the decision of R. F. Mactier, Judge of the District Court of Satara, affirming the decree of P. S. Binivale, First Class Subordinate Judge at the same place.

The plaintiff Ramji brought this suit for possession of certain land, alleging that the same had been mortgaged to him by the defendant for Rs. 300 under a deed, dated the 13th October, 1876; [447] that he had been put in possession of the land under the mortgage; that, subsequently, the mortgagor forcibly turned him out of the mortgaged premises. The plaintiff also claimed Rs. 100 as damages in respect of the crop standing on the land at the time of his dispossession, and removed by the defendant. The plaint was filed on the 13th August, 1877.

The defendant Sayaji answered, *inter alia*, that the plaintiff had caused the mortgage-deed to be executed, and obtained possession of the mortgaged land by fraud.

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The Subordinate Judge held the mortgage-deed proved, and awarded the plaintiff possession of the mortgaged land, together with Rs. 100 as compensation for the crop removed by the defendant.

In appeal, the District Judge remanded the case to the First Court for its trial on the two issues: first, whether the plaintiff had obtained possession of the land under his mortgage-deed; and, secondly, whether he had been subsequently forcibly turned out of it by the defendant. On remand, the Subordinate Judge found that the defendant had dispossessed the plaintiff after he had been put in possession of the land as mortgagee. He, accordingly, made a decree in favour of the plaintiff for possession of the mortgaged property until satisfaction of the mortgage-debt, and awarded Rs. 100 as damages for loss of his crop. This decree was affirmed by the District Judge on appeal (28th June, 1880).

The defendant thereupon appealed to the High Court on the 2nd October, 1880.

G. R. Kirloskar appeared for the appellant (defendant).

Shivram V. Bhandarkar (for *Shantaram Narayan*) took a preliminary objection on behalf of the respondent (plaintiff), that as the suit was one for possession under s. 9 of the Specific Relief Act I of 1877, no appeal lay to the High Court. The objection, however, was not pressed.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C.J.—Assuming for the moment, without in any way deciding, that the mortgage and possession under it were fraudulently obtained by the plaintiff Ramji, the defendant **[448]** Sayaji's proper course was to have brought his suit to have the mortgage set aside, and possession restored to him. He had not any right to dispossess the mortgagee without the intervention of a Court of Justice having jurisdiction for the purpose. The case being so clear on the merits, we have not considered the preliminary point as to whether the appellant was entitled to an appeal, and on that point we give no decision.

We affirm the decree with costs.

Decree confirmed.

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Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Birdwood.

BHULJI BECHAR (*Decree-holder*) *v.* BAVAJI DAJI AND OTHERS (*Judgment-debtors*).* [1st March, 1881.]

The Broach and Kaira Encumbered Estates Act XIV of 1877, *s.* 19—"*Suit*"—*Applications for execution—Limitation.*

The term "suits" in the last paragraph of s. 19 of Act XIV of 1877 includes application for execution of decrees.

UNDER s. 617 of the Civil Procedure Code (Act X of 1877), Rao Saheb R. K. Desai, Subordinate Judge of Borsad, stated the following case, with his opinion thereon, for the decision of the High Court:—

"The decree-holder Bhulji Bechardas obtained a decree in suit No. 1507 of 1875, for Rs. 17-1-0 and costs, on the 27th September, 1875,

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against the deceased, Bawaji Daji, and applied for the execution of the same on the 4th April 1876 and the 5th April 1877. But both the applications appear to have been dismissed, on the ground of the failure of the decree-holder to point out the property of the judgment-debtor to be attached.

"On the 6th March 1879, the provisions of Act XIV of 1877, were made applicable to the estate of the judgment-debtor, Bawaji Daji (*vide Bombay Government Gazette*, Part I, page 291); whereupon the decree-holder applied to the Talukdari Settlement Officer for the satisfaction of his decree. But the management **[449]** of the estate of the judgment-debtor was relinquished on the 23rd October 1880, under s. 19 of Act XIV of 1877 (*vide Bombay Government Gazette* for 1880, Part I, page 916), and, consequently, the decree-holder has been compelled to resort to this Court for the execution of his decree. The present application was presented on the 6th January 1881.

"The plaintiff's present application thus appears to be time-barred, unless the time during which the property of the judgment-debtor was under the management of the Talukdari Settlement Officer be excluded in computing the period of three years.

"The applicant claims the benefit of the last paragraph of s. 19 of Act XIV of 1877, which runs thus:— 'In calculating the periods of limitation applicable to suits to recover and enforce debts and liabilities revived under this section, the time during which the management has continued, shall be excluded.'

"A question thus arises, whether the term 'suits' includes applications for executions of decrees, so as to extend thereto the benefit provided by the aforesaid paragraph.

"In the case of *Jiwansing* v. *Sarnamsing* (1) the majority of the Full Bench of the Allahabad High Court has held that applications for execution of decrees are not 'suits' within the meaning of s. 15 of Act IX of 1871. But in the case of *Hurro Chunder Roy* v. *Shoorodhonee Debia* (2) the Calcutta High Court has ruled that the term 'suit' includes an application for the execution of a decree.

"The reasons given by the majority of the Full Bench for their decision in the case of *Jiwansing* v. *Sarnamsing*, above referred to, do not, I beg to submit, apply to the present case, inasmuch as no distinction appears to have been made by the Legislature between suits, appeals, and applications, in enacting the provisions of s. 19 of Act XIV of 1877.

"The intention of the Legislature, so far as it can be gathered from the last two paragraphs of s. 19 of Act XIV of 1877 taken together, was, I respectfully submit, to include applications for execution of decrees within the term 'suits.' But as the several High Courts have placed different meanings upon the term 'suits,' I deem this reference necessary.

[450] "My opinion on the question hereby referred, is in the affirmative."

The reference was considered by the High Court on the 1st March 1881.

There was no appearance of parties.

The following is the decision of the Court:—

JUDGMENT.

Per Curiam.—The Court concurs in the opinion of the Subordinate Judge.

(1) 1 A. 97.

(2) 9 W.R. C. R. 402.

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Before Mr. Justice Marriott.

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SADASHIV BHASKAR JOSHI, *Plaintiff v.* DHAKUBAI AND OTHERS, *Defendants.** [7th, 8th, 10th, 11th, 14th, 15th and 18th June, 2nd September and 7th October, 1880.]

Deed of sale set aside—Fraud—Undue influence—Old and illiterate woman near to her death—No independent advice—Inadequate consideration—Terms on which deed will be set aside—Purchase-money declared a charge—Funeral expenses of Hindu widow declared a charge—No allowance for repairs and improvements.

C was the widow of one R, deceased, and from the death of R until her own death remained in occupation of a house and chawl which had belonged to him. D was a sister of C's, and, shortly after R's death, D and her son, B, the first and second defendants, went to live with C on the said property, and lived with C, and were her only companions, until C's death. While so living with C, D and B advanced to C at various times, in joint account various sums of money —amounting to Rs. 3,500—for purposes such as would have justified C in pledging the property of her late husband to secure the repayment of the same. C became very ill; and D and B, fearing she might be going to die, requested her to take some steps to secure to them the repayment of the sums they had advanced to her. C thereupon offered to give D and B an absolute deed of sale of the said house and chawl in consideration of the said sum of Rs. 3,500—already advanced to her—and of an additional sum of Rs. 500 then to be paid to her to defray her funeral expenses and the costs of the said conveyance. D and B consented, and called in their sollcitor to take C's instructions and draw up the deed in question, which he accordingly did; and within three days of the said agreement the deed was executed. At that time C was very ill, and twelve days after the execution of the deed, C died. C was an illiterate woman, over sixty years of age, and had in this matter no independent professional or other advice. The additional sum of Rs. 500, agreed to be paid to C, was never so paid to her; but, after her death, D and her son expended moneys in and about her funeral ceremonies, amounting, as they **[451]** alleged to upwards of Rs. 400. The property in question, so pledged to them for Rs. 4,000, was worth, at least Rs. 5,200. The plaintiff, one of the heirs of R, sued to set the deed aside and for possession of the said property.

Held that the deed of sale must be set aside as obtained under circumstances which amounted to fraud.

Held also, that the advances, amounting to Rs.3,500, made to C by D and her son B—being made for purposes for which C would have been justified in pledging the said property—the deed of sale should be set aside only on the terms that the property in question should stand charged with the repayment of the sums so advanced.

Held also, that the property must stand charged with the repayment to D and B of such a sum as, having regard to her position and station in life, should be found to be a reasonable sum for the funeral expenses of C.

After C's death, D and B remained in possession of the said property under the deed of sale, and expended considerable sums of money in and about repairs and improvements to the same; and they now claimed that if the sale was to be set aside, the sums so expended should be repaid to them.

Held, that no allowance could be made to D and B for sums so expended by them, such sums having been expended at a time when D and B must be taken to have known that they were fraudulently in possession of the property in question.

[Appl., 6 C.L.J. 490 : R., 22 B. 818 ; 3 C.L.J. 260 ; 16 Ind. Cas 139 (144)=23 M.L.J. 223=12 M.L.T. 230=1912 M.W.N. 861 (868).]

THE plaintiff sued *in forma pauperis* as one of the heirs or reversioners, according to Hindu law, of his paternal great-uncle, Raghoba

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Raghunath Joshi, deceased, to recover from the first and second defendants, the possession of a house and chawl in Hanuman Lane, in Bombay, alleged to belong to the deceased, and for an account of the rents and outgoings derived from the said property enjoyed by the said defendants. The first defendant, named Dhakubai, was the sister of Chandrabhagabai, the widow of Raghoba, and the second defendant was Dhakubai's son. The remaining defendants were the other heirs of Raghoba according to Hindu law.

The first and second defendants opposed the claim of the plaintiff to the said property, alleging that they were purchasers of the same from Chandrabhagabai for value; and that, since the sale to them of the said property, they had spent large sums of money in repairs and lasting improvements upon the same. The consideration which the said first and second defendants alleged they gave to the said Chandrabhagabai for the sale to them of the said property, consisted, for the most part, of **[452]** advances of money—amounting, in all, to Rs. 3,500—said to have been made to her at various times for various stated purposes, and of a further sum of Rs. 500 said to have been advanced to her at the time of the execution of the deed of sale for the purpose of defraying her funeral expenses, and the costs of the said conveyance. The plaintiff denied the payment of the said sums by the first and second defendants, and disputed the right of Chandrabhagabai, in any event, to sell, or even pledge, the property of her deceased husband to the said defendants in order to repay debts incurred for the purposes alleged.

The following issues were raised at the hearing:—

(1) Whether the first and second defendants advanced to Chandrabhagabai such sums as they alleged, for the purposes alleged?

(2) Whether, in consideration of the advances aforesaid, for the purposes aforesaid, Chandrabhagabai sold the property to the first and second defendants?

(3) Whether there was any necessity for the sale of the property at the date of the alleged sale?

(4) Whether such sale was in fraud of the plaintiff's rights?

(5) General issue.

The facts of the case will be found fully set out in the judgment.

Viccaji (with him *Dhurandhar*), for the plaintiff.

Gill (with him *Mankar*), for the first and second defendants.

The other defendants appeared, respectively, in person.

JUDGMENT.

2nd September.—Judgment was this day delivered by

MARRIOTT, J.—In this suit the plaintiff seeks to recover possession, from the first and second defendants, of certain immoveable property, consisting of a house and chawl situate at Hanuman Lane, outside the Fort, with the title-deeds and documents relating thereto.

The property in question formerly belonged to one Raghoba Raghunath Joshi, who died without issue on the 17th May 1874, leaving a widow named Chandrabhagabai.

[453] The plaintiff and the third, fourth, fifth, sixth, and seventh defendants are the heirs, according to Hindu law, of Raghoba Raghunath.

Raghoba in his lifetime on the 16th May 1873, by deed of that date, mortgaged the property in question to Byramji Cursetji Desai for Rs. 2,000.

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This mortgage was paid off on the 18th day of May 1875; and one of the principal questions in the case was, whether this mortgage-debt was paid off by Chandrabhagabai out of moneys produced by the sale of her husband's ornaments, or whether it was paid off by the first and second defendants, as they allege, with their own moneys, at the request of Chandrabhagabai.

Chandrabhagabai died on the 28th February 1876, having by indenture—dated the 16th day of February 1876, and made between herself of the one part and the second and first defendants of the other part—conveyed the premises, by way of absolute sale, to the first and second defendants; the consideration for such conveyance being a sum of Rs. 4,000 alleged to be due to them by Chandrabhagabai.

The first defendant is Chandrabhagabai's sister, and the second defendant is the son of the first defendant, and, consequently, Chandrabhagabai's nephew.

The first defendant with her husband, Ganpat Nana Joshi, and the second defendant, her son, came to live with Chandrabhagabai shortly after Raghoba's death; and they continued to reside with Chandrabhagabai, on the premises, up to the time of her death.

It is alleged by the first and second defendants that they, and Ganpat Nana Joshi, advanced the following sums of money to Chandrabhagabai, *viz.*, Rs. 300 on the third day after Raghoba's death for his furneral expenses; subsequently, Rs. 200 for expenses, and to enable Chandrabhagabai to pay municipal bills; in the third month after Raghoba's death, Rs. 500 for maintenance; and Rs. 500 for Chandrabhagabai's pilgrimage expenses to Benares to perform the annual ceremonies of her husband.

[The learned Judge then went into the evidence with regard to the payment of the said sums, by the first and second defendants, **[454]** to Chandrabhagabai, and found, as a fact, that those sums— making, in all, Rs. 1,500—had been advanced to Chandrabhagabai in the manner and for the purposes alleged; and continued:—]

The purposes for which the sums were advanced to Chandrabhagabai were such as would have entitled her, as a Hindu widow, to charge them on her husband's estate.

[The learned Judge next found, as a fact, that the first and the second defendants did, at the request of Chandrabhagabai, pay off Byramji's mortgage for Rs. 2,000 on the property in question, and were by her authority put in possession of the title-deeds of the same, and thereupon became equitable mortgagees of the said property for the sum of Rs. 2,000 and that Chandrabhagabai was quite competent to impose such a charge upon the said property.

The learned Judge then continued:—]

According to the case of the first and second defendants, the conveyance of the 16th February, 1876, was executed by Chandrabhagabai under the following circumstances. Chandrabhagabai became ill with chronic dysentery after her return to Bombay from her pilgrimage to Benares. The second defendant says that, when Chandrabhagabai became ill, he demanded payment of the several sums he had advanced, and that she said she would pay him when she recovered; that, when she daily got worse, he on two or three occasions asked her to make some arrangement regarding the repayment of the money, and that she then said that he should advance a further sum of Rs. 500 for her funeral expenses and conveyancing charges, and cause a declaration of the advance to be taken

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down by an attorney; and in cross-examination he added: "Chandrabhagabai said when we demanded the money, that we should cause a conveyance to be prepared for the money," and, "on Sunday, the 13th February, at noon, Chandrabhagabai told me she wished us to take the property absolutely. She expressed that wish of her own accord; that was after our repeated demands upon her in her sick bed to repay the money: no lawyer or law-agent was consulted before Mr. Balkrishna. It was all arranged between us and Chandrabhagabai." And he added: "She offered to pay the costs of the conveyance when she asked us to deposit the Rs. 500 for her funeral expenses."

[455] Ganapatrav Nana in his cross-examination stated—"I went to Balkrishna to get a conveyance prepared. Chandrabhagabai told me to do so. She said—'I have no hopes of my recovery: save your money, I have no other means to pay it off. You had better get a conveyance prepared of this property.' She said that two days before Balkrishna came there."

Ganpatrav first went to request Mr. Balkrishna to come to his house on Sunday, the 13th February, 1876. Ganpatrav went to him at 4 P.M., but did not find him at home, and went again at half-past 10 the same night, and then found Mr. Balkrishna, who accompained him to Chandrabhagabai's house.

There is no doubt that Ganpatrav and his son Krishnarav then considered Chandrabhagabai in a precarious state, and were anxious to have the conveyance prepared as soon as possible.

Mr. Balkrishna accompanied Ganpatrav to the house; saw Chandrabhagabai; and took instructions from her for this conveyance. He took rough notes of the instructions; and the next day, from those rough notes, made an entry in his diary, which was put in as an exhibit at the hearing.

It will be observed that the entry in the diary states—"The lady informed me she was unable to repay all these sums to her sister, and, consequently, was going to sell absolutely the property to her for Rs. 4,000, already due by her to them." Whereas the sums deposed to by the defendants as having been borrowed by Chandrabhagabai from her sister amounted to Rs. 3,500 only, and, with reference to that difference, Mr. Balkrishna said on cross-examination—"I have no note of it, but think I asked her about the difference between the amount of the different sums given and the Rs. 4,000, and she said that the anticipated costs of preparation and execution of the conveyance and registration would cover the difference. I believe she also mentioned her own funeral expenses. She did not mention any amount, but she said her funeral expenses were to be defrayed by her sister and sister's son."

The conveyance was prepared by Mr. Balkrishna, and was on Wednesday, 16th February, executed by Chandrabhagabai in the presence of Mr. Balkrishna and his clerk. Mr. Balkrishna's **[456]** account of the execution is contained in the extract from his diary before alluded to. Previously to execution the deed had been interpreted to Chandrabhagabai by Survotum Sakharam, an interpreter of this Court; and previously to the execution she had been professionally examined by Mr. Pandurang Gopal, a graduate of the Grant Medical College, who had been specially called in for the purpose; and I think there can be no doubt that she understood the nature of the instrument she executed.

It will be observed that Mr. Balkrishna's diary says—"I have asked her (Chandrabhagabai) whether she had received the full sum of Rs. 4,000, and she replied that she had."

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There can be no doubt that she had not received the sum, and that nothing more had actually been paid to her than the beforementioned sums amounting to Rs. 3,500.

The expenses attending the preparation, execution, and registration of the conveyance were paid by the second defendant, and must have amounted, it seems, to about Rs. 170. As before stated, Chandrabhagabai died on the 28th February—twelve days after the execution of the conveyance.

The second defendant stated that he paid Chandrabhagabai's funeral expenses, amounting altogether to 400 or 425 rupees. He also stated that, shortly after Chandrabhagabai's death, he repaired the house and chawl—such repairs being necessary in consequence of the whole of the interior wood-work of the chawl being rotten, and that it had to be repaired in order to make the rooms habitable. He spent Rs. 3,000 on such repairs, out of which Rs. 40 or 50 were expended on the house. That, to complete the repairs, he borrowed Rs. 1,000 from the witness Byramji Cursetji Desai, to whom the property was then re-mortgaged by the first and second defendants for that amount. But the second defendant stated that he had no account of the sums spent on repairs, and that the amounts he mentioned were from memory; and at the close of the case, in answer to me, stated that he employed a Katchi, named Husan Ali, to do the repairs to the chawl, that he had gone to Katch, and that he had no books, as he paid him monthly.

No reliable evidence of the value of the property was given in the course of the case by either side; and at the close of the case **[457]** I gave the first and second defendants leave to call Mr. James Morris, a surveyor, who stated that he valued the chawl at Rs. 5,000 and the dwelling-house at Rs. 2,200, but that he could not tell what the value of the property was in 1876.

[The learned Judge then went into the evidence given by Mr. Morris with regard to the cost of the repairs alleged by the defendants to have been executed by them, and continued :—]

Thus according to Mr. Morris, the total expense of the repairs to the chawl and stables would not exceed Rs. 1,600. On a sale, I should think the expense of the repairs would not be realized; and, taking the total value of the present premises to be what Mr. Morris puts it at, *viz.*, Rs. 7,200, and assuming that Rs. 2,000 were expended on repairs after Chandrabhagabai's death, I think the value of the property, at her daughter's death, must have been at least Rs. 5,200, and, consequently, that Rs. 4,000 was an inadequate price.

I think the repairs done to the chawl and stable were necessary for the preservation of the building, and to render it habitable, and were done *bona fide* for that purpose.

It was contended that there was no legal necessity for the sale by Chandrabhagabai to the first and second defendants, and that the price was inadequate, and, consequently, that the sale by Chandrabhagabai was invalid as against the plaintiff and other heirs of Raghoba. But I think the case presents other and important features, and that the sale is invalid upon another ground.

I have found that the alleged consideration for this conveyance—Rs. 4,000—was below the value of the premises.

Chandrabhagabai was an illiterate woman, and at the date of the conveyance was sixty years old. She was at the time suffering from dysentery, and died only twelve days afterwards. She was then and had

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been, from a time shortly after her husband's death in 1874, living with the first defendant her sister, Raghunath, her sister's husband, and her nephew, the second defendant. After they came to live with her, a Pardesi servant she previously had, was discharged, and the second defendant collected the rents of the property for her and did her bazar business;—in fact, he managed her affairs and continued to do so, up to the time of her death.

[458] It appears she was not on good terms with her husband's relatives, and that they did not visit her, and no mention is made of any other relatives.

Thus it may fairly be inferred that the first and second defendants and Raghunath exercised considerable influence over her; and it would appear that there was no person to give her independent advice and assistance.

It cannot be said that she had the advice and assistance of a professional man, for Mr. Balkrishna was called in by the second defendant and his father. He advised her, it is true, that her power, as a Hindu widow, of selling her husband's estate was limited; but he made no enquiries respecting the value of the property or the adequacy of the price; and, although she told him that the conveyance was to be made for the purpose of paying her debts, he did not consult with her upon the advisability or feasibility of attaining her object by a mortgage, instead of a sale, but contented himself with taking her instructions for the conveyance, and the particulars of the sums making up the consideration money. Mr. Balkrishna, therefore, must, I think, be considered as employed by the first and second defendants—with the result that Chandrabhagabai had no independent advice, professional or other.

Thus we have here a sale of property made in payment of debts, and not for cash; for a consideration clearly inadequate; obtained by the near relatives of the vendor an aged, sick, and illiterate woman, over whom the vendees must under the circumstances, have had considerable influence, and who had no professional or other independent advice;—a sale, moreover, effected with some degree of precipitation, for Chandrabhagabai is stated to have consented to the sale on the Sunday at noon, and the conveyance was executed between four and five on the following Wednesday afternoon.

These being the facts, I think it is unnecessary to consider the question whether or not Chandrabhagabai was entitled to dispose of this property by way of absolute sale, since I am clearly of opinion that, assuming she had such a power, a sale made by her under such circumstances must nevertheless be set aside.

[459] The facts of this case bring it well within *Clark* v. *Malpas* (1), in which case a purchase from an illiterate man, who was ill at the time, was set aside—the price being inadequate, and the vendor having no professional advice, and the transaction being completed in haste, and in terms unduly disadvantageous to him. In *Baker* v. *Monk* (2), also, it was held that a purchaser from an old, infirm, and ignorant woman, having no professional advice, was bound to prove that he gave the full value for the property, and, failing in such proof, the transaction was set aside with costs; and in the latter case Lord Romilly said: "A man who comes to a lorn, aged woman, in a lower rank of life, and buys from her property without her having any consultation or advice on the subject with

(1) 31 Beav. 80; 4 DeG. F. & J. 401.] (2) 33 Beav. 429; 4 DeG. J. & S. 398.

any one else except his solicitor, can only support the transaction, if questioned in a Court of equity within a reasonable time, by proof that he gave the full value of the property for it."

The sale, then, must be set aside; but upon what terms, remains to be now considered. In the case of *Baker* v. *Monk* the conveyance was ordered to stand as a security for the money advanced; and the order in *Clark* v. *Malpas* would, it seems, have been to the like effect if money had been paid.

In *Phoolchandlall* v. *Raghoobans Sabhaye* (1), which was a suit by reversioners to set aside a deed of sale made by a Hindu widow of part of her husband's estate, on the ground that there was no necessity for such sale, Sir Barnes Peacock said: "If the widow was not authorized to sell any part of the estate, because it would have been more beneficial for the reversioners that she should raise the amount by mortgage instead of sale, I am of opinion that the reversioners could not set aside the deed of sale without placing the purchaser in the same position as that in which he would have been if the widow had mortgaged instead of selling."

I think this sale, therefore, ought only to be set aside upon the condition that the first and second defendants be placed in the same position as that which they would have held if Chandrabhagabai had executed, as she might have executed, a deed of mortgage instead of a deed of sale.

[460] I am of opinion, as I have already stated, that Chandrabhagabai might have executed a mortgage to secure the repayment of the various sums before mentioned—amounting, in all, to Rs. 3,500—advanced to her by the first and second defendants, and shall, therefore, direct that the conveyance stand as a security for the repayment of that sum.

Then, as to the sum alleged to have been expended by the first and second defendants in and about Chandrabhagabai's funeral expenses, I find no case in which the question whether a Hindu widow can charge her husband's estate with the payment of a sum of money raised for the payment of her funeral expenses has been decided. But it has been held that a Hindu widow may validly charge her husband's estate with the payment of money received for her maintenance, if the income of the estate be insufficient; and I see no reason why she should not likewise be able to charge the estate with a reasonable amount for the purpose of her proper and necessary funeral expenses, according to her station in life.

The second defendant states he expended Rs. 400 to Rs. 425 for Chandrabhagabai's funeral expenses. I cannot allow the first and second defendants any sum they might choose to pay; but such a reasonable sum as would be sufficient for the due performance of her funeral ceremonies, according to her station in life, should, I think, be allowed; but as to what would be such a reasonable sum, I must first be satisfied.

I cannot allow the costs of the conveyance, which, in my opinion, ought not to have been executed.

I am of opinion that the first and second defendants are not entitled to any allowance for repairs."

In Sugden's Vendors and Purchasers (14th ed., p. 747, par. 30), it is said: "If, however, a man has acted fraudulently, and is conscious of a defect in his title, and with that conviction in his mind expends a sum of money in improvements, he is not entitled to avail himself of the expenditure"; and, again, (p. 254, par. 43) "a purchaser, after he knows of

(1) 9 W.R. 107.

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the defect of the title, cannot claim an allowance for subsequent repairs"; and, treating of the terms upon which a conveyance is set aside in equity, Mr. Dart **[461]** says: (1) "Where a purchaser for value is evicted in equity, under a prior title, he will be credited with all moneys expended by him in necessary repairs or permanent improvements (except improvements made after he has discovered the defect of title); and will be debited with the rents which he has received." And, further on: (2) "A person, claiming under a fraudulent deed voidable at law cannot, however, claim for improvements or repairs, but the rule may be different when relief against the deed can be afforded only in equity, and the deed, though invalid, is not actually fraudulent." This implies that if the deed be fraudulent, a claim for repairs will not be allowed in equity.

Against these text-books there is the case of *Trevelyan* v. *Charter* (3) where Lord Cottenham, then Master of the Rolls, set aside a conveyance from a client to his attorney on the ground of fraud on the part of the attorney, and allowed the attorney an account for substantial improvements and repairs (the decree in the suit is to be found in Seton on Decrees, 3rd ed., p. 646), but the point does not seem to have been argued, and the deed was set aside many years afterwards against the attorney's representatives. The decree was afterwards affirmed in the House of Lords (4) but the question of repairs and improvements was not adverted to. This decision was not likely to have been overlooked by Lord St. Leonards and Mr. Dart, and, together with the other decisions on the question and the passage above cited from Sugden's Vendors and Purchasers, was referred to by counsel in argument in the case of *Stepney* v. *Biddulph* (5) before Lord Hatherley (then V.C. Wood), where the conveyance was set aside as being *ultra vires* of a railway company; but the Vice-Chancellor, having expressly found that no fraudulent design was proved, added: "It is clear, however, that the defendants must have the benefit of their improvements. Their object in making them was not to prevent the owner from being able to get back his estate, but *bona fide* to improve the lands; and it appears that there was an actual improvement.....the proceedings were by one who had obtained possession, though in an improper manner."

[462] The form of the decree in *Trevelyan* v. *Charter* (3) was set out in the third edition of Seton on Decrees (at p. 646); but that form of decree has been removed from the subsequent editions, and the form of decree in the fourth edition (at p. 1353) in a suit to set aside a deed, contains no allowances for repairs or improvements.

The rule is thus stated by Lord Cranworth in *Ramsden* v. *Dyson* (6): "If a stranger builds on my land, knowing it to be mine there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights."

I apprehend the same rule applies in the case of any expenses for repairs and lasting improvements. It was applied as regards lasting improvements in the case of *The Master of Clare Hall* v. *Harding* (7), where the defendant had made a claim to the premises, and plaintiff was held not entitled to recover from the defendant moneys expended by the plaintiff in lasting improvements with the knowledge of such claim.

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(1) Dart's Vendors and Purchasers (5th ed.) 911. (2) P. 912.
(3) 4 L.J. Ch. 209. (4) 11 Cl. & Fin. 714. (5) 13 W.R. Eng. 576.
(6) L.R. 1 H.L. 141. (7) 6 Hare 273.

I think, therefore, it must be considered as settled that where a conveyance is set aside, as here, for fraud, the purchaser is not entitled to any allowance for repairs or lasting improvements.

The first and second defendants must be taken to have known that their conveyance was fraudulent; that, although it might stand as a valid security for the amount to which Chandrabhagabai might legally charge the property, that was the extent of its validity; that it would not entitle them to retain possession as against the true owners; and that their retention of such possession was wrongful. It follows that, although it might be that the repairs were required for the very upholding of the premises, yet inasmuch as the first and second defendants must be taken to have known that their possession was wrongful, the principle of law I have adverted to applies, and they must be held not to be entitled to the return of any moneys expended on such repairs or improvements.

The questions as to any and what account should go for rents and outgoings subsequent to the date of the conveyance, and as **[463]** to what sum should be allowed to the first and second defendants for expenses incurred in and about Chandrabhagabai's funeral ceremonies, will stand over for consideration until a future date. At present I make the following order only:—

Order.—That the sale by Chandrabhagabai to the first and second defendants be set aside, and that the conveyance do stand as a security for the sum of Rs.3, 500 *plus* the sum allowed for funeral expenses (to be afterwards ascertained) with interest thereon, at 9 per cent., from date of the decree until payment, payable to the first and second defendants; the said premises to be reconveyed by the first and second defendants to the plaintiff and the remaining defendants on the payment of the above sum with interest as aforesaid; the first and second defendants to pay to the plaintiff his taxed costs of suit, save and except the costs of the first and second issues; plaintiff to pay to the first and second defendants their costs of the first and second issues, to be deducted from the costs payable by the first and second defendants to the plaintiff.

7th October.—The parties appeared this day; and an agreement having been come to in the meantime with respect to the remaining provisions of the decree, a decree in the form agreed upon was passed accordingly.

Solicitors for plaintiff.—Messrs. *Nanu and Harmusjee.*

Solicitor for first and second defendants.—Mr. *Khanderav Moroji.*

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ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice.

PESTONJI BEZONJI *v.* ABDOOL RAHMAN BIN SHAIK BUDOO.*

[21st and 28th June, 1881.]

Civil Procedure Code—Act X of 1877, *s.* 43—*Entitled to more than one remedy—Leave to omit to sue—First hearing—Mortgage—Suit on personal covenant—Limitation Act* (*XV of* 1877), *sch. II, art.* 132—*Money charged upon immoveable property.*

The plaintiff held a mortgage of certain immoveable property given to him by the defendant to secure the repayment of a loan of money with interest. The plaint stated the fact of the mortgage, but prayed only for a money decree. The

* Suit No. 187 of 1881.

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mortgage contained a personal undertaking to repay. Plaintiff's counsel, directly upon the case being called on for hearing and before the case had in any way been gone into, applied (under s. 43 of Act X of 1877, Civil Procedure Code) for leave to reserve his remedies [464] under the mortgage, taking then only a money decree, an application which, it is provided by that section, must be made "before the first hearing."

Held, that the application was not too late.

The said mortgage was dated 16th February, 1870, and the plaint in this suit was filed on the 28th April, 1881. The plaintiff maintained that he was not timebarred, as he had twelve years within which to bring the suit under art. 132 of sch. II of Act XV of 1877.

Held, that plaintiff was too late in bringing a suit for a money decree on the promise to pay in the mortgage, inasmuch as the article referred to was meant to apply to suits brought to enforce *against the property* payment of "money charged upon immoveable property," and not, under any circumstances whatever, to a suit for a mere money decree.

[**Over.**, 6 B. 719 (723) ; **F.**, 12 C.L.R. 165 (168) ; **R.**, 7 A. 120 (123) ; 10 B. 519 (526) ; **Expl.**, 11 M. 56 (59); **D.**, 9 A. 591 (602).]

THE plaint in this suit alleged a loan of a sum of money by the plaintiff to the defendant and a mortgage, dated the 16th of February, 1870, of certain immoveable property of the defendant to the plaintiff to secure the same; and prayed for a decree for the money lent, with interest. The mortgage contained a personal covenant to repay the said loan after a certain date, then long since passed, with interest thereon at a stated rate.

The suit being called on for hearing.

Starling for plaintiff (defendant in person) now applied, under s. 43 of Act X of 1877 (1), for leave to omit to sue for the remedies under the mortgage, reserving such remedies for a future action if so advised, and to take now merely a money decree on the covenant contained in the mortgage.

[SARGENT, J.— Are not you too late? The application must be made "before the first hearing", and we are now at the first hearing. Should you not have applied in chambers before the case was called on?]

"Before the first hearing" means before the case is heard. It has not yet been heard. The section does not say "before the case is called on for hearing."

[465] SARGENT, J.—I think it will be convenient to lay down that such an application as this may be made directly the case is called on. I think if the application is made, as it is here, directly the case is called on, and before anything whatever has been done towards the hearing of the case, it is in time under this section; and I grant the leave asked for accordingly.

Plaintiff, having proved his case, asked for a decree accordingly.

[SARGENT, J.—The mortgage containing the covenant on which you sue is dated 16th February, 1870, and this suit was not brought until the 28th April, 1881. Is this suit not barred?]

Starling for plaintiff.—The suit can be brought any time within twelve years under art. 132, sch. II of the Limitation Act XV of 1877,

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(1) The portion of the section referred to, runs thus :—

"A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

"For the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action."

which refers to suits to "enforce payment of money charged on immoveable property." This money is money "charged on immoveable property," and, therefore, that article applies to the present suit: *Juneswar Dass* v. *Mahabeer Singh* (1).

[SARGENT, J.—But you are suing on the undertaking to pay.]

The section does not say that I must seek to enforce the charge. An Act like this must be construed strictly. If the words, on the face of them, bear the construction I contend for, it should be given to them. They must not be stretched in order to curtail a plaintiff's right of action (2).

[SARGENT, J.—Does this section apply to mortgages at all? There are other sections applying specifically to mortgages. Does not this section apply only to "charges" specifically so called, such as *haks* and charges for providing for younger children, &c. ?]

"Charge" is a generic word, and includes mortgages. The specific remedies of mortgagee are provided for elsewhere it is true, but this provides a general remedy which the mortgagee shares with all other beneficiaries of a charge.

Cur. adv. vult.

JUDGMENT.

28th June.—SARGENT, J., gave his decision on the point of limitation raised.

I have considered the point of limitation, and I have come to the conclusion that art. 132 of the Limitation Act XV of [466] 1877 does not apply to such a case as this. It applies, I think, only to suits to enforce "*against the land*" money charged upon it, and not to suits for a mere money decree. The fact that the money lent, which is the subject of the suit, happens to be secured by a charge on immoveable property is, in my opinion, immaterial, if the suit is not brought to enforce that charge. There is no doubt that before Act IX of 1871, such suits could only be brought within three years, or, under special circumstances, six years—unless, indeed, the debt was a specialty debt as contemplated by s. 11 of Act XIV of 1859; and if it was intended to alter that state of things, one would expect to find that intention clearly expressed. Again, whenever a suit for a mere money decree is meant, the language used in the Act is different to the language used in this section. It is also to be remarked that art. 132 does not contain the words "secured by mortgage" which are found in 3 and 4 William IV, c. 27, s. 40, and which words, it was argued in *Forsyth* v. *Bristowe* (3), would extend to the case of an action on the covenant to pay the mortgage money. Parke, B., however, in delivering judgment, said: "It was a question whether that section applied to any but remedies against the realty." Nor would there appear to be any reason why this plaintiff should be placed in a better position in respect of obtaining a money decree, capable of execution against the general property of the defendant, than any of the ordinary creditors. He has taken care to secure a better position, it is true, but that is against the land comprised in the mortgage; and he must, in my opinion, confine himself to that if he claims the benefit of the longer period within which to enforce payment.

(1) 3 I.A. 1.
(2) *Ibid.*
(3) 8 Exch. 716.

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[467] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice, in chambers.

KEVALDAS SAKARCHAND *v.* PESTONJI NASSERVANJI AND OTHERS.* [9th July, 1881.]

Inspection where to be given—Contract made in Bombay to be performed upcountry—Civil Procedure Code, s. 132.

Defendant was owner of certain cotton-ginning factories at and near A in the Mofussil, and had also a place of business in Bombay. He entered into a contract in Bombay with the plaintiff to gin certain cotton of the plaintiff's at the said factories of the defendant in the Mofussil. Plaintiff brought a suit for damages for the breach of this contract, and demanded inspection, in Bombay, of all defendant's books relating to the business of the said ginning factories belonging to the defendant. The defendant was willing to give the inspection asked for; but contended that it should be had at A, where all the books in question were kept, and objected to bringing the books down to Bombay as demanded by the plaintiff.

Held, that the contract, though made in Bombay, having been intended to be performed at a considerable distance from Bombay at and near A where the business of ginning was conducted, and where the books relating to the said business were kept, A was the proper place at which to give inspection.

THIS was a suit for damages for the breach of an agreement alleged to have been entered into between the plaintiff and the defendant in Bombay, whereby the defendant agreed to gin certain cotton of the plaintiff's at the defendant's ginning factories at Anklesvar, Pali, and Hansot, in the Broach Collectorate, in certain specified quantities, and at certain specified rates of payment, and in preference to the cotton of all other customers. The contract contained other provisions in respect of which also damages were sought: which provisions, however, it is, for the present purpose, unnecessary to specify.

Plaintiff wrote to the defendant demanding inspection, in Bombay, of all defendant's books relating to the business of ginning cotton carried on by him at his said three factories at Pali, Hansot, and Anklesvar. Defendant, however, objected to give the inspection asked for in Bombay, on the ground of the immense inconvenience to his business it would entail to remove to Bombay so many books that were in daily use at his factories; but offered to give inspection of all the books in question at Anklesvar. The defendant's head-office was at Anklesvar, and the accounts **[468]** of all his three factories, he alleged, were made up there. Anklesvar is a station 198 miles from Bombay, on the Bombay and Baroda Railway. The plaintiff objected to go to Anklesvar to take inspection; and, accordingly, took out a summons against the defendant to show cause why the inspection asked for should not be given at the office of the defendant's attorney in Bombay.

The affidavit, on which the summons was granted, alleged that the books in question were not then required by the defendant at his factories, as all work at the said factories was then (it being the rainy season) suspended; that it was necessary the books in question should be brought to Bombay in order that translations might be made of certain entries; and that a full and free inspection would not be had up-country, where the defendant could more easily obstruct the same than in Bombay.

* Suit No. 165 of 1881.

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JUDGMENT.

July 9, 1881.—The summons came on to be heard before Sir Charles Sargent.

Inverarity (for defendant) showed cause.—The books of which inspection is asked amount to fifty in number, and constitute the bulk of the books relating to the defendant's business at his several factories. Our affidavit shows that it would inflict the most serious inconvenience on the defendant if these books had to be brought down to Bombay. The factories are not now at work, it is true; but all the accounts of the past season are being made up, and the books are in daily request for that purpose. They contain some two hundred accounts, which are now being made up. The defendant, it is true, has a place of business in Bombay, but his head-office is at Anklesvar. The contract was not one capable of performance any where; it was to be performed at Ankleswar.

In such a case the rule must be that inspection is to be had, if required, at that place where the contract was to be performed, and where the books are. Any other rule would result in putting a grievous instrument of oppression into the plaintiff's hands. He might purposely bring his action in Bombay, rather than in the place where the books are, simply in order to cause us to come to some unjust compromise rather than suffer the heavy loss and inconvenience which would certainly be entailed upon **[469]** us if we were forced to bring all our books down to Bombay. All our books are now at Anklesvar, and it is much more reasonable that the plaintiff should send up some one to examine them there, than that our business should be stopped for weeks, or longer, while the plaintiff is taking inspection of them in Bombay. Moreover, not only will all our books have to come down, but also the *mehtas* who alone can explain them. And, as to having translations made of certain entries, we undertake to let the plaintiff take true copies of any entries he pleases, and allow translations of such copies to be used in the trial.

Skipsey (for the plaintiff) *contra*.—My affidavit shows that it is not true that the books are wanted at Anklesvar at the present moment for the proper conduct of defendant's business. At any rate, some can be spared; they can send down a few at a time without any inconvenience to themselves. Section 132 of the Civil Procedure Code seems to contemplate that inspection should be given at the office of the attorney of the party giving it.

[SARGENT, J.—The words are "at his pleader's office or some other convenient place." The defendants say their attorney's office in Bombay is a most inconvenient place.]

No doubt it is not so convenient to them as Anklesvar, but that is equally inconvenient to us, and the contract having been made and the suit brought here, in Bombay, all proceedings in that suit should be had in Bombay.

SARGENT, J.—I feel no hesitation in holding that where parties have entered into a contract which, though made in Bombay, is intended to be performed at or near the place where the party to perform it carries on his principal business and keeps his books, that if general inspection be sought of those books in an action brought against that party, it should ordinarily, if the defendant requires it, be taken at the place where he, the defendant, keeps his books. The parties must be taken to have contemplated that it should be so, and that place must under the circumstances be deemed to be the "convenient place." The plaintiff can bring

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his action there if he likes, and, if he chooses to bring it in Bombay, he cannot claim the right to suit his own convenience at the cost of most serious inconvenience to the defendant. But I do not say that the [470] costs of the rule and of taking inspection at defendant's place of business up-country should be borne entirely by the plaintiff in the event of his having to pay the costs of the suit. As to that, I say nothing now, but reserve the question of the costs of taking the inspection until the hearing. But this much is quite clear, that, in such a case as this, it would be most unreasonable to require the defendant to bring all these books down to Bombay to the serious obstruction of his business in the meantime.

Costs of the summons costs in the cause.

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5 B. 470 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Sir Charles Sargent, Kt., Mr. Justice M. Melvill and Mr. Justice Kemball.

SHA NAGINDAS JEYCHAND (*Plaintiff*) *v.* HALALKORE NATHWA GHEESLA, DECEASED, BY HIS WIDOW BAI PANEE (*Defendant*).*

[14th June, 1881.]

General Stamp Act I of 1879, *sch. I, arts.* 16 *and* 21, *ss.* 21, 23, 24, 27—*Judicial sale—Certificate of sale, stamp duty on—Sale or transfer subject to a mortgage or other lien—Mortgage-debt "part of the consideration"—Interest—Proclamation of sale.*

Where a certificate of sale, granted to the purchaser of property sold by public auction under an order of Court, has expressly set out that such sale is made subject to the mortgage right of a third party, the principal sum (but not the interest) due at the time of the sale on such mortgage, is to be deemed "part of the consideration in respect whereof the transfer is chargeable with *ad-valorem* duty" under s. 24 of the Indian Stamp Act: so that the whole consideration in respect of which such sale is, under arts. 16 and 21 of sch. I of that Act, liable to stamp duty, is the sum of the purchase-money and the principal money so due on the mortgage. The certificate of sale, therefore, whenever it is possible, should set out the exact amount that is due, at the time of the sale, in respect of the principal sum secured by the mortgage.

Semble.—It is otherwise if the mortgage be only recited in the proclamation of sale, and not expressly set out, as an existing incumbrance on the property sold, in the certificate of sale.

Arrears of *interest* due on the mortgage are to be excluded from such calculation, since s. 23 of the Indian Stamp Act—which enacts that "where interest is expressly made payable by the terms of the instrument, [471] such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein"—applies as much in this case as if the document of transfer, on which the stamp duty was to be calculated, had been the document itself which stipulated for the payment of interest.

[N.F., 10 C. 92=13 C.L.R. 164; 7 M. 421 (F.B.); F., 15 B. 532; R., 6 O.C. 76 (78); 1 S.L.R. 44 (46).]

THIS case was referred for the opinion of the High Court by Rao Bahadur Mukundrai Manirai, First Class Subordinate Judge at Ahmedabad, under s. 49 of the General Stamp Act I of 1879.

The facts of the case, as stated by the Subordinate Judge, are briefly these. The plaintiff, Nagindas, having attached a house, the property of his judgment-debtor (the defendant), one Kuber Hargovan informed the

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* Civil Reference, No. 16 of 1880.

Subordinate Court of Ahmedabad, which issued the attachment, that he (Kuber) had a mortgage on the said house for Rs. 49. Kuber's claim, accordingly, was mentioned in the proclamation of sale, as directed by s. 287 of the Civil Procedure Code (Act X of 1877). At the Court sale the house was purchased by one Bhagia Gola Sakra for Rs. 10. The certificate which the Court granted to the purchaser was written on a stamp paper of *eight* annas, and stated that the sale was made subject to the mortgage of Kuber for Rs. 49. The Subordinate Judge forwarded a copy of the certificate of sale to the Sub-Registrar of Ahmedabad, as directed by s. 89 of Act III of 1877, amended by Act XII of 1879, s. 107. The Sub-Registrar and the Inspector-General of Registration were of opinion that the certificate was insufficiently stamped. The Subordinate Judge, therefore, submitted the question for the decision of the High Court with the following remarks :—

"The auction purchaser is not subjected by the sale itself to any further payment; nor is the transfer contingent on the payment, by him, of the mortgage money. He purchases the right of the judgment-debtor only; and the specification in the proclamation of the mortgage incumbrance, required to be inserted by s. 287 of the Civil Procedure Code, is intended to prevent a purchaser from being unknowingly entrapped, and the fact is notified simply to enable the purchaser to judge of the nature and value of the property he is going to purchase. Article 16 of sch. I of the General Stamp Act (No. I of 1879) clearly **[472]** directs that the proper stamp duty on a certificate of sale is 'the same as a conveyance (art. 21) for a consideration equal to the amount of the *purchase-money*' and it is a question whether we shall be justified in demanding stamp duty on a sum higher than that amount."

There was no appearance of parties in the High Court.

JUDGMENT.

The following is the decision of the Full Court delivered by

WESTROPP, C.J.—The question, referred to us by the Subordinate Judge of Ahmedabad, as put by him was : "Whether a certificate of sale, granted to the purchaser of property sold by public auction by our Courts, and which (property) is proclaimed, under s. 287 of the Civil Procedure Code, to be incumbered with the mortgage right of a third party, should be charged, under art. 16 of sch. I" (of the Indian Stamp Act I of 1879), "with a stamp duty for a consideration equal to the amount for which the auction-purchaser purchases the property only, or for a consideration equal to that amount *plus* the amount of the mortgage to which the property is liable ?" We are not prepared to hold that the mere mention of a mortgage claim in the proclamation of sale would warrant a reply in the affirmative to the question of the Subordinate Judge. But, on procuring from him the certificate of sale, we find that the sale is therein expressly mentioned to have been made "subject to the mortgage of Kuber Hargovan for Rs. 49." Under art. 16 of sch. I of the Indian Stamp Act I of 1879, the duty on a "certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Court, or Collector or other Revenue Officer" is "the same duty as a conveyance (art. 21) for a consideration equal to the amount of the purchase-money ;" and s. 24 of the same Act enacts that "where any property is transferred to any person in consideration, wholly or in part, of any debt due to him, or subject (1), either certainly or

(1) *Vide Mortimore* v. *Commissioners of Inland Revenue*, 2 H. & C. 838.

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contingently, to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the [473] transfer is chargeable with *ad-valorem* duty" (1). That is the present law with respect to the stamp duty on a private conveyance. It has been held here by a Bench of three Judges (Sargent, Acting C.J., Melvill and Pinhey, JJ.), on the 27th of January, 1880, in Civil Reference 27 of 1879, that, having regard to art. 16 of sch. I of Act I of 1879, there is not any difference in respect of stamp duty between a certificate of sale by public auction and a conveyance by way of private sale. We think that decision is correct, and we are prepared to follow it. Therefore, if the property be sold expressly subject to a debt due upon a mortgage of such property, that debt must be added to the further sum (if any) given as purchase-money, in order to ascertain the total amount of consideration of the certificate of sale or private conveyance, as the case may be, upon which stamp duty is payable. In the present case the certificate of sale mentions that the sale was made "subject to the mortgage of Kuber Hargovan for Rs. 49." The manner in which the certificate is worded leaves it doubtful whether the sum of Rs. 49, mentioned in it, indicates the sum due on the mortgage at the time of the sale, or merely the original sum in respect of which the mortgage was granted. The sum of Rs. 49 may be the whole or only part of the principal money originally secured by the mortgage, or the whole of such principal money and interest, or part of such principal money and interest. We have not any reason for supposing that there was any fraudulent intention in referring to the sum of Rs. 49 in the mode in which it is mentioned in the certificate of sale. But it should be remembered that s. 27 of Act I of 1879, directs that "the consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of duty with which it is chargeable, shall be fully and truly set forth therein." This direction is of especial importance where the conveyance or certificate of sale is made subject to a mortgage or other incumbrance. In such a case we think that, under s. 24 of the Act, when taken in combination with s. 23, the amount due on the mortgage or other incumbrance, for principal only, at the time of the sale, is chargeable with stamp duty, and that interest is not so chargeable. Section 23 of Act I of 1879 (which is a re-enactment of s. 9 [474] of Act XVIII of 1869) is as follows:—"Where interest is expressly made payable by the terms of the instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein." Hence it is certain that if, in the mortgage itself, interest were expressly made payable, stamp duty would not have been leviable on that mortgage in respect of such interest. The exemption from stamp duty in respect of interest does not, however, appear to us to be limited to the mortgage or other instrument by which the interest was originally made payable. Where property is transferred expressly subject to a mortgage or other incumbrance, we think that the transferee, or such other person as pays the stamp duty on the document of transfer, would be entitled to the benefit of s. 23, if, in such document of transfer, it were expressly mentioned that the transfer is made subject to interest already due, or thereafter

(1) *Vide In re Gill's Conveyance*, 8 Exch. 376.

to accrue due on the mortgage or other incumbrance, subject to which the transfer is expressly made. Section 24 of Act I of 1879 is new in India. We have not been able to discover any similar provision in previous Indian enactments. It seems to have been copied from s. 73 of the English Stamp Act of 1870 (Statute 33 and 34 Vic., c. 97). The prototype of that section is to be found in the following enactment under the title or article. "Conveyance" in Part I of the schedule (1) to the Statute 55, Geo. III., c. 184; "And where any lands or other property shall be sold or conveyed in consideration, wholly or in part, of any sum of money charged thereon by way of mortgage, wadset, or otherwise, and then due and owing to the purchaser, or shall be sold and conveyed subject to any mortgage, wadset, bond or other debt, or to any gross or entire sum of money to be afterwards paid by the purchaser, such sum of money or debt shall be deemed the purchase or consideration money, or part of the purchase or consideration money, as the case may be, in respect whereof the said *ad valorem* duty is to be paid." In consequence of the decision in *The Marquis of Chandos* v. *The Commissioners of Inland Revenue* (2), the passage now cited from the Statute 55, Geo. III., **[475]** c. 184, was amended in 1853 by s. 10 (1) of the Statute 16 and 17 Vic., c. 59. That section, after reciting the concluding portion of the passage above quoted, and that "it has been held and determined that the said *ad valorem* duty is payable in respect of any such sum or debt only where the purchaser is personally liable or bound or undertakes or agrees to pay the same, or to indemnify the vendor against the same; and it is expedient to alter and amend the law in this respect," enacted that "Where any lands or other property shall be sold and conveyed subject to any mortgage, wadset, or bond, or other debt, or to any gross or entire sum of money, such sum of money, or debt shall be deemed the purchase or consideration money, or part of the purchase or consideration money, as the case may be, in respect whereof the said *ad valorem* duty shall be paid, notwithstanding the purchaser shall not be or become personally liable, or shall not undertake or agree to pay the same, anything in any act or otherwise to the contrary notwithstanding." It should be especially noted that, in the Statute 33 and 34 Vic., c. 97, there is not any provision so advantageous to the subject as s. 23 of Act I of 1879. On the contrary, the second clause of s. 71 of the Statute 33 and 34 Vic., c. 97, enacted that "Where the consideration or any part of the consideration for a conveyance or sale consists of any security, not being a marketable security, such conveyance is to be charged with *ad-valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon such security"(3). The Indian Legislature, while in Act I of 1879, s. 21, adopting the first clause of s. 71 of the Statute 33 and 34 Vic., c. 97, relating to stock or any other marketable security, has deliberately discarded the second clause of that section just quoted. This leads to the conclusion that the provisions of s. 23 of Act I of 1879 were intended, by that Legislature, to apply as well to transfers of property subject to non-marketable securities, as to the conveyances or other instruments originally stipulating for the payment of interest.

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(1) Repealed by Stat. 33 and 34 Vic., c. 99, Schedule.

(2) 6 Exch. 464. A criticism of that case by Mr. Tilsley, the Solicitor to the Board of Inland Revenue, is contained in page 56th of the supplement published in 1853 to the 1st ed. of his Treatise on the Stamp Laws.

(3) See also, to the same effect, the concluding passage under the title "Conveyance" in the schedule to the English Statute 13 and 14 Vic., c. 97.

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Section 24 of Act I of 1879, which, as already noticed, makes its appearance in the Indian Statute Book for the first time in [476] Act I of 1879, even though, as we think, properly controlled by s. 23 in so far as interest is concerned, imposes both upon private purchasers and upon the officers of Government a difficult task. When property is sold subject to a mortgage or other incumbrance, from whom is the amount due for principal to be ascertained? It may be replied: from the mortgagor and mortgagee, or other incumbrancer. But in India the mortgagor and mortgagee, even though they may concur as to the existence or validity of the mortgage (which they often do not), are seldom in accord as to the amount due upon it. If the existence of the mortgage be not altogether concealed from a private purchaser by the mortgagor and vendor, as it frequently is, he generally would have great, if not insuperable, difficulty in ascertaining the amount due upon it. In the case of Court sales, s. 287 of the Civil Procedure Code of 1877, confers certain powers on the Court for the purpose of preparing the proclamation of intended sale with a view to afford to intending purchasers such information with regard to the property as the Court may find itself able to procure. The mortgagor and mortgagee or other incumbrancer may not always be present in the locality and available for examination: and, even if they be so, their evidence is not always to be trusted. Sometimes they are in direct conflict as to the facts: at other times they are in collusion to charge the property with a fictitious mortgage in order to defeat the judgment-creditor. It would be hard on the purchaser that his conveyance or certificate of sale, if insufficiently stamped in consequence of misinformation or want of information as to the amount due on a mortgage or incumbrance subject to which the property is sold to him, should be rendered ineffectual, or that he should be subject to a penalty in order to have the document properly stamped. If s. 24 be ultimately retained on the Statute Book, which we hope it may not, it is fair that some reference to it should be made under the article 'Conveyance' in the schedule to the Act. The majority of people look to the schedule for the stamp duty. As it now stands, they would find no hint there that the amount due on a mortgage or incumbrance, subject to which the property is sold, is to be regarded as part of the consideration liable to duty. A similar precaution to that now suggested has been taken by the Imperial Legislature, which under the title 'Conveyance' [477] in Statute 33 and 34 Vic., c. 97, refers to its 73rd section amongst others, as explanatory of the mode in which the stamp duty on conveyances is to be calculated.

It would, we think, be a wholly erroneous practice to charge stamp duty on the amounts of claims against the property mentioned only in the proclamation of sale; inasmuch as, by the circular orders of this Court, the proclamation of sale must contain an express intimation that "the Court does not warrant the title of judgment-debtor or any other claimant specified in the proclamation to any lot set forth in it or any interest therein or charge or claim thereon." See Circular Order Book, page 175, cl. (*b*) of the form of proclamation of sale, and page 180 C, rule 11, cl. (*b*) of the Government Rules regulating sales by Collectors. The Civil Procedure Code of 1877, ss. 282 and 295, show that property may be attached and sold subject to a mortgage or lien. The case of *Faquir Baksh* v. *Chutterdharee Chowdry* (1) shows what the words, "subject to a

(1) 14. W.R.C.R. 209.

mortgage" which occur in s. 271 of Act VIII of 1859 (the section in that Act analogous to s. 295 of Act X of 1877), have by the High Court of Calcutta been held to mean. It may thence be inferred that a judicial sale subject to a mortgage means a sale made expressly so subject—*i. e.*, by the certificate of sale. The power of the Court, to sell expressly subject to a mortgage or other lien or incumbrance, is one which manifestly ought to be exercised with the greatest caution, and in none except the clearest cases. In the present case, the sale to the auction-purchaser having been, by the certificate of sale, made expressly "subject to the mortgage of Kuber Hargovan for Rs. 49," and there being nothing to show that any portion of that sum consisted of interest, or that less than that sum was due on the mortgage for principal at the time of the sale, we hold that the stamp duty chargeable on the certificate of sale should be upon a consideration in the whole of Rs. 59, *viz.*, Rs. 49, the sum named in respect of the mortgage,and Rs. 10, the amount of the purchase-money payable by the purchaser, Bhagia Golla Sakra.

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5 B. 478 (F.B.).

[478] APPELLATE CIVIL.—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill, Mr. Justice Kemball and Mr. Justice Pinhey.

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*REFERENCE FROM THE CHIEF COMMISSIONER OF CENTRAL PROVINCES.† [4th July, 1881].

***Indemnity note, stamp duty on—Stamp Act, I of** 1879, **sch. I, arts. 5 and** 28.

An indemnity note, passed to a railway company by a consignee and his surety in respect of goods delivered to the consignee, and for which he is unable to produce the railway receipt—by which note they undertake to hold the railway company, its agents, and servants, harmless and indemnified in respect of all claims to the said goods—is not 'an indemnity bond' falling under art. 28, sch. I of the Indian Stamp Act I of 1879, but is an agreement falling under cl. (*c*) art. 5, sch. I of that Act, and, consequently chargeable only, with a stamp duty of *eight* annas.

[D., L.B.R. (1893—1900) 119.]

THE Chief Commissioner of Central Provinces submitted, for the opinion of the High Court, the question—what was the proper amount of stamp duty chargeable on an indemnity note? in the following form :—

"I hereby acknowledge to have received from the State Railway valued at Rupees which was despatched to my address from the station of the State Railway on or about the day of , the railway receipt for which has been lost; and for myself, my heirs, executors, and administrators. I undertake, in consideration of such delivery as aforesaid, to hold the State Railway, its agents, and servants harmless and indemnified in respect of all claims to the said goods; and I, the undersigned, signing below , consignee of these goods, certify that the first signor is the *bona-fide* owner of the goods, and that I, the undersigned surety, undertake the whole of the said liability equally with the consignee, and for this purpose I affix my signature hereto.

Signature of consignee :
Witness :
Signature of surety :
Witness :"

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* [It is not found in I.L.R.—ED.]

† Civil Reference No. 24 of 1881.

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The letter of reference from the Chief Commissioner stated that the form of indemnity notes used by the Great Indian [479] Peninsula railway was identical with the form of the above note, and that the instructions issued by that Railway Company to their servants were to the effect that such indemnity notes were chargeable with an *eight*-anna stamp, irrespective of the value of the goods to which they might relate. The letter of reference further observed :—

"The State Railway authorities point out that such instructions of the G. I. P. Railway Company are opposed to art. 28, sch. I of Act I of 1879, and ask—(1) with what duty is an indemnity note chargeable, and (2) what description of stamp should be used?

"The G.I.P. Railway Company do not state the grounds for their instructions that indemnity notes are chargeable only with an eight-anna stamp. Apparently, such a note is held to fall under art. 5 of sch. I of Act I of 1879 as being an agreement or memorandum of an agreement not otherwise provided for by that Act.

"The Chief Commissioner is not inclined to this view of the matter. The indemnity note is for all purposes an indemnity bond; for, in consideration of a certain contingency—*viz.*, the delivery of goods—it holds the Railway Company harmless and indemnified in respect of all claims. An indemnity bond is provided for by art. 28 of sch. I of Act I of 1879, and is chargeable with the same stamp duty as a security bond (art. 14). A security bond is again chargeable with the same *ad valorem* duty as an ordinary bond (No. 13); and the definition of bond contained in s. 3 of the Act, cls. 4, (*a*) and (*b*), seems to apply to such an engagement as that contracted by the indemnity note.

"The replies which the Chief Commissioner would, then, make to the enquiries of the State Railway authorities are—(1) an indemnity note is an indemnity bond, and falls under art. 28 of sch. I of Act I of 1879; (2) the description of stamp to be used is an impressed stamp. As, however, some of the officers consulted by this Administration have held different views to those set forth above, and as the G. I. P. Railway Company is following a practice different to that prescribed for the State Railway Company, the Chief Commissioner desires to set the matter at rest by obtaining a definite ruling of the learned Judges of the Bombay High Court of Judicature on the point."

JUDGMENT.

[480] The following judgment of the Full Court was delivered by

WESTROPP, C.J.—The Chief Commissioner of the Central Provinces has referred to this Court the question as to the proper stamp for an indemnity note, such as that annexed to his letter of reference. His opinion leans in favour of its being an indemnity bond, and, as such, ranging under art. 28 of sch. I of Act I of 1879, in which case it would be liable to the same *ad-valorem* duty as a security bond: (art. 14). The Act, however, by its glossarial s. (3), cl. 4, defines a bond as follows :—

"Bond" means—

"(*a*) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;

"(*b*) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and

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" (*c*) any instrument so attested whereby a person obliges himself to deliver grain or other agricultural produce to another."

In the indemnity note submitted for our opinion, there not being any such condition as mentioned in sub-cl. (*a*), or any obligation to deliver grain or other agricultural produce as mentioned in sub-cl. (*c*), it is quite clear that the indemnity note does not fall within either of those definitions. It may, however, be suggested that it comes within sub-cl. (*b*), as it is attested by a witness; is not payable to order or to bearer; and the executants may, in virtue of the indemnity note, have to pay money to another. Each of these three last allegations is correct; but the last of them falls short of the exigency of the definition, for the executants do not *oblige themselves to pay money to another*. What the executants, by the indemnity note, contract to do is, " to hold the State Railway, its agents, and servants, harmless and indemnified in respect of all claims to the said goods" delivered to the principal executant. This might be done in various ways beside by the payment of money. For instance, if the principal executant were not, in fact, entitled to the delivery of the goods mentioned in the note, and the real owner put forward a claim to **[481]** them, the executants, by immediately delivering the goods in perfect order to the real owner, would keep the State Railway harmless and indemnified in respect of the claim so made to the goods. Again, if in lieu of the original goods, the subject of the indemnity note, the executants deliver other goods, of a similar or different character, which the real owner accepts in lieu and satisfaction of the original goods, the executants would have kept the State Railway harmless and indemnified in respect of the claim to the original goods. Many other modes might be suggested whereby the executants, without making any direct payment of money to the State Railway might yet keep them harmless and indemnified against claims to the goods. Often, no doubt, the most convenient mode of indemnifying the State Railway, would be by paying in money the value of the goods and all costs incurred by the true claimant inmaking good his claim, and costs which the State Railway may have incurred in the matter; but the indemnity note contains no contract that the payment of money shall necessarily be the mode of keeping the State Railway harmless and indemnified, and the indemnity note leaves it open to the executants to adopt such other mode, as may at the time be practicable, to keep the State Railway harmless and indemnified in respect of the goods, the subject of the indemnity note. That note appears to us to be an agreement ranging under cl. (*c*), art. 5, sch. I of Act I of 1879, and, therefore, chargeable with a stamp duty of eight annas. The practice of the Great Indian Peninsula Railway in such matters, as described in the letter of reference from the Chief Commissioner, seems to be correct.

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[482] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Birdwood.

PRANJIVAN DAYARAM AND OTHERS (*Original Defendants*), *Appellants v.* BAI REVA, DAUGHTER OF RAJARAM NARBHERAM, MINOR, BY HER GUARDIAN HER HUSBAND KASHIRAM FAKIR (*Original Plaintiff*), *Respondent.** [22nd March, 1881.]

Bhagdari *lands in the district of Broach—Special custom as to succession—Hindu and Mahomedans—Males perferred to females.*

The plaintiff, as heir of her father (a deceased Hindu *bhagdar*) sued the sons of sisters of her father's paternal uncle for possession of certain *bhagdari* lands situate in a village in the Broach Collectorate. The defendants pleaded that they were entitled to the property under a special custom regulating the succession to *bhagdari* lands in the Collectorate of Broach under which custom, on the death of a *bhagdari* whether Hindu or Mahomedan; without male issue, his nearest male relations (after the death of his widow) whether sprung through male or female relatives of the deceased *bhagdar* succeed to his *bhagdari* lands, to the exclusion of his daughter or sister.

Held—that the custom alleged was sufficiently proved, and that the defendants were entitled to retain possession of the *bhagdari* lands in question.

Per Curiam.—The custom alleged being, if not universal, at least general in the Broach Collectorate, it should, in the case of any particular village, at any rate on evidence being given of its continuance in other similar adjacent villages, if not in the particular village itself (though it would always be more satisfactory if this could be done), be held still to survive, unless and until the opposite party prove the adoption of some other custom, or of the ordinary rules of inheritance, in the particular village, or, failing such proof, the general prevalence of such rules or such opposing custom in other similar adjacent villages.

Quære—whether males sprung of male relatives of a deceased *bhagdar* have priority over males sprung of female relatives of the same.

Quære—whether a daughter or sister of a deceased *bhagdar* is wholly excluded, by the custom, from the line of inheritance, or would on failure of male relations, succeed to the *bhagdari* lands.

Bai Kheda v. *Dasu Sale* (1) referred to.

Colonel Monier Williams' "Memoir of the Zillah of Baroche" referred to and commented on.

[R., 12 Bom. L.R. 573=7 Ind. Cas. 659 (660).]

THIS was an appeal from the decision of Rav Bahadur Mangeshrav Balvant, First Class Subordinate Judge of Surat, in original suit No. 893 of 1875.

[483] The plaintiff, Bai Reva, sued for possession of certain immoveable property with mesne profits, as the heir of her father, Rajaram, who died in 1865. The property chiefly consisted of *inam*, *khata*, and *bhagdari* land situate in a village in the Collectorate of Broach. The following are, shortly, the facts of the case:—

One Raghunath, a Brahmin by caste, had two sons, Narbheram and Haribhai; and two daughters, Bai Kesar and Bai Kapur. Narbheram died in 1863, leaving a son named Rajaram and his brother, Haribhai. Rajaram died in 1865, leaving a daughter (the plaintiff, Bai Reva) as well as his uncle, Haribhai, him surviving. Rajaram owned immoveable property, chiefly consisting of *inam*, *khata*, and *bhagdari* lands situate in the village of

* Appeal No. 3 of 1881.

(1) 5 B.H.C.R.A.C.J. 123.

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Saen, in the district of Broach. On Rajaram's death, his uncle, Haribhai, obtained possession of his (Rajaram's) *bhagdari* lands, and was recognized as *bhagdar* by the Revenue authorities. The same authorities recognized the plaintiff's right to her father's other lands. On the death of Haribhai in 1869, his widow, Bai Amba succeeded to the *bhagdari* lands and sold them to Pranjivan and Harishankar (defendants 1 and 2), sons of Bai Kapur, and Mancharam (defendant No. 4), son of Bai Kesar by Vallabh (defendant No. 3). Bai Amba died in 1871. In 1872, defendants 1, 2 and 4 (Pranjivan, Harishankar and Mancharam) mortgaged the *bhagdari* and other lands, the property in dispute, to defendants 5, 6 and 7, who were in possession of them at the date of the institution of the suit. The plaintiff sued in *forma pauperis* and, being a minor, was represented by her husband, Kashiram, as her guardian.

Defendants 1, 2 and 4, pleaded, regarding the *bhagdari* lands in dispute, that they were entitled to them by virtue of their purchase, and under a special custom prevailing in the district of Broach. (The other allegations are immaterial.) Defendant No. 3 answered that he had no claim to the property in dispute. The plea of defendants 5, 6 and 7 was that they were mortgagees, and were willing to give up the mortgaged property on receiving their money.

The Subordinate Judge found, on the evidence, that Rajaram and his uncle, Haribhai, were divided in estate, and that the **[484]** custom relied upon by the defendants was not proved. He, therefore, held the plaintiff entitled to the immoveable property claimed by her, as heir of her father, according to the general principles of the Hindu law of inheritance. The following are his remarks on the question of the custom, and his reasons for awarding the plaintiff's claim to the immoveable property in dispute:—

"In Monier Williams' Memoirs on the Zilla of Broach (put in in this suit) it is stated that if a *bhagdar* die without male issue, his nearest male relative succeeds in preference to daughters and sisters. But the extract which is recorded in this case, does not clearly show that the particular custom therein recited equally applies to Mahomedan and Hindu *bhagdars*, or to either of them; and, in the absence of any such clear specification, I am, on the evidence recorded in this case, rather inclined to hold that the custom referred to has reference only to the Mahomedan *bhagdars*, and not to Hindus. I decided a similar case five days ago, wherein the parties were Mahomedans; and in that case, on the evidence recorded, I held that among the Mahomedan *bhagdars* such a custom existed; whereas, on the evidence recorded in this case, I find that such is not the case among Hindu *bhagdars*. * * * * * The decision of our High Court relied on (5 Bom. H.C. Rep. A. C. J. 123), also refers to Mahomedan *bhagdars*, and not to Hindus, and hence I hold that that decision is inapplicable to this case. The evidence, therefore, afforded by Colonel Monier Williams' work is not so conclusive as to justify me in holding the alleged custom proved. Such being the case, the deceased, Haribhai, had no right to assume the management of the estate, and I consider him to be a mere trespasser; and his widow, Amba, therefore, had no right whatever to dispose of the property in the manner she did; and the alienation made by her to defendants 1, 2 and 4 becomes null and void. Hence I need not consider whether she had or had not any legal necessity for making the alienation to defendants 1, 2 and 4; and the mortgage-lien, created by these defendants in favour of defendants 5, 6,

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and 7, consequently loses all its force, as one created by persons having no legal right over the mortgaged property."

Defendants 1, 2 and 4 appealed to the High Court.

[485] The appeal was argued on the question of the claim to the *bhagdari* lands only.

K. T. Telang (with him *Nagindas Tulsidas*), for the appellants.

Gokaldas Kahandas, for the respondent.

JUDGMENT.

The following is the judgment of the Court delivered by

BIRDWOOD, J.—In this case the Subordinate Judge awarded to the plaintiff, Bai Reva, as daughter of Rajaram—the son of Narbheram, the son of Raghunath—possession of certain immoveable property in the village of Sayen (Saen), in the Broach Collectorate, with mesne profits for the period during which she had been, as he held, wrongfully excluded from its possession by the defendants No. 1, Pranjivan, No. 2, Harishanker, and No. 4, Mancharam, who had taken possession on the death of Amba in Samvat 1927 (A.D. 1871). Amba was the widow of Haribhai, the paternal uncle of the plaintiff's father, Rajaram. The present suit was commenced in A. D. 1875. The property included certain *bhag* lands which alone form the matter in contest in this appeal. Defendants Nos. 1, 2, and 4, the appellants in this Court, said that they had acquired those lands by purchase from Amba, the widow of Haribhai. For the defendants Nos. 1 and 2—as sons of Haribhai's sister, Kapur (daughter of Raghunath)—and for the defendant No. 4—as son of Haribhai's sister, Kesbar (also a daughter of Raghunath)—a preferable title to that of Reva was claimed in argument before this Court and the Court below. The defendants Nos. 5, 6, and 7 are the mortgagees of defendants Nos. 1, 2, and 4. Defendant No. 3 claimed no right to the property, and said that he had been unnecessarily made a party to the suit. On the death of Rajaram, his uncle, Haribhai, had obtained possession of the *bhag* of Rajaram, and was recognized by the Revenue authorities as *bhagdar*. But the same authorities recognized the title of Rajaram's daughter to the lands of Rajaram which were not *bhagdari*. Amba, the widow of Haribhai, succeeded to the *bhagdari* land on the death of Haribhai in Samvat 1925.

It does not appear to us to be necessary to decide whether or not Amba had power to sell the *bhagdari* land to the defendants 1, 2, and 4. Assuming that, as a Hindu widow, she could not do so, except for special reasons not here existing, we must direct **[486]** our attention to a special custom alleged to exist in *bhagdari* villages in the Broach Collectorate; under which custom—which is said, and indeed appears to admit the succession of the widow of a *bhagdar* who dies without leaving issue male—the daughter or sister of such a *bhagdar* is excluded from the succession (on the death of the *bhagdar's* widow, if he leaves a widow), by the nearest male relations. The plaintiff relied on the ordinary Hindu law of inheritance—her father Rajaram having been separate in estate from his uncle, Haribai.

The Subordinate Judge found that the alleged custom for the exclusion of a daughter or sister was not proved in the case of *bhagdars* who are Hindus, though he had found it proved in another suit in which the parties were Mahomedans. The appeal has been argued only with reference to this custom, which on our appreciation of the evidence we find to be sufficiently established as against the plaintiff.

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The Subordinate Judge refers in his judgment to an extract from Colonel Monier Williams' "Memoir of the Zilla of Baroche," filed as an exhibit in this suit in which the custom is thus described: "Daughters do not inherit the lands. If the *bhagdar* dies without a son, the nephews or nearest male relations take the lands after the death of the widow." The Subordinate Judge did not consider the authority of this passage as conclusive in the present case, because it was not clear to him that it had any application to Hindu *bhagdars*. He also held that the decision of the High Court in *Bai Kheda* v. *Dasu Sale* (1), where male first cousins of the deceased *bhagdar* were preferred to his sister, was inapplicable, as that was a case of Mahomedan *bhagdars*. The report of the arguments in that case shows that the case described by Colonel Monier Williams was that "of a Hindu *bhag*"; and on referring to the memoir itself, page 32, we find that the *bhagdar*, Bhowandass Bhooda—regarding whose *bhag* in the village of Turalsa in the Broach District, certain particulars are given—was a Hindu of the caste of Lewa Kunbis, and not a Mahomedan. Of course, any information obtained by Colonel Monier Williams regarding the village of Turalsa would not necessarily be conclusive as to the rights of the parties in the present case. But **[487]** his work has always been regarded as of high authority, and he says that the particulars given by him "will assist in forming a more distinct idea of the (*bhagdar*) system in general." He evidently deemed the village of Turalsa to be a fair sample of the *bhagdari* villages of the Broach Zilla in general, and would seem to have regarded the custom as to succession (described by him) as usually adopted in all *bhagdari* villages in that zilla. And the custom has been recognized, not only in the reported case already referred to, but in several decisions also of the District Court of Surat.

Of these one was *Bai Dala and another* v. *Laldas Ishver and another* (2)—a case between Hindus, decided in 1876, which arose in Kimoj, in the Jambusar Taluka of the Zilla of Broach. The *propositus* there—Haribhai—was succeeded in his *bhagdari* and other lands by his widow, Tezbai: and, on her death, a contest as to the right to a certificate of heirship having arisen between her daughters by Haribhai, Dela, and Ladbai, on the one side, and Haribhai's male first cousins (father's brother's sons) Laldas Ishvar and Jeysing Ishvar, on the other, the Assistant Judge Mr. Aston, recommended the grant of a certificate of heirship to Haribhai's daughters limited to such of Haribhai's lands as were not *bhagdari*. The District Judge so far acted on this recommendation, but also granted a certificate of heirship in respect of the *bhagdari* lands to Haribhai's male first cousins.

In 1868 the case of *Ranchod Lakshmidas and others* v. *Kalidas Lakshmidas and others* (3) was tried in appeal from the Munsif of Jambusar by the Assistant Judge at Broach, Mr. Philpotts. Besides other matters in dispute it appeared that certain *bhagdari* property situate at Kavi, in the Jambusar Taluka of the Zilla of Broach, had been held, during her widowhood, by Bai Ruliat in right of her deceased husband, a Hindu. The suit was brought by male cousins of the sixth or seventh degree of her husband to recover that *bhagdari* land from Kalidas Lakshmidas, who, as son of the daughter of Bai Ruliat and her husband, and as devisee under the will of Bai Ruliat, claimed to hold that land. The Munsif had made a decree for the defendant, Kalidas

(1) 5 B.H.C.R.A.C.J. 123.
(2) Application 53 of 1875 under Regulation VIII of 1827.
(3) Appeal No. 12 of 1866.

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[488] Lakshmidas ; but Mr. Phillpotts, after a detailed discussion of the evidence and of the authorities, reversed that decree, and held that the plaintiffs (the male cousins of Bai Ruliat's husband) were, according to the custom of the Zilla of Broach, to be preferred to a daughter or daughtor's son, and that Bai Ruliat—being a Hindu widow—had not any power to devise her deceased husband's property. He referred to a decision of Mr. Hebbert at Broach in 1858 (No. 221 of 1858) preferring the male relatives of the deceased *propositus;* and to Special Appeal 1636 of 1863 as supporting his view ; and to the Mahomedan case reported as *Bai Kheda* v. *Dasu Sale* (1), where male first cousins of the deceased *bhagdar* were by the High Court (2), preferred to his sister, in affirmance of the decree of the Assistant Judge. Kalidas Lakshmidas made a special appeal (No. 168 of 1869) to the High Court against Mr. Phillpotts' decision, but that Court (3) on the 22nd July, 1869, affirmed the decree of Mr. Phillpotts. Both in that case and in *Bai Kheda* v. *Dasu Sale* Mr. Justice Warden was one of the presiding Judges in the High Court when those cases were decided there on appeal. He had the advantage of having been a District Judge in Gujarat for many years, and must have been well acquainted with the customs of Broach in *bhagdari* tenure. So recently as the 11th September, 1879, the Assistant Judge in Appeal No. 110 of 1877, *Bai Fula and another* v. *Umal Amiji Sale*, affirmed a decree of the Subordinate Judge of Broach, declaring a deed of gift of *bhagdari* land, by the widow of a deceased Mahomedan *bhagdar* to his daughter's son, to be void (from such time, we presume, as the widow might die) as against the brother of the deceased *bhagdar*, which decision does not seem to have been appealed against to the High Court.

Such decisions tend strongly to show what the Civil Courts have understood to be the law in the District of Broach, where the lands in dispute in the present case are situated. In one case, however, which came before the High Court in appeal (Special Appeal No. 334 of 1872) (4), the custom was alleged, but sufficient evidence to prove it does not seem to have been adduced.

[489] In the case of *Bai Kheda* v. *Dasu Sale* (1) reference is also made to another case in which the evidence given was insufficient to support the custom. It seems advisable, therefore, that in every case in which the custom is relied on, the parties should be prepared with evidence regarding it, for it is possible that it may not have been adopted in all the *bhagdari* villages in the district of Broach. Whether or not it is universal there, we do not decide; but the impression left on our minds by the evidence in this case and by the authorities is that the custom is at least generally prevalent in that district. In the present case, evidence has been adduced both in support of and in disproof of it, in dealing with which we cannot disregard either the result of Colonel Monier Williams' enquiries, conducted apparently about sixty years ago, or the distinct recognition of the custom in several judicial decisions in recent years (although in two cases the custom was held not to be proved), or the special recognition of such a custom by the revenue authorities in 1867 in respect of the lands in dispute in the present case, for (as already mentioned) it appears that, on the death of Rajaram, a *kabulayat* was taken for the *bhag* land from his uncle Haribhai, while for the other land a *kabulayat*

(1) 5 B.H.C.R. A.C. J. 123.
(2) Tucker and Warden, JJ.
(3) Warden and Lloyd, JJ.
(4) Printed Judgments of 1873, June 10th, No. 63.

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was taken on behalf of plaintiff, who was, as she still is, a minor. Of course, the order of the revenue authorities, sanctioning this proceeding, does not bind the plaintiff; but it shows what their opinion as to the ordinary course of descent of *bhagdari* lands in the village of Sayen and district of Broach was at the time. The Subordinate Judge has distinguished between Hindu and Mahomedan *bhagdars*, but there is apparently nothing in evidence sufficient to warrant the acceptance of any such distinction. And it is to be noted that in the case reported in 5 Bombay High Court Reports, 123, A. C. J., the custom was upheld among Mahomedans partly on the authority of Colonel Monier Williams' "Memoir on the Zilla of Baroche," which refers specially to a case of Lewa Kunbi *bhagdars*. It has been argued before us that, in the present case (in which the parties are Brahmins) the defendants rely on instances of the exclusion of daughters which have occurred among Koli *bhagdars*, and that these instances are of no weight, because it has been sworn by **[490]** one witness that among Kolis the daughter never succeeds to any property. But no such distinction between Kolis and Hindus of other castes seems to have been known to Colonel Monier Williams. And the *bhagdars* described by him were not Kolis, but, as already stated, Kunbis. Having regard, therefore, to the foregoing considerations, we should be inclined to recognize the custom in any *bhagdari* village in the Broach Collectorate whenever the party relying on it was able to give specific instances of its continuance in other similar adjacent villages, if not in the particular village itself, though it would always be more satisfactory if he could do this, and whenever the opposite party could not or did not prove the adoption of some other custom or of the ordinary rules of inheritance in the particular village, or, failing such proof, the general prevalence of such rules or such opposing custom in other similar adjacent villages. Now, in the present case, the defendants have shown that the alleged custom, which was a custom sixty years ago in the Broach District, still survives in many *bhagdari* villages. This evidence is met, but, as we think, inadequately met, by proof of certain instances in which the daughter has excluded the male relations. Several of the cases relied on by the plaintiff were cases of gifts to the daughter during the lifetime of the father, or of devise by will—which gift or devise if he were separated and without male issue, he might make—and such cases would rather tend to show that there may have been a custom, excluding the daughter, the operation of which it was sought by the gift or will to exclude. In several of the cases given in evidence for the plaintiff, a daughter's son, or sister's son, and not the daughter or sister herself, succeeded the *bhagdar* or his widow. This, no doubt, leads to the inference that the male relatives, who would be preferred to the daughter or sister, need not necessarily claim through male relatives of the deceased *bhagdar*, but may be male relatives sprung from his female relatives, and, by preference of sex, excluding the females through whom they claim—males being deemed more suitable sharers in the management of and responsibility for the *bhag* than females. The only instance of succession (other than that of Haribhai Raghunath) given in connection with the village of Sayen seems really to have been of this kind. **[491]** After the death of Neermul (the widow of Harjivan, a *bhagdar*) his daughter's son succeeded him in preference to his male cousins. That case occurred since the present suit was instituted, or about the time of its institution. Such a case is no authority for the succession of a daughter herself in Sayen.

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The learned pleader for the respondent, when asked by this Court whether he could refer us to any instances of the preference of a daughter or sister to male relatives of a deceased *bhagdar*, which were independent of devise or deed of gift, specially mentioned four cases to us: (1) that of Bai Ganga; (2) that of Kurnaram; (3) that of Dulabh, and (4) that of Anandram. The witness that mentions Bai Ganga's case is unable to say whether the *bhag* was entered in the Government books at the desire of her father in Bai Ganga's name during her father's lifetime or not. If it were so entered under such circumstances, she would have come in by gift and not by inheritance. The same witness does not know "the practice prevalent in *bhagdari* villages," but says that, according to the custom of his caste (he is a Sajodra Brahmin) "if the daughter of a deceased *bhagdar* lays no claim to his property the cousins inherit." He did not know of any contest between a daughter and a male cousin. The case of succession given by him (that of Bai Ganga) occurred in Cholad. Another witness mentions an instance of the exclusion from succession to a *bhag* of the daughter of a Sajodra Brahmin, which occurred at Ashta, in the taluka of Anklesvar in the Broach District, and of the preference of a male first cousin of her father. Another witness speaks of that case as one in which a deed of gift by the father, in favour of the daughter, was set aside. Kurnaram's case occurred in Kalam. Bai Manek succeeded to the *bhag* of her father, Kurnaram, whose cousins of the fourth or fifth degree were living when he died. During Manek's lifetime the land was transferred to the name of her husband, who bequeathed it to his daughters. Manek apparently survived her husband, and on her death the property was taken by her daughters' sons. The witness who speaks to that case says: "I know of no instance in which a *bhagdar* died without making a will, and in which in that case a daughter or niece inherited a *bhag* in exclusion of cousins." **[492]** In Dulabh's case the *bhag* was, on Dulabh's death, entered in the Government books in the name of his daughter Jumna. In his cross-examination the witness who speaks to that case says: "Jumna being a minor, the *bhag* was somehow entered in her name by the *mehta*; but the fact being made known to me, I applied, and for the last two years my name has been entered, and the whole *bhag* is in my possession." So he has ousted his niece, the daughter of the deceased *bhagdar*, Dulabh. The fourth case, *viz.*, the succession of Jumna, the daughter of Anandram Hurdev, to his *bhag* in preference to his uncle, relied on by respondent, occurred in Kothia, and seems to have been, in its inception, distinctly opposed to the alleged custom; but another witness who, in his cross-examination, also mentioned it admitted that the uncle has since obtained the *bhag* from her. It cannot be said that the evidence, as a whole adduced by the plaintiff has successfully encountered the evidence given, and precedents quoted, for the defence. On the contrary, a part of it, *viz.*, such as shows the succession of daughters' sons or sisters' sons when their mothers were living or succession of daughters or sisters by virtue of deeds of gift or wills, is more consonant with the custom of exclusion of such females in favour of male relatives, than of the prevalence of the ordinary Hindu law. We think that the result of the whole body of evidence and precedents, adduced in this case, favours the exclusion of daughters where male relatives of the deceased *bhagdar* are forthcoming. We use the term "male relatives" in the larger sense,—*i.e.*, as including, not only male relatives claiming through males, but also male relatives claiming through females, which latter description of male

relatives, comprises the defendants Nos. 1, 2 and 4. It is unnecessary for us to enter into any discussion of the rival pretensions of male relatives of the two above-named species, as in this case there seem to be only male relatives claiming through females. We are not to be understood as holding that a daughter or sister is wholly excluded by the custom from the line of inheritance,—*i.e.*, that, if there were not any male relatives of the deceased *bhagdar*, his *bhag* would escheat to the Crown rather than descend upon his daughter or sister. We think that the plaintiff, Bai Reva, under the circumstances existing in this case, **[493]** has failed to establish her right to the *bhagdari* land in dispute, or to any mesne profits in respect of such land. We vary the Subordinate Judge's decree by rejecting so much of the claim as has reference to the *bhagdari* land and its profits, and by reducing the costs awarded by the said decree in proportion to so much of the plaintiff's claim as relates to the *bhagdari* lands (as to which she has failed in this Court) and also as relates to the moveable property (as to which she has failed in the Court below),—*i.e.*, she can only have her costs of the suit in proportion to so much of her claim as relates to the *inam* lands and the profits thereof. The appellants are to recover their costs of this appeal from the respondent.

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5 B. 493.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Acting Chief Justice, and Mr. Justice M. Melvill.

DUGAPPA SHETI, GRANDSON OF KRISHNAPA SHETI (*Original Defendant*), *Appellant v.* VENKATRAMNAYA, SON AND HEIR OF DECEASED MAHABLESHVARAYA BIN NADKARNI VENKATESHAYA AND OTHERS (*Original Plaintiffs*), *Respondents.**

[19th January, 1880.]

Undivided Hindu family—Ancestral estate—Attachment and sale of the interest of one of several co-parceners—Possession.

A obtained a decree in a suit against B, and executed it by the sale of certain plots of land which B alleged belonged to him—A himself becoming the purchaser thereof. A entered into possession of the plots of land under his purchase, and remained in possession thereof for a considerable time. As a matter of fact, the plots of land belonged—part absolutely and part as to mortgagees in possession—not to B solely, but jointly to him and his father C and others, the members of an undivided Hindu family.

A suit having been brought by C to recover possession of the said plots of land from A, and for mesne profits, and for payment over of a sum of Rs. 800 paid to A by the mortgagor of the mortgaged property in redemption of his mortgage.

Held—that A was entitled to stand in B's place, and to retain possession in respect of B's share in the said land, but no further; and that he held the mesne profits, and the said sum of Rs. 800 as trustee for the other members of the said undivided family to the extent of their shares in the family property.

[494] *Babaji Lakshman* v. *Vasudev Vinayak* (1) and *Kallapa Girmallappa* v. *Venkatesh Vinayak* (2) followed.

[**F.**, 26 B. 141=3 Bom. L.R. 598; **R.**, 10 B. 363 (366); 8 Bom. L.R. 99; 1 S.L.R. 133; 2 S.L.R. 43 (50); **Expl. & D.**, 5 B. 499; **D.**, 11 C.L.J. 61=14 C.W.N. 298=5 Ind. Cas. 298.]

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* Second Appeal No. 373 of 1879.

(1) 1 B. 95.

(2) 2 B. 676.

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THIS was a second appeal from the decision of A. L. Spens, Judge of the District Court of Kanara, in appeal No. 108 of 1877, amending the decree of the Subordinate Judge of Honavar in original suit No. 787 of 1876.

The plaintiff Mahableshvaraya sued (1) Dugappa and (2) Subrav (plaintiff's son) for possession of four plots of land, of which he (plaintiff) alleged the first defendant was in possession—he having purchased them in execution of a money decree obtained by him (the first defendant) against Subrav (the second defendant). The plaintiff also claimed one year's produce. The plaint alleged that the property in dispute belonged to the plaintiff, who, however, had allowed it to stand in the name of his son, Subrav, the second defendant, who had managed the property on behalf of his father, the plaintiff; that the second defendant had deceived his father and, unknown to him, had allowed the property in question to be taken by the first defendant in execution of a decree obtained against himself, the second defendant.

The plaintiff valued the suit at Rs. 1,496-3-3. Plots 1 and 2, plaintiff stated, had been held by him merely as mortgagee—having been mortgaged to him by one Krishna Puranik: the remaining two plots he had held on a *mulgani* tenure.

Dugappa, the first defendant, answered, *inter alia*, that the plots belonged to, and were in the possession of Subrav, the second defendant, when he (Dugappa) purchased them in execution of a decree which he obtained against Subrav; that he (Dugappa) had received 53 muras of rice on account of a year's produce of the land; that plots 1 and 2 had been redeemed by Krishna Puranik under a decree in a redemption suit brought by him against the first and second defendants. Subrav, the second defendant, did not appear. Krishna Puranik was then, on plaintiff's application, made a party to the suit as a third defendant; and Krishna pleaded, *inter alia*, that he had redeemed plots 1 and 2 on payment of Rs. 800 to Dugappa, and that neither he nor the property redeemed by him, was liable for the plaintiff's claim.

The Subordinate Judge found that the plaintiff had failed to [495] prove that his son, the second defendant, had been merely his agent in respect of the property in question, and he, therefore, dismissed the plaintiff's suit.

In appeal the District Judge found that the plaintiff and his son, the second defendant, were members of a joint Hindu family, and, as such, had had a joint interest in the property in question. He amended the decree of the first Court by directing the first defendant to deliver up plots 3 and 4 to the plaintiff, and pay him the Rs. 800 which he, the first defendant, had received from the third defendant, Krishna; also that plaintiff should receive from the first defendant the value of 53 muras of rice (16th June 1879).

On the 22nd September, 1879, Dugappa, the first defendant, appealed to the High Court.

Pandurang Balibhadra, for the appellant.—The District Judge has found that the plaintiff and the second defendant, who are father and son, are undivided in interest. The appellant therefore has acquired a right in the property equal to the share of the second defendant—his judgment-debtor, and is entitled, in respect thereof, to joint possession with the plaintiff of the property in question under the rulings of this Court. The lower Courts ought to have allowed the appellant's claim, at least to this extent, and not to have rejected it altogether.

Shamrav Vithal appeared for the respondents.

The following is the judgment of the Court:—

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SARGENT, A.C.J.—As the Judge has found that the plaintiff and second defendant are members of a joint family, the first defendant is entitled to stand in the place of the second defendant. This Court, therefore, reverses the decree of the Court below; and following the decisions in *Babaji Lakshman and another* v. *Vasudev Vinayak* (1) and *Kallapa bin Girmallapa* v. *Venkatesh Vinayak* (2), directs that plaintiff be put into joint possession with the first defendant of plots 3 and 4, and declares that the first defendant is a trustee of the 800 rupees and the value of the 53 muras of rice mentioned in the decree of the Court below so far as the members of the joint family, other than the second defendant, are interested in the same. Parties to bear their own costs throughout.

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5 B. 496.

[496] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

KRISHNAJI LAKSHMAN RAJVADE (*Original Plaintiff*), *Appellant v.* SITARAM MURARRAV JAKHI AND OTHERS (*Original Defendants*), *Respondents.** [12th July, 1880.]

Undivided Hindu family—Ancestral estate—Mortgage by one co-parcener of a portion of the undivided estate—Mortgagee affected by acts of mortgagor—Partition—Possession—Res judicata—Amendment of plaint.

A mortgagor's acts prior to the date of the mortgage bind the mortgagee; but his subsequent acts do not bind the latter, unless they are done by the mortgagor as agent for the mortgagee.

A, one of three members of an undivided Hindu family, mortgaged his share in the immoveable family property to B. The mortgage recited that the money was raised in order to enable A to sue his co-parceners for partition of the family property and possession of his share therein. A subsequently did bring a suit with that object against his co-parceners, but allowed it to be dismissed against him for default. B now brought a suit against A and his co-parceners for possession of A's share in such family property.

Held—that as it was not made out that A, in bringing his suit, had acted as the agent of B and at B's request, B's suit was not barred by the dismissal of A's suit.

Held, also, that B's suit being a suit for possession, was wrongly framed and was not maintainable, there never having been any partition of the joint family property. Leave, however, was given to B, on certain terms, to amend his plaint, so as to make his suit a suit for partition.

[F., 5 B. 499; R., 21 B. 570; 5 Bom. L.R. 314 (317).]

THIS was a second appeal from the decision of C. B. Izon, District Judge of Ratnagiri, in appeal No. 291 of 1878, affirming the decree of the Second Class Subordinate Judge of Sangameshvar.

The plaintiff Krishnaji brought this suit against (1) Sitaram Murar, (2) Chimnaji Ravji, and (3) Mahadji Ravji for possession of a one-anna share in a certain village mortgaged to him by the first defendant (Sitaram)

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* Second Appeal No. 447 of 1879.

(1) 1 B. 95.

(2) 2 B. 676.

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on the 18th May, 1872, for Rs. 200. He also claimed Rs. 54 for interest and Rs. 50 on account of mesne profits. The mortgage recited that the mortgagor (the first defendant Sitaram) borrowed the money for the purpose of bringing a partition suit against his brother, Ravji, father of the second and third defendants. Sitaram did, in fact, file a suit on the 4th [497] July, 1872, against Ravji for a partition and possession of his (Sitaram's) one-anna share; but when the suit came on for hearing Sitaram allowed judgment to go against him by default. In 1874 the plaintiff brought a suit against the present second and third defendants for mesne profits in respect of the one-anna share mortgaged to him by Sitaram. That suit was dismissed on the 20th March, 1876, on the ground that Sitaram, the mortgagor, was not in possession of his share, and that it would be necessary for the plaintiff first to sue for possession of the mortgaged property. He, therefore, instituted the present suit for possession of his mortgagor's share in the property in question.

The first and second defendants did not appear. The third defendant answered, *inter alia*, that Sitaram, the mortgagor, was not in separate possession of his share, and that the action was barred by the two former suits mentioned above. Both the lower Courts dismissed the plaintiff's suit, holding it was barred by the previous suit brought by Sitaram against his brother, Ravji, for partition and possession. The plaintiff thereupon filed a second appeal in the High Court.

Y. V. Athalye, for the appellant.—The lower Courts were wrong in holding that the present suit was barred by the previous suit. That suit was brought by the mortgagor (the first defendant, Sitaram), subsequently to the date of the mortgage. If Sitaram had prosecuted that suit and obtained a decree of partition, the plaintiff, no doubt, as mortgagee would have been benefited by it. But the mortgagor allowed the suit to be dismissed for default, evidently in collusion with the second and third defendants. His act did not bind the mortgagee, as it was subsequent to the mortgage, and he was not acting as the agent of the mortgagee. The mere recital in the mortgage that the loan was raised in order to bring a partition suit against his brother is no proof that that was to be done on behalf of the mortgagor, and there is no other evidence to show that such was the case. If this suit is wrong in form, and the Court thinks it should have been a suit for partition, I will ask the Court to allow the plaint to be amended accordingly.

Shamrav Vithal, for the third defendant.—The plaintiff should not be allowed to change the form of his action after having [498] dragged my clients through three Courts. The case in its present form is not sustainable, and should be dismissed.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C.J.—It appears to us that the decree in Sitaram's suit for partition is not a bar to the plaintiff's present suit. The acts of Sitaram antecedent to the mortgage by him to the plaintiff would bind the latter, but the acts of Sitaram subsequently to the mortgage do not bind the plaintiff, unless they were done by Sitaram as agent for the plaintiff. The mortgage contains a recital that Sitaram borrowed the mortgage money for the purpose of enabling him to maintain a suit against certain of his co-parceners, but that recital does not establish that Sitaram was to bring such an action on behalf of his mortgagee (the present plaintiff); although, if the suit brought were for partition and were persisted up

to the decree, it might to a certain extent redound to the benefit of the mortgagee. To the extent of the equity of redemption in Sitaram's share such suit would be solely for the benefit of the mortgagor, Sitaram. The circumstance, that Sitaram permitted, in that suit, a decree to go against him by default, tends strongly to show that he was not acting as the agent of the plaintiff, and may very probably have been acting in collusion with his co-parceners in abandoning the suit. Except the insufficient recital in the mortgage, no evidence has been pointed out to us of agency on the part of Sitaram for the plaintiff, and there is not any finding, in either of the Courts below, that there was any such agency. We cannot agree with the Courts below in holding the decree in Sitaram's suit to be any bar to the present suit.

We concur with the District Judge in holding that the decree in the plaintiff's suit for mesne profits is not any bar to the present suit for possession.

But we are of opinion that this suit has not been framed correctly in asking for possession. It has been admitted in the plaint that the defendants Sitaram, Chimnaji and Mahadaji are undivided in estate. It would, under such circumstances, be impossible for the Court to put the plaintiff, as purchaser of Sitaram's undivided share, into possession of it. The proper course to pursue in such a case is for the purchaser to sue **[499]** for a partition: *Pandurang* v. *Bhaskar* (1); *Udaram Sitaram* v. *Ranu Panduji* (2). The cases of *Mahabalaya* v. *Timiaya* (3), *Babaji* v. *Vasudev*, (4) and *Kallapa* v. *Venkatesh* (5), in which declarations of tenancy in common were made by the Court, were all instances in which the purchaser from a co-parcener had already obtained possession of the undivided property, or of a part of it, and are, therefore, inapplicable here, where the purchaser (the plaintiff) has never had any real possession.

There being no denial of the *bona fides* of the mortgage by Sitaram so far as the plaintiff is concerned, and it appearing to us that the plaintiff was erroneously advised as to the forms in which he has brought both his former and his present suit, we will allow him to amend by altering it to a suit for partition, and by adding parties if he be so advised, and for this purpose we reverse the decrees of the Courts below. The said permission to amend is granted only upon the terms of the plaintiff paying to the defendants their costs of this suit and of both appeals therein up to the present time. Such amendment and payment of costs must be made within three calendar months after the making of the present decree has been notified by the District Court of Ratnagiri to the plaintiff or his pleader in that Court. In the event of the payment of costs aforesaid and of the said amendment not being made within the said period, this suit is to stand dismissed with costs throughout to be paid by the plaintiff to the defendants.

(1) 11 B.H.C.R. 72. (2) 11 B.H. C.R. 76. (3) 12 B.H.C.R. 138.
(4) 1 B. 95. (5) 2 B. 676.

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5 B. 500.

5 B. 500.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

BALAJI ANANT RAJADIKSHA (*Applicant*) *v.* GANESH JANARDAN KAMATI.* [26th January, 1881.]

Undivided Hindu family—Ancestral estate—Attachment and sale of the interest of one of several co-parceners—Partition—Possession.

A judgment-creditor attached in execution and caused to be sold the judgment-debtor's alleged one-twelfth share as a member of an undivided Hindu [500] family, in seven parcels of land of which the applicant was in possession as manager. At the sale Y became the purchaser; and subsequently, and without having himself entered into possession, Y assigned his interest in the purchase to G. G claimed to be put into possession, and obtained a Court's order, directing that possession should be given to him. The applicant, however, obstructed the execution of the said order, and applied to the High Court to declare G not entitled to the possession he sought. No division of the property in question, by metes or bounds or otherwise, between the members of the undivided family had ever been made, nor had the judgment-debtor ever had separate occupancy of any definite share of the same.

Held—that G's proper remedy was by a suit for partition, and that he could not claim to be put into joint possession, with the applicant and the other members of the undivided Hindu family, of the family property.

Krishnaji v. *Sitaram* (1) and *Dugappa* v. *Venkatramnaya* (2) commented on and explained.

Indrasa v. *Sadu* (3) dissented from.

[R., 26 B. 141=3 Bom. L.R 593.]

THIS was an application, under the extraordinary jurisdiction of the High Court against the order of Rao Saheb P. B. Joshi, Second Class Subordinate Judge of Vengurla in the district of Ratnagiri, in miscellaneous application No. 58 of 1879.

The facts of the case are briefly set out in the head-note above, and appear at length in the judgment.

On the 8th April, 1880, *Ghanasham Nilkant* applied for a *rule nisi*.—As a matter of fact, this property is not ancestral, but the self-acquired property of the applicant; but, even assuming it to be ancestral, no division has taken place between the judgment-debtor and the other co-parceners, and till the judgment-debtor's separate share has in some way been ascertained and determined, the purchaser cannot claim to be put into possession. He must bring a suit for partition: *Pandurang Anandrao* v. *Bhaskar Sadashiv* (4); *Udaram Sitaram* v. *Ranu Panduji* (5); *Krishnaji* v. *Sitaram* (1); and *Deendyal Lal* v. *Jugdeep Narain Singh* (6).

The High Court (Pinhey and F. D. Melvill, JJ.) granted the *rule nisi* as prayed for.

On the 17th January, 1881, *Manekshah Jehangirshah* showed cause.—A member of an undivided Hindu family may mortgage or sell his share in the joint estate, and it may be attached and sold in execution of a decree against him: *Vasudev Bhat* v. [501] *Venkatesh Sanbhav* (7); *Fakirapa* v. *Chanapa* (8). The High Court has refused to disturb such a

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* Extraordinary Application, No. 43 of 1880.

(1) 5 B. 496. (2) 5 B. 493. (3) *Vide* note, 5 B. 505.
(4) 11 B.H.C.R. 72. (5) 11 B.H.C.R. 76. (6) 3 C. 198.
(7) 10 B.H.C.R. 139. (8) 10 B H.C.R. 162.

purchaser in his possession of a portion of the joint-property, and held him entitled to continue in it as a tenant in common with the other co-parceners : *Mahabalaya* v. *Timaya* (1); *Babaji* v. *Vasudev* (2) ; *Kallapa* v. *Venkatesh*(3). His right to possession has been thus fully recognized, and he can, therefore, be put into possession in a case like the present, without the trouble of a partition suit.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C.J.—Krishnaji Ramchandra obtained against Ramchandra Balaji (one of the sons of the applicant Balaji Anant) a money decree, and upon it an attachment against the alleged one-twelfth share of Ramchandra Balaji in seven parcels of land then in possession of the applicant, and caused the same to be sold by the Court of the Subordinate Judge of Vengurla which had made the decree. Yeshvant Narayan Adarkar became the purchaser for Rs. 18-5-3 on the 8th February 1877. Neither the order for confirmation of that sale, nor the certificate of sale, is in evidence. However, for the purpose of the present judgment (and for that purpose only), we assume that the sale was confirmed, and such a certificate given. Yeshvant Narayan Adarkar subsequently—*viz.*, on the 23rd July, 1879—sold the subject of his purchase to the respondent, Ganesh Janardan Adarkar, for the same sum. The deed of purchase is not in evidence, but that resale does not appear to be disputed. He applied to be put in possession. A warrant for that purpose was issued by the Subordinate Judge. The present applicant, Balaji Anant, obstructed the execution of that warrant. The respondent then applied, under s. 335 of Act X of 1877, to have that obstruction removed, and the Subordinate Judge, on the 15th January, 1880, made an order complying with that request, and directing the present respondent to be put into possession. Balaji Anant thereupon made the present application to the extraordinary jurisdiction of this Court to set aside that order. A *rule nisi* was made by Pinhey and F. D. Melvill, JJ., to set it aside ; and cause against the *rule* **[502]** *nisi* having been shown before us, we are of opinion that the cause shown should be disallowed, and the *rule nisi* made absolute with costs. Our reasons for this opinion are that, even assuming what the applicant denies, namely, that the property is ancestral property, it has not been contended, on behalf of the purchaser, that any division of the property, by metes or bounds or otherwise, of which he claims a twelfth part as the share of the judgment-debtor Ramchandra, had taken place between the latter and his father, Balaji, and the other co-parceners (if any) whereby a twelfth part of the property, or any other share thereof, had been allotted to Ramchandra, or that Ramchandra ever had separate occupancy of a twelfth or any other part of that property, or had the management of any part of it. In *Appovier* v. *Rama* (4) it has been stated by the highest judicial authority in Indian cases that, "according to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt and claim to take from the Collector

(1) 12 B.H.C. R. 138.
(2) 1 B. 95.
(3) 2 B. 676.
(4) 11 M.I.A. 75 (89).

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or receiver of the rents (*i.e.*, the family manager) a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse and then dealt with according to the modes of enjoyment by the members of an undivided family." Lord Westbury, who thus spoke in delivering the judgment of the Privy Council, then proceeded to discuss the case of a family which had voluntarily agreed to a division of right as distinguished from a division of property,—*i.e.*, the conversion of a joint tenancy into a tenancy in common without any actual partition by metes and bounds. We have nothing of that kind in the present case. Undoubtedly the undivided share of a co-parcener may in this Presidency be alienated by him for valuable consideration, or may be seized and sold in discharge of his separate debt (1). In *Pandurang Anandrav* v. *Bhasker Sadashiv* (2)— where the mortgagee of a portion of the estate of an undivided Hindu **[503]** family, whose mortgage was executed by two members of the family only, brought a suit to recover, from a third member of the family, the mortgaged premises which were in his possession—the Court (West, J., and Nanabhai, J.) held that such a suit was not sustainable, and that the mortgagee could only obtain relief against the property by a plenary suit for partition, inasmuch as the share of a co-parcener, being in the estate as a whole and not in any particular part of it, can be ascertained only by taking a general account of the whole estate, and making a distribution in accordance with the result of such an account. A similar opinion was expressed (as an *obiter dictum*) in *Udaram Sitaram* v. *Ranu Panduji* (3), where it was said that " the sale (judicial or private), mortgage, or other alienation of a share in the undivided family property of a Hindu family, though in this Presidency conferring a right upon the mortgagee or purchaser, and working a severance so far as to render the mortgagee or purchaser a tenant-in-common with the parceners other than he whose share has been thus alienated, cannot be regularly and completely enforced by giving possession except through the medium of partition, which may be effected either amicably with the other parceners, or by a duly constituted suit for the partition of the whole of the family property, to which suit all of the co-parceners should be made parties." It is true that in certain cases, in which the purchaser of a co-parcener's share has peaceably obtained possession, Division Benches of this Court have refused to oust him, and have declared him entitled to hold as a tenant-in-common with the other co-parceners. Such were *Mahabalaya* v. *Timaya* (4), *Babaji* v. *Vasudev* (5), and *Kallapa* v. *Venkatesh* (6). In all of these cases the suit was instituted by the co-parceners, other than he whose share had been sold, against the purchaser in possession, and the plaintiffs sought to oust him from that possession. A Division Bench of this Court refused to go beyond those cases in *Krishnaji* v. *Sitaram* (7), which was a suit by a mortgagee of the share of a co-parcener against the other co-parceners for possession. Such a suit that Court deemed **[504]** to be unsustainable, but it permitted the plaintiff to amend his plaint by converting it into a suit for partition. It distinguished that case from the three last mentioned cases—saying that those "were all instances in which the purchaser from a co-parcener had already obtained possession of the undivided property or of a part of it, and are, therefore, inapplicable here, where

(1) *Vide* 10 B.H.C.R. 139 (162).
(2) 11 B. H C. R. 72.
(3) 11 B.H. C. R. 76 (81).
(4) 12 B.H.C.R. 138.
(5) 1 B. 95.
(6) 2 B. 676.
(7) 5 B. 496.

the purchaser (the plaintiff) has never had any real possession." In *Dugappa* v. *Venkatramnaya* (1) the Division Bench did not go beyond the three previous cases; as the facts of that case show that it, too, was a suit by a co-parcener in which the principal defendant was a purchaser (already in possession) of another co-parcener's share. But the more recent case—*Indrasa* v. *Sadu* (2)—does go beyond *Dugappa* v. *Venkatramnaya* and the three previous cases; as, in it, a Division Bench of this Court in a suit brought by a mortgagee, claiming under a purchaser to obtain possession of a house (to the whole of which he the plaintiff, improperly laid claim) from the co-parcener of the vendor—made a decree whereby it ordered the mortgagee (the plaintiff) to be put into joint possession with the defendant (the co-parcener). Neither the purchaser nor his mortgagee had ever previously been in possession: so that, although the Division Bench grounded its decree upon the above-mentioned cases of *Babaji* v. *Vasudev*, *Kallapa* v. *Venkatesh*, and *Dugappa* v. *Venkatramnaya*, it really went beyond those cases and *Mahabalaya* v. *Timaya*, and is in conflict with *Pandurang Anandrav* v. *Bhaskar Sadashiv*(3) and with *Krishnaji* v. *Sitaram* (4), which latter case probably had not then been printed, and does not appear to have been cited. We prefer to adhere to the rule laid down in the two last-mentioned cases, and feel less difficulty in so doing than we should have experienced, had the Court in its judgment in *Indrasa* v. *Sadu* noticed the distinction between the cases there relied upon by the Court and that before it. We also deem it a far safer practice, and less likely to lead to serious breaches of the peace, to leave a purchaser to a suit for partition than to place him by force in joint possession with members of a Hindu family, which may be not only of a different caste from his own, **[505]** but also different in race and religion. We think that the Court has gone quite as far as it can go with prudence in *Mahabalaya* v. *Timaya*, *Babaji* v. *Vasudev*, *Kallapa* v. *Venkatesh*, and *Dugappa* v. *Venkatramnaya*. We disallow the cause shown, and make absolute the *rule nisi* to set aside the order of the Subordinate Judge of the 15th January 1880, with costs.

The case of *Indrasa* v. *Sadu* (Second Appeal, No. 189 of 1880) referred to above: heard before Mr. Justice Melvill and Mr. Justice Kemball, July 26, 1880:—

5 B. 505 N = Unrep. P. J. B. H. C. (1878-1880) 735.

This was a second appeal from the decision of E. Hosking, Assistant Judge at Nasik, in the district of Thana, in Appeal No. 114 of 1878, affirming the decree of Krishnamukh, Second Class Subordinate Judge of Yeola.

The plaintiff, Indrasa, brought his suit for possession of a house which he alleged had been sold by one Tukaram, brother of the defendant Sadu, to one Lakshman Bavasa; that, after the sale, Tukaram had continued to live in the house as tenant to Lakshman under a rent note executed by him to Lakshman; that Lakshman, on the 11th January, 1873, mortgaged the house in question to the plaintiff; that Tukaram then passed a new rent note to the plaintiff, and continued to live in the house as plaintiff's tenant; that the plaintiff subsequently brought a suit of ejectment against Tukaram, and obtained a decree against him; that the plaintiff attempted to execute the decree and take possession of the house, but was prevented from so doing by the defendant, who had himself in the meanwhile taken possession of the same. Hence the present suit.

The defendant, Sadu, answered that the house was the ancestral property of himself and his brother Tukaram, and not the self-acquired property of the latter.

It appeared, on the evidence, that neither the plaintiff nor his mortgagor, Lakshman (the purchaser of the house from Tukaram), had ever been in actual personal possession of the house.

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(1) 5 B. 493.
(2) *Vide* note, 5 B. 505.
(3) 11 B.H.C.R. 72.
(4) 5 B. 496.

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The Subordinate Judge found that the plaintiff had not proved the house to have been the self-acquired property of Tukaram. He, therefore, rejected the plaintiff's claim.

In appeal, the Assistant Judge affirmed the decree of the Court below, on the ground that the house was ancestral property in which Tukaram and Sadu were, respectively, half-sharers, and that the plaintiff could not maintain a suit for the whole of it (19th January, 1880).

The plaintiff, Indrasa, thereupon appealed to the High Court on the 12th April, 1880.

Pandurang Balibhadra, for the appellant.—The Assistant Judge found that Tukaram, through whom the appellant derives his title, had a half-share and only a half share, in the house in dispute. Having found that, he ought to have allowed the appellant's claim to that extent, and not to **[506]** have dismissed it altogether. The appellant is, at least, entitled to the joint possession of the house with the respondent under the previous decisions of this High Court.

Harishankar Balkrishna, for the respondent.

The following is the judgment of the Court delivered by

MELVILL, J.—The appellant's pleader admits that he cannot say that there is no evidence to support the Assistant Judge's finding that the house in dispute is ancestral property; and we must, therefore, accept that finding as conclusive. The house must, consequently, be held to have been the joint property of Tukaram and his brother, the defendant. The plaintiff, having purchased Tukaram's share only is not entitled to the whole house, nor to the exclusive possession of half of it; but, following previous decisions of this Court (*Babaji Lakshman and another* v. *Vasudeo Vinayak* (1); *Kallapa bin Girmallapa* v. *Venkatesh Vinayak* (2); and *Dugappa Sheti* v. *Venkatramnaya and others* (3)), we make a decree that the plaintiff be put into possession of the house jointly with the defendant, and leave it to either of the parties to have their respective shares therein ascertained by a partition suit. The decrees of the Courts below are amended accordingly. The parties to bear their own costs in this appeal. **[N.F., 5 B. 499.]**

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5 B. 506.

ORIGINAL CIVIL.

Before Mr. Justice Bayley.

MITHIBAI AND OTHERS *v.* LIMJI NOWROJI BANAJI AND OTHERS.*

[28th and 29th April, 2nd and 3rd May and 4th August, 1881.]

Parsis in the Mofussil of the Bombay Presidency, law applicable to—"Justice, equity, and good conscience,"—English law, general and special—Rule in Shelley's case.

The law applicable to Parsis in the Mofussil of the Presidency of Bombay is, in the absence of evidence of any specific law or usage, applicable to the particular case, "justice, equity, and good conscience alone." (Reg. IV of 1827, s. 26.)

In applying "justice, equity, and good conscience" to the facts of any particular case the Courts will be guided by the general principles of English law applicable to a similar state of circumstances, and so as, if possible, to give effect to the intentions of the parties concerned, where such intentions are clearly expressed, and are not repugnant to any general principle of English law.

The Courts will not, in such a case, apply rules of English law which, though well established and binding on English Courts, are yet so special in their nature and origin as to be inapplicable to the different circumstances of this country.

The members of a Parsi family, the heirs of one Framji Cowasji Banaji, deceased, entered into an agreement with one another, bearing date the 24th May 1851 by which they agreed that the remaining income, after paying the deceased's debts of a certain estate which had belonged to the deceased, called the Poway Estate—an estate situated in the island of Salsette, and, **[507]** therefore, in the mofussil of the Presidency of Bombay—should be apportioned "to the heirs mentioned in cl. 7 (of the agreement)"—*i.e.*, among the various heirs of Framji Cowasji Banaji, deceased, the parties to the agreement—

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* Suit No. 877 of 1870.

(1) 1 B. 95. (2) 2 B. 676. (3) 5 B. 493.

"but, after their death, their shares are to be enjoyed and received by their heirs and children from generation to generation."

Held—that, it being the plain intention of the parties to the agreement, appearing on the face of the agreement, that they themselves should take only a life-estate to the extent of their respective shares in the remaining income of the Poway Estate, the rule in *Shelley's Case* ought not to be applied so as to defeat that plain intention.

[**Affirmed**, 6 B. 151 ; **F.**, 1 Bom. L.R. 303 ; **R.**, 8 B. 323 (327) ; 18 B. 160 (170) ; 30 B. 359=7 Bom. L.R. 988 ; 33 B. 122 (187)=10 Bom. L.R. 417=1 Ind. Cas. 834 ; 5 Bom. L.R. 983 (986).]

MOTION to vary the special report of the Assistant Commissioner, Mr. G. H. Farran, dated 11th April, 1881.

The facts of this case and the arguments of counsel, together with the authorities cited on either side, will appear fully from the judgment herein.

Latham (with him *Inverarity*) moved, on behalf of the defendant Hari Valabdas Kaliandas, to vary the Assistant Commissioner's report.

Lang, for plaintiffs other than Hormusji Pestonji Framji, Jerbai, and Awabai.

The Hon'ble *J. Marriott* (Advocate-General), for defendant Nanabhoy Framji.

The plaintiff Hormusji Pestonji Framji in person for himself and his wife Jerbai, and the defendant Dhunjibhoy Byramji in person for himself and his wife Navazbai.

The other parties did not appear, either in person or by counsel.

JUDGMENT.

4th August.—Judgment was this day delivered by

BAYLEY, J.—This is a motion to vary a special report of Mr. G. H. Farran, Assistant Commissioner of this Court, dated the 11th April, 1881, by which he certified and reported that he had decided that the persons who had signed a certain family agreement, dated the 24th May, 1851, had a life-interest only in the Poway Estate, in Salsette ; that they had no power to dispose of any interest in that estate, save such life-interest, by deed or will ; and that the interest of the defendant, Hari Valabdas Kaliandas, extended only to the life-interest of the defendant, Nanabhoy Framji, **[508]** in the Poway Estate. He further certified and reported that all the parties interested in this matter had not been represented before him.

A brief reference to the facts which led up to the agreement of the 24th May 1851, being made, as well as to the nature of this long-pending suit, and of the decretal order made in it by consent on the 24th February, 1872, is necessary for the proper understanding of the points argued before me on the hearing of this motion.

Framji Cowasji Banaji died on the 12th February, 1851, seized or possessed of the Poway Estate, in Salsette, which had been granted to him by the East India Company by an indenture, bearing date the 15th February, 1837, to hold unto and to the use of himself, his heirs, executors, administrators, and assigns for ever. The deed contained a covenant by Framji Cowasji, for himself, his heirs, executors and administrators. that he and they would, when and so soon as required by the said East India Company, their successors or assigns, execute such deed or other sufficient instrument for securing the due supply of water to two reservoirs erected on the Duncan Road, near Kamathipura, in the island of Bombay, for the purposes and in manner in that behalf in the said deed of the 15th February,

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1837, contained, as by the said Company their successors or assigns, and their counsel learned in the law, should be deemed reasonable and expedient in that behalf. Framji Cowasji also died possessed of much moveable and immoveable property in the island of Bombay; but he left considerable debts contracted in the course of his trade as a merchant.

He left a widow, Bachubai; three sons—Jehangir (the eldest), Pestonji and Nanabhoy; three daughters—Rutanbai, Navazbai and Perozbai; and he left grandchildren by three other daughters, Goolbai, Meherbai and Maneckbai, all of whom had predeceased him. He left a Gujarathi will, dated the 5th July, 1828, and a Gujarathi codicil of the 15th December, 1831.

In cl. 2 of his will he states, in much detail, his reasons for being dissatisfied with the conduct of his eldest son, Jehangir; excludes him from any share in his inheritance, but directs that Rs. 100 a month should be paid him—to be increased, if his mother **[509]** Bachubai thinks fit, to Rs. 125; and that, two years after his (the testator's) death, Rs.————are to be paid, when the monthly sum of Rs. 125 is to be stopped—a bequest which, as no sum was named, was no bequest at all, or, if it was, is void for uncertainty; and he further directed that a small house, worth Rs. 10,000 or Rs. 12,000, was to be given that his children might remain in it.

Neither the will nor the codicil contained any general devise of his residuary estate; and there were no words, in either of those documents, sufficiently large to include the Poway Estate, which he did not obtain from Government until 1837, although he had made an application to Government so early as 1831 in regard to such estate.

By the codicil he confirms his will, and then refers to the Poway Estate. The codicil is short, and is as follows:—

CODICIL.

In the way thus particularly set forth this will or testament was made before. It is to be considered as confirmed and upheld. And besides this, as to the property (called) the Sans Souci which I having sold, laid out on Poway Rs. 1½ (one and a half) lacs. I cannot at present write at great length, because my health is much impaired; but now, by the grace of God, I am better: so I will afterwards make a memorandum, but at present this is all. On the ———, 1831, I wrote a letter to Government, an answer to which arrived on the ——, in accordance with which it shall not be competent to my heirs to sell this estate, neither shall it be competent to them to partition it. As to the conveying of water from Mugbhat to Kumateepol (or Kamathipura) the outlay for that is to be made out of this Poway Estate; and, besides that, after making the outlays, whatever balance may remain my heirs are to divide and take. And as to the whole of the outlays for the water of Mugbhat, in case my heirs should neglect the same, I have made the Government joint trustees, (and) they will, disgracing you, cause the same (outlays) to be made. Therefore you should very honourably carry on that water charity perpetually. Now, if God will bestow good health on me, I will write a separate memorandum in regard to this. The English date the 15th December of the year 1831: the Kudmi 15th day *Dukhmir*, the 4th month *Teer*, *Yezdeserdi* 1201 (*Maha Sud* 11th of *Samvat* 1888), the day of the week Thursday.

The state of affairs soon after his death, assuming as correct the statements in the will and codicil as well as those in the family agreement dated the 24th May, 1851, and in the plaint, would appear to have been somewhat as follows:—Jehangir, the eldest son, and his family were virtually disinherited. There was no testamentary disposition in regard to the Poway Estate or in regard to some of the immoveable property in the island of Bombay, or in **[510]** regard to much of the testator's moveable property. There were considerable debts due by the testator to

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third parties which it was, of course, desirable to pay off as soon as possible.

Disputes had arisen regarding the will, the allegation in para 4 of the plaint being that the will was defective in parts, and that disputes and differences had arisen respecting the same and about the distribution of the said property, and that, in order to put an end to such disputes and differences (amongst other things), an agreement was on the 24th May, 1851, entered into by and between the parties interested in the property mentioned in the will and codicil.

The most material clauses of the agreement, to be noticed here, are the first, second, fourth, seventh, ninth, tenth, eleventh, twelfth, fourteenth, and fifteenth. They are as follows :—

1. The said late Framji Cowasji Seth, deceased, had for many years past carried on an extensive business, and, agreeably to the affairs of this world and by reason of his trade, he has left behind him debts due by him, and has at the same time, by the favour of God, left very extensive landed property ; but it is now the desire of all of us, the undersigned, that the deceased during his lifetime having entertained a wish to settle all his affairs with his own hand ; but as it has pleased the Almighty to order him at last to leave this world, and he departed this life on the 12th day of February, 1851, of the English year and the 19th day of *Furverdin* of the 6th month of *Sharavur* of the Kudmi, and carried with him the desire he had entertained of settling his affairs ; but he, having been ill for a long time before his death, had, in accordance with both his wishes, commenced making out his new will, but as the same remained unexecuted and unattested, we all of us, having unanimously joined together, do entertain the same wish that the debts due by, and to, him be paid and received in a proper manner ; and, with a view that no blot should in any way be attached to his name, we, the undersigned, are to aid and assist in conducting this business as far as it may lay in our power, and to carry on the whole affair with peace and unanimity, and, therefore, it became necessary to make this writing and we are to act agreeably to the conditions of this writing, which is truly to be agreed to and abided by all of us respectively and our heirs and executors.

2. On searching the presses of the late Seth Framji Cowasji, deceased, on the 17th of February, 1851, the above-mentioned will of the 5th July, 1828, with its codicil of the 15th December, 1831, was found in a tin-box, at which all of us were delighted that, after obtaining probate under the said will, the management of the affairs and dealings of our patron, the late Framji Cowasji, deceased, would be carried on with ease ; but on examining it we found it had been made many years ago, whereupon we all, the undersigned, do hereby unanimously consent and agree that the said will should only be made use of, and abided by, for the purpose of obtaining probate from the **[511]** Supreme Court, in order that the affairs and dealings of the deceased may be managed by the hands of his executors. Therefore none of us, the undersigned heirs, or any one else to whom a legacy or inheritance or a lump sum has been given in the said will, shall now or at any time hereafter make any claim or demand after the probate has been obtained of the said will ; and if any one should make any claim or demand whatsoever it shall be by this writing considered null and void, and that this writing containing this arrangement after being executed and attested by all shall be registered in the Supreme Court along with the abovesaid will of the deceased, and we are truly to abide by the same.

4. After I, the undersigned Bai Bachubai, have obtained probate of the above-mentioned will of the 5th July, 1828, with its codicil, it is resolved, with the unanimous consent of us, Bachubai and all the undersigned, to give full authority to Parsi Cursetji Nusservanji Camaji for conducting the management of my late husband Framji Cowasji Seth's affairs and dealings, for collecting and paying (his debts), selling his landed property and other goods and effects, and managing his estates in Salsette and other villages ; and this party, after I, Bai Bachubai, shall have obtained probate, is to commence to exercise his authority under this writing ; but to whatever the said Cursetji Nusservanji Camaji does, neither I, Bai Bachubai, nor any of the other undersigned are to raise a dispute or objection of any kind whatever, and are not to swerve herefrom; and, should we at any time raise any dispute or objection, it is truly to be all null and void.

7. As to all the debts due by the late Seth Framji Cowasji, deceased (the proceeds of) the sale of his landed estate in Bombay and the amount of insurance of the ship *Buckinghamshire*, destroyed by fire, having been collected, and furniture and other

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goods and effects having been sold, and such outstanding debts as may be due by different persons having been collected, his creditors should be paid. But on selling and collecting all the above (property), should all the creditors be not paid in full, then there are six villages, inclusive of Poway in Salsette, belonging to the deceased which have been obtained from Government rent-free for ever: out of the income of these villages in the first place water should be supplied for the use of the poor community of Kamathipura in Bombay which the late Framji Cowasji Seth, deceased, has been supplying from the year 1824 A.D. out of the well in his Girgaon oart called Mughbat; and, in order that this charity may continue for ever, a trust-deed in English, dated the 30th September, 1837, had been made for drawing Rs. 2,400—namely, twenty-four hundred—annually out of the income of the villages, inclusive of Poway; and the English Government has been appointed trustees therein with a view that, should the heirs of the deceased be unable to supply the water properly, then Government—the trustees having drawn out of the income of the village of Poway the above-mentioned sum of Rs. 2,400 every year—are to conduct and preserve that charity work for ever. Therefore, after the amount of these charges of the karkuns and sepoys and the charges of the villages, inclusive of Poway, have been deducted from the amount of the income, the surplus, whatever it may be, should be paid in the best possible way to the creditors in part payment of the interest; and, in case there be any surplus, the same should be paid to them in equal proportions, **[512]** in part payment of their principal, until all the debts of late Framji Cowasji, deceased, are discharged: payments are to be truly made out of this income.

9. We all, the undersigned heirs of the late Seth Framji Cowasji, deceased, have by our unanimous consent acknowledged and determined by the writing of the undermentioned persons to be the heirs of the said Framji Cowasji deceased. The particulars of their names and the manner in which it is agreed their shares are to be paid, are as follows:—

25 (twenty-five) cents to Bai Bachubai the widow of our late patron, Framji Cowasji.

50 (fifty) cents to be divided equally among the sons who are living. The particulars whereof are as follows:—namely (1) Jehangir Framji, (2) Postonji Framji, and (3) Nanabhoy Framji—50.

25 (twenty-five) cents to be divided in equal shares among the living daughters and the heirs of the deceased daughters:—(1) Bai Rutonbai, the widow of the late Nusservanji Rustomji Baly Hamaji, deceased.

(2) Bai Navazbai, the wife of Dhunjibhoy Byramji Rana.

(3) Bai Pirozbai, the wife of Ardasir Cursetji Seth.

(4) The late Goolbai, deceased, wife of the late Dhunjibhoy Nusservanji, deceased, is dead, and her daughter, Hirabai, is at present her heir, and she is the wife of Sorabji Pestonji.

(5) The late Meherbai, deceased, the wife of Pestonji Nowroji, is dead, and her heirs are her two sons, Ardesi Pestonji and Nowroji Pestonji, and these sons are at present young, and are living with their father, Pestonji Nowroji; and having appointed along with their father and guardian two other persons as trustees, and the amount of the share of these young heirs until such time as they come of age having been duly guaranteed,—that is to say, having been invested in Government paper,—the accumulating interest is to be added thereto, and their shares should be paid to them as they respectively come of age. The late Maneckbai, deceased, the wife of Dadabhoy Rustomji, is dead, and her heirs are her daughter, Sirinbai, and her son, Kaikhashru, but those children are at present young, and are living with their father, Dadabhoy Rustomji; and having appointed along with their father and guardian two other persons as trustees, the amount of the shares of these young heirs until such time as they come of age having been duly guaranteed,—that is to say, having been invested in Government paper,—the accumulating interest is to be added thereto, and their shares should be paid to them as they respectively come of age. According to these particulars, 100—namely, one hundred—cents are to be apportioned among Bai Bachubai, the three sons, the three living daughters and the children and heirs of the three deceased daughters, agreeably to the shares of the heirs settled above.

10. Agreeably to what is written above, the said Bai Bachubai, the widow of our patron, the late Framji Cawasji, deceased having obtained probate in her own name alone under the said will of our patron, the late Framji Cowasji, deceased, and having given a full authority to her attorney or vakil, the above-mentioned Cursetji Nusservanji Camaji is to discharge all the debts due by our patron, the late Framji Cowasji, deceased, and after paying all **[513]** those debts and after paying them by selling the landed property and other goods and effects, the surplus, whatever it may be, shall be divided among the said heirs, determined in the above-mentioned paragraph 9, agreeably to what is written in that very paragraph, and the same is truly to be apportioned

by the said Bai Bachubai, the widow of the late Framji Cowasji, deceased, and Cursetji Nusservanji Camaji.

11. After paying in full, agreeably to what is written above, all the creditors of the late Seth Framji Cowasji, deceased, out of the income of the Poway Estate of the late Seth Framji Cowasji, deceased, as written above; out of the remaining income, whatever it may come to, after paying for the two charitable works—namely, supplying water and the management of fire-temple, for which trust-deeds have been made agreeably to and as mentioned in paragraphs 7 and 8—and after deducting the amount of the expenses of those villages, the remainder is to be apportioned to the above-mentioned heirs agreeably to the shares mentioned above; but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever; no other person shall make any claim or demand whatsoever thereon; and, should any male or female heirs give away his or her or their share to a stranger or to any improper person, the same should not take effect; and we, all the heirs, do agree by this writing that, should anything of this kind be done, it is to be all null and void, and is truly to become void; and should any of the under-mentioned heirs or their heirs and children die hereafter without issue, then his or her share is truly to go to the surviving male and female heirs, and my (Bai Bachubai's) share, too, after my death, is truly to go to the male and female heirs settled above, and, in the event of their death, to their children and heirs in the manner written above. This we all, the undersigned heirs, concurring with one another, are truly to abide by. Should we, or our children and heirs, now or hereafter, make any alterations or deviations therein, or make any claim or demand thereon, it is to be truly null and void. Moreover, the authority for the management of all the remaining estate of the late Seth Framji Cowasji, deceased, whatever it may be, and the income of the villages in Salsette, inclusive of Poway, and the management and the taking care thereof, and for the management of the supply of water for charity from the Girgaon cart to the poor of Kamathipura in Bombay belongs to us, Pestonji Framji and Nanabhoy Framji, executors and heirs appointed in the said will of the late Seth Framji Cowasji, deceased; and, in the event of the death of either of them, one of his sons and heirs is to be appointed by the other, and so from generation to generation, who is to do all the business agreeably to what is written above. Should any one die without appointing any one out of his sons as his heirs, then his eldest son, whoever he may be, is truly to join in conducting all the management on behalf of his father agreeably to what is written above, and is truly to give and receive what is due to and from the other heirs appointed by this writing agreeably to what is written above; no other heirs have any authority in this matter, and, should any one whatsoever raise any claim or demand whatsoever thereon at any time, it is truly to be null and void.

[514] 12. The trust-deeds, which have been executed by our patron, the late Framji Cowasji, deceased, during his lifetime are to be kept in force in every respect, and they shall not in any way be affected, or be suffered to be affected, by anything contained in this writing: and we are truly to agree and abide by whatever is contained therein, and conduct ourselves agreeably thereto.

14. As the late Seth Framji Cowasji, deceased, had himself no right either to sell or mortgage the villages and the estate in Salsette belonging to our patron, the late Framji Cowasji, deceased, consequently none can ever exercise such a right over the same in any respect; but we, the undersigned heirs, and our successive heirs do agree that we are in no way able either now, or at any time hereafter, to sell or mortgage the said estate in Salsette; but in addition thereto, agreeably to what is written in the above paragraph in this writing, it is agreed that the claim of inheritance of us, the undersigned heirs of our patron, the late Framji Cowasji, deceased, is to be received out of the income of this estate. As to that claim we, the undersigned, all the heirs of the late Seth Framji Cowasji, deceased and our successive heirs do agree that the claim of each of us separately over the above-mentioned income is not in any way to be sold or to be given in writing to any one now or hereafter by any of one of us or any of our successive heirs; and should any one do any such thing it shall truly be null and void by this writing. Our respective shares, after they shall have come into our hands, may be used and enjoyed by us in any way we like; but agreeably to this writing, we are not to sell or give away in writing our prospective income to anybody, which we all are truly to agree to and by agreeably to this writing.

15. We, after having read and understood the above-mentioned particulars, have at present signed this writing, and are truly to sign without any objection another writing also that may be made in English from this writing through an attorney.—Dated *Samvat* 1907, *Vaisak Vud* the 9th day of the week, being Saturday, the English date being the 24th of May A.D. 1851.

In June, 1851, probate of the will and codicil was granted by the late Supreme Court to the testator's widow and executrix, Bachubai—

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power being reserved to the two others, her sons Pestonji and Framji, to come in and prove the same.

Mr. Cursetji Nusservanji Cama managed the estate in obedience to the powers conferred on him by the family agreement of the 24th May, 1851, and by Bachubai, the executrix, and, it is alleged, paid off, as soon as he was able, all the testator's debts.

In November, 1858, Bachubai died intestate, and on the 17th December, 1858, probate of the will and codicil of Framji Cowasji was granted to the surviving executors, the testator's two sons Pestonji and Nanabhoy.

The testator's eldest son Jehangir, died on the 16th December, 1863, having by his will appointed his wife, Mithibai (the first **[515]** plaintiff in this suit), his executrix, and given her authority over his inheritance and share in the property of his deceased father. Mithibai obtained probate of his will on the 25th January, 1866.

Pestonji, one of the testator's three sons, died after the commencement of this suit, and one of his executors, Mr. Limji Nowroji Banaji, was made a party defendant in his stead.

Nanabhoy, the other son of the testator, is still alive; but all his right, title, and interest in his father's property having been attached in execution of one or more decrees against him, all his interest in the property and all the rights secured by such decrees became subsequently vested in Hari Valabdas Kaliandas, who, by a Judge's order dated the 18th March, 1880,—made after full argument, and which order was not appealed against—was added as a defendant.

The suit, the plaint in which was filed on the 5th December, 1870, was brought by Mithibai, the widow, and by the heirs of Jehangir Framji against the other parties to the family agreement of the 24th May, 1851—the suit being based upon that agreement—and prayed that the rights and interests of the plaintiffs and defendants, under the said agreement of the 24th May, 1851, might be ascertained and declared; that the net residue of the testator's estate might be ascertained and decided according to the shares mentioned in the said agreement; that such of the immoveable property as was unsold might be sold under the decree and directions of this Court; that the defendants, Pestonji Framji and Nanabhoy Framji, might be directed to account for all moneys received by them, or either of them, belonging to the estate of the testator, or which, but for their or either of their wilful neglect or default, might have been received by them or either of them; that a receiver might be appointed, and the said Pestonji Framji and Nanabhoy Framji restrained by injunction from receiving and collecting the rents, profits, and moneys belonging to the estate of the deceased Framji Cowasji; that the share of Bachubai in the estate of Framji Cowasji might be ascertained and set aside, or distributed among her next-of-kin, under the decree and directions of the Court; that, pending the suit, provision might be made **[516]** for the maintenance of the plaintiff, Mithibai, and such of the defendants, other than the defendants Pestonji Framji and Nanabhoy Framji, as might desire the same out of their shares in the estate of Framji Cowasji. There was also a prayer for further relief.

The suit came on for hearing before me, and was heard on the 20th, 22nd 23rd, and 24th February, 1872, on which last day the Court declared, with the consent of the plaintiffs and defendants, their respective counsel and attorneys, that the plaintiffs and defendants were entitled to have the estate of the late Framji Cowsaji ascertained and distributed under the

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agreement of the 24th May, 1851. The Court also declared that the agreement of the 24th May, 1851, was, and then was, a binding and valid agreement between the parties thereto, and decreed the same accordingly; and ordered, by and with the like consent, that it be referred to the Commissioner of the Court to enquire and report who were then entitled to a share in the estate then remaining of Framji Cowasji, and to ascertain and report in what shares and from what dates they were so entitled on the footing of the agreement of the 24th May, 1851, after making all just allowances, and to ascertain and report the amount of the share of Bachubai, the testator's widow, in his moveable and immoveable estate, and also of her ornaments and moveable estate (if any), and to report amongst whom and in what shares the same ought to be divided. The decretal order contained directions as to taking certain accounts, and appointed the late Mr. Henry Gamble sole receiver to manage the said estate in lieu of the defendant, Pestonji Framji; and Pestonji Framji and Nanabhoy Framji were restrained from collecting or receiving the rents, profits, and moneys belonging to the estate. The receiver was, with the like consent, ordered to pay to certain of the parties to the suit certain sums monthly for their maintenance; and it was likewise ordered that such of the immoveable property of Framji Cowasji as was not sold be sold forthwith by the Commissioner, in one or more lots, by private contract or public auction as to him might seem best, with liberty to the parties to bid. Liberty was given to the Commissioner to report specially as to the best mode of releasing any portion of the estate from any charges or **[517]** incumbrances thereon and of providing for the same. The costs of all the parties to the suit up to and including the decretal order were to be paid out of the estate. Further directions and further costs were reserved with liberty to any of the parties to apply as there might be occasion.

The accounts directed by the above decretal order have been partly taken in the Commissioner's office by Mr. C. E. Fox and Mr. G. H. Farran, and are still being taken by the latter officer. Part of the testator's landed estate in Bombay has been sold; but, in consequence of the difficulty experienced in giving a good title to the Poway Estate, in Salsette, by reason of its liability to contribute towards the maintenance of the water-supply to the two reservoirs in the Duncan Road and the necessity of obtaining the concurrence of the Government of Bombay to any alienation of the Poway Estate, no part of that estate has as yet been sold.

From the recitals in the special report of the Assistant Commissioner of the 11th April, 1881, now objected to, it appears that a warrant was taken out by Messrs. Craigie, Lynch, and Owen, solicitors for Hari Valabdas Kaliandas, "to show cause why the Assistant Commissioner should not issue a certificate or special report defining the nature and extent of the estate and interest in the Poway Estate of the defendants, Hari Valabdas Kaliandas and Nanabhoy Framji, and of the other persons named as heirs in the ninth clause of the family agreement dated the 24th May, 1851." And the Assistant Commissioner having, upon the return of such warrant, been attended by the parties or their solicitors, made his special report, dated the 11th April, 1881, to the effect already stated at the commencement of these remarks, and thereby decided (*inter alia*) that the interest of the defendant, Hari Valabdas Kaliandas, extends only to the life-interest of the defendant, Nanabhoy Framji, in the Poway Estate.

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The parties to that agreement mostly support the contention of Hari Valabdas Kaliandas in his objection to the above finding of the Commissioner.

The objections to the Commissioner's special report were argued before me at considerable length, on the 28th and 29th [518] April and the 2nd and 3rd May last, by Mr. Latham for Hari Valabdas Kaliandas, supported by Mr. Lang, who appeared for all the plaintiffs except Hormusji Pestonji Framji, Jerbai, and Awabai; and by the Advocate-General, who appeared for Nanabhoy Framji. Such of the other parties to the suit as were not represented by counsel took no part in the argument,—the plaintiff, Hormusji Pestonji Framji, who appeared in person on behalf of himself and his wife, the plaintiff Jerbai, stating only that he relied on the decretal order, and left the rest to the Court.

The question now for determination is whether the finding of the Assistant Commissioner—that the persons who signed the family agreement dated the 24th May, 1851, have or had life-interests only in the Poway Estate—is erroneous.

The family agreement, upon the true construction of which the question turns, is written in the Gujarathi language and character, and is headed, as is usual in native documents, with "Shree $1\frac{1}{4}$" (*i.e.*, prosperity, &c.) It was evidently framed without any legal advice; but the parties intended that a more formal document should be executed, as, by the last clause of it (the fifteenth clause), they say: "We, after having read and understood the above-mentioned particulars, have at present signed this writing; are truly to sign, without any objection, another writing also that may be made in English from this writing through an attorney."

The translation, a copy of which was annexed to the plaint, was admitted to be correct and not susceptible of improvement. It was made by the late Mr. Narayan Dinanath on the 13th September, 1851, then one of the interpreters and translators of the late Supreme Court of Bombay.

It was not contended before me that the persons who signed the agreement were domiciled elsewhere than in the island of Bombay. They were all Parsis; and it was argued on either side that the law to be applied, so far as regards that portion of the agreement which concerns the Poway Estate, must be the law in force as to Paris in the island of Salsette, which is part of the Mofussil of this Presidency, forming part of the collectorate of Thana and beyond the ordinary original civil jurisdiction of the High Court of Bombay.

[519] The learned Advocate-General stated that no case has decided what is the tenure of land belonging to Parsis in the Mofussil of Bombay; and he contended that English law does not apply to Parsis outside the island of Bombay; that the leading principles as to English real property, including the law of primogeniture, are not applicable to Parsis in the Mofussil; that there is no distinction between moveable and immoveable property as regards Parsis; that this agreement must, as regards the Poway Estate, be construed with reference to the *lex loci* of the Mofussil; and that Parsis as to that estate must be governed by their own usages and customs.

Mr. Latham, on the other hand, contended that the strict English law, with the distinction between realty and personalty, would not apply to the Mofussil; that Nanabhoy Framji had, and that Hari Valabdas Kaliandas now has an absolute estate of inheritance in one-third of one-half of the Poway Estate, possibly liable to be divested if Nanabhoy

dies without issue (which at present seems improbable, as Mr. Latham stated that Nanabhoy has two sons who have children); that the Court will apply the *lex loci* in Salsette in regard to property there. Mr. Latham stated that he and the Advocate-General seemed to agree that the law of descent there would more nearly resemble personal law. He contended that here the parties intended to create an estate which would remain in the family for ever, which the Court would be bound to reject. That the rule in *Shelley's Case* applied; but, even if it did not, that the estates of the persons who signed the agreement were not for life, and that the estate of inheritance in the parties to the agreement was good, but the restraint against alienation was absolutely void.

Some of the above points are not merely novel, but of much importance and difficulty.

Now, what is the law applicable to these limitations in the family agreement of the Poway Estate?

With respect to real property, the *lex loci rei sitæ* universally prevails: *Sill* v. *Worswick* (1); *Doe d. Birtwhistle* v. *Vardill* (2); *Brodie* **[520]** v. *Barry* (3); *Warrender* v. *Warrender* (4); Story's Conflict of Laws, ss. 365—428; Forsyth's Cases on Constitutional Law, 248.

The case of *Earl Nelson* v. *Lord Bridport* (5), cited by the Advocate-General, and decided in 1846 by Lord Langdale, Master of the Rolls—a case presenting several points analogous to those in the one now before me—may here be noticed in some little detail.

Ferdinand the IV, King of the Two Sicilies, granted in 1799, by a charter or instrument written in the Latin Language, to Horatia Viscount Nelson, for himself and the heirs of his body, the duchy and estate of Bronte, situated on the western slopes of Mount Etna, with power to appoint a successor to whom solemn investiture should be granted according to the law of Sicily. By a will, in the English Form, Lord Nelson appointed William (afterwards Earl) Nelson and W. Haslewood to succeed to the Bronte Estate, and he devised the same upon certain trusts. For the purpose of determining the rights of the parties it became necessary to ascertain, as well as might be, what, according to the laws of Sicily as effecting the estate of Bronte, was the operation and effect of the will of Viscount Nelson, and such enquiries as were thought proper were referred to the Master who reported thereon. Many exceptions were taken to his report, some of which related to his findings respecting the law of Sicily, or the effect of it, and were argued before the Master of the Rolls. It appeared that the law of Sicily did not admit of a settlement or conveyance of the estate with a rule of succession conformable in all respects to the limitations directed by the will.

At p. 570 Lord Langdale said: "The incidents to real estate, the right of alienating or limiting it, and the course of succession to it, depend entirely on the law of the country where the estate is situated. Lord Nelson, having accepted this Sicilian estate, could deal with it only as the Sicilian law allowed; he had a right to appoint a successor, but no right to modify the estate, interest or power of disposition to which the successor was entitled by the law of Sicily. The successor became the holder of the estate **[521]** subject to the incidents annexed to it by the grant and the law of Sicily, and no others." At p. 572 he said: "Earl Nelson, the duly nominated successor of Lord Nelson, the grantee, had obtained the

(1) 1 H. Bl. 665. (2) 5 B. & C. 438. (3) 2 Ves. & B. 127.
(4) 9 Bligh's H L. 89. (5) 8 Beav. 547.

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only estate which the law of Sicily allowed him to have—an inalienable estate descendible in a particular manner. By an alteration in the general law of Sicily that estate was afterwards enlarged, and Earl Nelson became the absolute owner of it, with a free power of disposing of it as he pleased;" and he stated that he was of opinion (p. 574) "that the alteration made in the law of Sicily gave the absolute ownership of the estate to William Earl Nelson, and that the estate did not continue to be, and did not then become, subject and liable to the trusts of the will so far as they regarded the Bronte Estate."

In *Webbe* v. *Lester* (1), which was argued in 1865 by the late Mr. Anstey on one side and by myself on the other—a case as to whether certain land near Poona had been held by two persons as joint tenants or as tenants in common—Mr. Justice Couch in delivering the judgment of the Court said (p. 56): "The English law is confined within the limits of the charters of the Supreme Courts, and is not the law of the Mofussil, where by Reg. IV of 1827, s. 26, the law to be observed in the trial of suits is 'Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations the usage of the country in which the suit arose; if none such appears, the law of the defendant; and, in the absence of specific law and usage, justice, equity, and good conscience alone.'"

In the Report of the Commission appointed to enquire into the usages recognized as laws by the Parsi community of India and into the necessity of special legislation in connection with them, dated the 13th October, 1862, and of which Commission Sir Joseph Arnould and Mr. Justice Newton were the two European members, it is stated in paragraph 2 that "the Parsis of the Mofussil in this Presidency have, ever since the year 1824, when the charter constituting the late Bombay Supreme Court came into operation, been under a different system of substantive law from the Parsis within the limits of the late Supreme Court and of the present [522] High Court in its ordinary original civil jurisdiction. The Parsis of the Mofussil have throughout had law administered to them in accordance with such usages and customs as the litigants were enabled from time to time to prove to the satisfaction of the adjudicating tribunal to be binding upon the Parsi community."

In paragraph 3 it is stated that "the law applicable to Parsis in the Mofussil has throughout been and still is ascertained and administered in the mode thus indicated" (*i.e.*, as indicated by s. 27, cl. 2 of Reg. IV of 1827): "The disadvantages of such a mode of administering law are its uncertainty, its consequent tendency to encourage litigation, the inconvenience and delay arising from having to ascertain the law in each case, as well as to apply it. On the other hand, such a mode of administering law is likely to be popular with a community whose prejudices are strong, whose dread of change is deeply rooted, and whose progress in civilization is comparatively slight."

In paragraph 4 it is stated that "in the Recorder's Court of Bombay the law appears for some time to have been administered to Parsis on the same principles as in the Mofussil. Thus, in the case of the 'Gheestas,' Sir James Mackintosh, just before leaving India (in 1811), was induced, on evidence that such was Parsi usage, to admit to the right of inheritance the illegitimate son of an intestate Parsi, because he had been invested with the sacred badge. This decision, which caused a great sensation

(1) 2 B.H.C.R. 52.

among the Parsi community at the time, was reversed by Sir John Newbold (Sir James Mackintosh's immediate acting successor); and it is by no means improbable that this and other instances of the difficulty and uncertainty introduced into the administration of law among Parsis, by the admission of such evidence of usage, had much to do with inducing the Judges of the late Supreme Court to exclude Parsis from the benefit of that clause in the charter of 1823 which provides "that matters of contract, inheritance, and succession should be determined, in the case of Mahomedans, by the laws and usages of the Mahomedans, and in the case of the Gentus by the laws and usages of the Gentus." The Judges of the late Supreme Court "declined to regard the Parsis as Gentus; and from thenceforth the Parsis, within the limits of the jurisdiction of the late Supreme Court, were, 'in all **[523]** matters of contract, inheritance, and succession,' subjected to English civil law; while in matters of marriage and divorce they have, as will presently appear, been for some years absolutely deprived of the benefit of all law."

And in paragraph 20 the Commissioners state that "before recording their conclusion on this point" (*i.e.*, what, if any, are the usages recognized as laws by the Parsis of India as to the right of females to inherit to intestate male Parsis?) "the Commission wish to observe, as a general result of an anxious and laborious enquiry on their part into the matter, that whatever usages as to property, inheritance, and succession may hitherto have been regarded as law by the Parsi community in India, are not Zoroastrian usages but Hindu usages—usages to which, in the course of some twelve centuries of sojourn in the land, the Parsis have become habituated, and which they have acquiesced in, regarding them as having the force of customary law. After all the enquiry they have been able to make, the Commission are of opinion that the language of Mr. Borradaile (a gentleman profoundly versed in the history and manners of the Parsis) is almost as true now as it was when first published in 1825. 'The Parsis,' (1) says Mr. Borradaile, '*have no laws*; for such books as they had before they emigrated from Persia were at that time all lost; and the rules, which, by their engagement with the Hindu Chief of Sunjan, they bound themselves to obey, form, together with the custom of the country which they insensibly picked up in their intercourse with the people, a body of rules or common law differing in few respects from that custom of the country founded on Hindu law which regulates the whole of a Hindu's life.'"

No evidence was offered, before the Assistant Commissioner of this Court, as to any usage in regard to land in Salsette, or as to any specific law or usage by which, as the law of the persons who signed the agreement of the 24th May, 1851, he ought to have decided the points argued before him on the return of the warrant taken out by the solicitors of Hari Valabdas Kaliandas.

I have had nothing placed before me to indicate the existence of any specific law or usage applicable either to lands held by **[524]** Parsis in Salsette, or to the parties to the family agreement. It does not, indeed, expressly appear whether all or any of the parties to that agreement were born in Bombay or in British India:—whether, in fact, they must or must not be considered as natural-born subjects of the Queen, so as to make (as the Court said in *Webbe* v. *Lester* (2)) the English law their law.

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(1) 1 Borr. 2, note.

(2) 2 B.H.C.R. 52.

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I think it probable, however, that the persons who signed that agreement were born in Bombay.

Framji Cowasji in his will dated the 5th July, 1828 (and which will is recited in that agreement), describes (para. 10) his deceased father Cowasji as having been "formerly ruined by trade and expenses. I received nothing belonging to him ; on the contrary, from the day I was seventeen years of age, I laboured and served Europeans, and according to my ability, I provided, as I could, for the expenses of the house. . . . . According to my ability I took care of my brothers in such a way as I could. Besides this there are sundry small sums of cash against my father, Cowasji Byramji, and from a former period up to this day I have been paying his creditors relative to the same. I, having made an account book, have given it to him up to the 23rd October, 1824 ; about Rs. 35,237 are found due as a balance to me." In his will, which is of great length; Framji Cowasji describes himself (para. 13) as having carried on business with European mates and captains of vessels, and (para. 7) as then transacting the business of captains of European ships. He appears to have invested large sums in the purchase of bungalows and house property in the Fort and elsewhere in the island of Bombay ; one of such houses he describes in the paragraph 6 of his will as the bungalow in the Sans Souci Garden at the Mount, lately repaired, and then in the occupation of Sir Edward West, Chief Justice, at the monthly rent of Rs. 300. He refers to an office and warehouses which he had built in the Fort—to six shares he held in the Apollo Screws (then of very considerable value) —to his ships (one of which, the *Sulleymany*, he says he had navigated for so many years) ; and he estimated (para. 6) the net annual income from that portion of his landed estate which he was then describing and from his shares in the Apollo Screws to amount to Rs. 35,000.

[525] In the indenture dated the 15th February, 1837, already noticed, by which the East India Company granted the Poway Estate unto and to the use of Framji Cowasji, his heirs, executors, administrators, and assigns for ever, he was described as "Framji Cowasji Banaji, Esquire, of Bombay, Parsi Merchant."

If, as he says in his will, he did business with Europeans from the time he was seventeen ; and if his trade, as it would seem to have been, was carried on, and his money made in Bombay, which contains a far larger number of Parsis than are to be found in any other town in India, I think it not improbable that he married or lived in Bombay, and, if so, it is likely that most, if not all, of his numerous children were born there.

If the persons who signed the family agreement were born in Bombay, or even in British India, they would be natural-born subjects of the Queen.

By the common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents,—and in the latter case whether the parents were settled or merely temporarily sojourning in the country,—was an English subject, save only the children of Foreign Ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England (1).

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(1) Nationality or the Law relating to Subjects and Aliens, by Sir Alexander Cockburn, Lord Chief Justice of England, 1869.

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In the well-known judgment, as to landed tenures in Bombay, of the Court of Appeal in the case of *Nowrojee Byramjee* v. *Rogers* (1), delivered by the present Chief Justice in 1867 (concurred in by Mr. Justice Couch), it is stated (pp. 11-12) that "until the recent legislation of the year 1865 (Act XV of 1865, Act XXI of 1865, and the Indian Succession Act of 1865) the law uniformly applied to Parsis and their property in the island of Bombay by the Supreme Court, and, since it was closed by the High Court at its Original Jurisdiction Side, has been, as correctly stated in the clear and §able report of the Parsi Law Commission (dated 13th October, 1862) of which Sir Joseph Arnould and Mr. Justice **[526]** Newton were members the English law, except so far as it is varied by Act IX of 1837, and also since the decision of the Privy Council in 1856 in *Ardasir Cursetjee* v. *Perozbai* (2), except as to matrimonial suits at the Ecclesiastical Side of the Court, and, perhaps I should add, except as to bigamy."

In the present case the plaintiffs brought their suit, praying that the rights and interests of the plaintiffs and defendants under the agreement of the 24th May, 1851, might be ascertained and declared. Most of the immoveable property of the late Framji Cowasji, as appears by his will, was situated within the island of Bombay. A portion only of such immoveable property, *viz.*, the Poway Estate, in Salsette, lies outside such jurisdiction. And such estate and its revenues had been in due form made liable by Framji Cowasji to certain onerous charges in respect of the expense of supplying water to the two reservoirs which are situated in the Duncan Road within the island, and, therefore, within the ordinary civil jurisdiction of the High Court of Bombay. The persons who signed that agreement were, as already stated, probably born in Bombay, and were, therefore, natural-born subjects of the Queen or of Her Royal Predecessors on the British throne. The agreement was, I think, in answer to a question from the Court, stated to have been executed in Bombay. By the agreement the parties to it bound themselves (cl. 15) to sign, without any objection, another writing that should be made in English from that agreement through an attorney, and at that date in 1851 the attorneys of the Supreme Court were exclusively Europeans.

In the early case of the *Earl of Athol* v. *Earl of Derby* (3) a contract respecting the Isle of Man, though out of the jurisdiction, was enforced by the Court of Chancery in England. So in *Tollier* v. *Carteret* (4), where a bill was filed by the mortgagee for foreclosure of the Island of Sark, the defendant pleaded to the jurisdiction of the Court that the Island of Sark was part of the Duchy of Normandy, and had laws of its own, and was not under the jurisdiction of the Court of Chancery; but the Lord Keeper, Sir Nathan Wright, overruled the plea, observing that the Court of Chancery **[527]** had jurisdiction, the defendant being served with process here, and *equitas agit in personam*, which is an answer to the objection.

In the leading case of *Penn* v. *Lord Baltimore* (5) Lord Hardwicke decreed the specific performance of articles executed in England concerning the boundaries of two provinces in America.

And in *Cood* v. *Cood* (6) Sir J. Romilly, M. R. said: "The right to land in Chili must, no doubt, be determined by their laws; but a contract entered into between three English gentlemen—two of them domiciled and

(1) 4 B.H.C.R. 1.
(2) 6 M. I.A. 348.
(3) 1 Ch. Cas. 220.
(4) 2 Vern. 495.
(5) 1 Ves. Sen. 444, and 2 Wh. & T. L. C. 939 (5th ed.)
(6) 33 L. J. Ch. 273.

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residing in England, and the third residing in Chili, but not having acquired a foreign domicile—must, I think, be governed and construed by the rules of English law."

In *Webbe* v. *Lester*, already cited, Mr. Justice Couch said that there was no evidence that the defendants must be considered as natural-born subjects of the Queen so as to make the English law their law, nor any evidence of any specific law or usage by which, as the law of the defendants, the suit ought to be decided; and the rights of the parties, must, therefore, be determined according to justice, equity, and good conscience, and that in so doing the Court might be guided by the principles of English law applicable to a similar state of circumstances, and that the Court had come to the conclusion that, according to both justice, equity, and good conscience and to English law, which in Courts of Equity ought to be identical, there was in that case no right of survivorship.

In the month preceding the one in which that decision was given, a case had been argued before Justices Couch, Newton, and Warden in regard to the application of the principles of English law in a Court in the Mofussil on special appeal from the District Judge of the Konkan, of which zilla the island of Salsette, in which the Poway Estate is situated, forms part: *Dada Honajee* v. *Babajee Jagushet* (1).

In delivering the judgment of the Court Mr. Justice Couch said (p. 40): "The judgment of the Privy Council in *Vardin Seth Sam* v. *Luckputty Royjee Lallah* (2) is an authority of the highest Court of Appeal; that, although the English law is not [528] obligatory upon the Courts in the Mofussil, they ought, in proceeding according to justice, equity, and good conscience, to be governed by the principles of the English law applicable to a similar state of circumstances.

Now, a not inconsiderable portion of the jurisdiction of this Court is exercised in either compelling parties to perform their agreements, or in awarding damages against those who have refused to perform them. Where persons for a valid consideration enter into a contract to which no objection can be raised either in law or in equity, it would be contrary to justice, equity, and good conscience, as well as to English law, to allow the parties to violate such contract with impunity. Courts of Equity look, too, with much favour upon family arrangements by way of compromise. See *Stapilton* v. *Stapilton* (3).

The parties to this family arrangement seek by their suit to have it established, and they now come—those of them at least who are represented by counsel, and following the lead, apparently, of Hari Valabdas Kaliandas, a Hindu, and, therefore, an alien in race to this Parsi family, but who has been made a party to the suit in consequence of his having become possessed of all the right, title, and interest of Nanabhoy Framji in the estate—and, with the exception only of Nanabhoy Framji, they ask this Court to hold the legal effect of the agreement to be totally different to the intention expressed on the face of that instrument.

For I take it to be clear, beyond all doubt, that the parties to the agreement intended, and have expressed that intention with sufficient clearness in the document itself, that in dealing with the Poway Estate they only professed to and did only intend to deal with the income of it during a succession of life-interests—limitations which would, no doubt, infringe the rule against perpetuities; or, to speak more accurately and

(1) 2 B.H.C.R. 36.
(2) 9 M.I.A. 303.
(3) 1 Atk. 2 and 2 Wh. & T.L.C., 836 (5th ed.), and the cases collected in the notes.

with special reference to the motion now before me, that they intended and by their language have said that they themselves, the persons who signed the agreement, should take no more than life-interests in the income of the Poway Estate. Indeed, the rule in *Shelley's Case*, which [529] Mr. Latham asked the Court to hold applicable, admits the existence of, and cannot have any operation unless there be a life-estate in the ancestor of first taker.

Having already read the material clauses of the agreement I will do no more than here point out that by cl. 11 the remaining income (*i.e.*, of the Poway Estate) is to be apportioned to the heirs mentioned in cl. 7 agreeably to the shares therein mentioned, but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation; and, by cl. 14, they state that, as Framji Cowasji had himself no right to sell or mortgage the villages and estate in Salsette, consequently none can ever exercise such a right; and the persons who signed the agreement, and their successive heirs agree that they are in no way able now or at any time hereafter to sell or mortgage the said estate in Salsette; and it is agreed that the claim of inheritance of them, the signors of the document, is to be received out of the income of this estate, and as to that claim they and their successive heirs agree that the claim of each of them separately over the above-mentioned income is not in any way to be sold or to be given in writing to any one now or hereafter by any of them or any of their successive heirs; and, should any one do any such thing, it shall truly be null and void by that writing. And they conclude that fourteenth clause by saying that their respective shares, after they shall have come into their hands, may be used and enjoyed by them in any way they like; but, agreeably to that writing, they are not to sell or give away, in writing, their prospective income to anybody, which they all are truly to agree to and abide by agreeably to that writing.

Clearer language, though no doubt it is untechnical, could not, I think, in the evident absence of legal advice, have been used to indicate the intention of the parties to that agreement, that, so far as they themselves were concerned, they were only during their lives to enjoy the income of the Poway Estate which remained after the charges upon it were satisfied, and without any power of anticipating the same.

Such, in my opinion, being undoubtedly the intention of the [530] parties as expressed in the agreement itself, is there any law which will prevent this Court carrying out such intention? In the case of *Varden Seth Sam* v. *Luckputy Royjee Lallah and others* (1) there is a passage in the judgment to the Privy Council delivered by Lord Kingsdown (2) which I will here quote, and which is in these words: "In this case there is an express contract for a security on the lands to which, no law invalidating it, effect must be given between the parties themselves."

Now, is there any law which this Court is bound to administer in the present case invalidating the contract by which the parties to this agreement have declared that during their respective lives they shall only take the income—*i.e.*, the remaining income—of the Poway Estate? Mr. Latham, in arguing that this was an absolute estate of inheritance in the parties to the agreement, at first cited and relied on the rule in *Shelley's Case*, and pointed out that it applied to personalty, citing 2 Jarman, on Wills, 306, 534, 535; Fearn's Contingent Remainders, p. 466,

(1) 9 M.I.A. 303.

(2) At p. 322

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note (H); whilst in his reply he stated that he was not arguing that English law applied, or that these were estates tail, but that the Court would apply the *lex loci* in Salsette in regard to property there. Later on in his reply he contended that the rule in *Shelley's Case* applied; but, even if it did not, that the first estate were not for life.

There appears to be this difficulty in applying "justice, equity and good conscience alone" (Regulation IV of 1827, s. 26) as interpreted by Couch, J., in 2 Bom. H. C. Rep. 38 and 55, and by the Privy Council in 9 Moore's Ind. App. 303, *viz.*, "according to the principles of the English law applicable to a similar state of circumstances," *viz.*, that there are no decisions directly bearing on this novel point either in England or in India; for it has never yet been decided,—at least the learned Advocate-General as well as myself has been unable to discover, nor was Mr. Latham able to point out any case in England or in India which has decided what is the tenure of land belonging to Parsis in the Mofussil of Bombay, or the Mofussil of any other part of British India, or anything strictly analogous to such a point.

[531] Some portions of the English law have been held to have no effect in India and other parts of the possessions of the British Crown. The Mortmain Act (9 Geo. II, c. 36), is not applicable to India (*The Mayor of Lyons* v. *The East India Company* (1); *Mitford* v. *Reynolds* (2), nor in general to our Colonies as to New South Wales (*Whicker* v. *Hume* (3)) or to the West Indies (*Attorney-General* v. *Steward* (4). The English law as to *felo de se*, and the forfeiture of goods and chattels consequent, upon suicide, does not apply to a native Hindu, though a British subject, committing suicide at Calcutta: *Advocate-General of Bengal* v. *Ranee Surnomoye Dossee* (5).

The rule in *Shelley's Case*, which Mr. Latham argued that the Court should apply to these limitations of the Poway Estate, has never yet, that I am aware, been held applicable to the deeds or wills of Parsis in cases arising within the local limits of the Supreme or High Court of Bombay, or in regard to the property of Parsis in the Mofussil of this Presidency. Mr. Fearne in his very elaborate and exhaustive discussion of that rule in his Essay on Contigent Remainders says (p. 83, 10th ed., 1844) that the rule has generally been considered of feudal origin, and introduced to prevent frauds upon the tenure. It has been held in England that words conferring an estate tail in real, give an absolute interest in personal estate (*Leventhorpe* v. *Ashbie* (6)) and in accordance with that case, which was cited by Mr. Fearne as a leading one upon the subject, it has, no doubt, been established by numerous cases that a bequest to a person of chattels, whether real or personal, in such terms as would, in the case of a devise of real estate, have conferred upon him an estate tail, will, as a general rule, but subject to certain exceptions, give him an absolute interest, which on his death will go, not to his heir in tail, but to his personal representative. See the cases collected by Mr. Tudor in the notes to *Leventhorpe* v. *Ashbie*, pp. 764, 765.

But the words "heirs of the body" may be so explained by the context as to have the meaning of the word "children" in **[532]** which case, as in the case of realty, the parent will only take for life, and the children as purchasers: *Symers* v. *Jobson* (8). In *Sparling* v. *Parker* (7) where there

(1) 1 M.I.A. 175. (2) 1 Phillips 185. (3) 7 H.L. Cases, 124.
(4) 2 Mer. 160. (5) 2 Moore's P.C. Ca. (N.S.) 22=9 M.I.A. 387.
(6) Tu. R. P. C. 763 (2nd. ed, 1863). (8) 16 Sim. 267.
(7) 29 Beav. 450.

was a bequest of personal estate to Charles Sparling " and to his first and other sons after him in the usual mode of succession," it was held by Sir John Romily, Master of the Rolls, that Charles Sparling only took an estate for life. The Master of the Rolls said: " I have no doubt, on the intention and on the true construction of this will, that no larger estate is given to Charles than for life. I cannot go beyond that; Charles may yet have children."

I may here remark that the material words in cl. 11 of the family agreement are that " the remainder" (*i.e.*, " the remaining income of the Poway Estate") " is to be apportioned to the above-mentioned heirs" (*i.e.*, those persons who signed the agreement) " agreeably to the shares mentioned above, but after their death their shares are to be enjoyed and received *by their heirs and children* from generation to generation for ever."

Two decisions of high authority may here be noticed.

The first was the case of *Knight* v. *Ellis* (1) decided by Lord Chancellor Thurlow. There the testator directed certain rents to be accumulated till his grand-nephew should attain the age of twenty-one years, and after that event he gave the interest of that accumulated fund to his grand-nephew for his life, and after his decease he gave the fund to his issue male, and in default of such issue to his (the testator's) three nieces. It was argued that as this would have been an estate tail in real estate it was an absolute interest in personalty; but Lord Thurlow held otherwise, that the grand-nephew took only a life-interest, and having died without issue who would have taken as purchasers, the limitation at once took effect.

At p. 578 he said: " Now an estate in chattels is not transmissible to the issue in the same manner as a real estate, nor capable of any kind of descent, and, therefore, an estate in chattels so given, from the necessity of the thing gives the whole interest to the first taker; but if the testator, without leaving it to the **[533]** necessary implication, gives the fund expressly to the issue, they are not driven to the former rule, but the issue may take as purchasers, and then there is an end of the enlargement of any kind of the estate of the tenant for life, for another estate is given after his death to other persons who are to take by purchase; it no longer rests on conjecture. The word 'issue' used in a will, certainly is considered as creating an estate tail, and that because the context puts on the word an import which it has not naturally, but in a feoffment it is not a word of inheritance, and a gift to A and the issue of his body gives only an estate for life. On the whole I think that the issue, if any, would have taken as purchasers."

The second case was *ex parte Wynch* (2) which was heard on appeal from Vice-Chancellor Stuart by Lord Chancellor Cranworth and the Lords Justices Knight Bruce and Turner. The question arose under a devise by John Wynch, late of Vellore, in India, who by his will, dated the 8th March, 1796, had bequeathed to Anna Maria Mealy, then wife of R. Mealy, Lieutenant and Fort Adjutant of Vellore, in the East India Company's service, an annuity of £600 sterling "for her life and the issue from her body lawfully begotten, on failure of which to revert to my heirs," with a request that K and C would act as trustees for her, so that the annuity might be secured for her sole use and benefit. It was held by Lord Cranworth and by Lord Justice Turner—the Lord Justice Knight Bruce giving no opinion

(1) 2 Bro. C. C. 570.

(2) 5 De G. M. & G. 188.

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on the point—that Anna Maria Mealy took an interest for life only, with a gift in the nature of a remainder to her issue.

Portions of the judgments of Lord Cranworth and Lord Justice Turner appear to me to afford much assistance in the consideration of the present case, and I will, therefore, quote them.

The Lord Chancellor said (p. 204): "The authorities, I must observe, on this subject are very far from satisfactory, and the principles on which they have gone, have not, I think, in many cases been such as were strictly applicable to questions of this sort. Rules drawn from principles of tenure have been adopted as canons of construction where tenure is out of the question [534] though in the great bulk of the cases the intention has been thereby defeated. Where, however, I find a rule established I will not question it, or inquire very narrowly as to its origin; but the point is whether the authorities which gave an absolute interest in personalty to the first taker do govern this case,—that is to say, whether this is a case in which I am bound by authority to hold that words expressing a gift to the issue are words of limitation, and not words of purchase. I think I am not so bound."

After citing some decisions in which it had been held that the first taker took an absolute interest, he said (p. 206): "In these cases the principle on which the Courts went was this, that technical words were used which indicated a clear meaning, on the part of the testator, that the property should go in a course of devolution till there was an exhaustion of the heirs of the body; and as that, of course, could not be carried into effect, they gave an absolute interest." After commenting upon some other decisions he said (p. 208): "In all these cases the rule applied to real estates derived from principles of tenure, has been made the foundation of the rule for construing bequests of personalty, but in all either the technical words 'heirs of the body' have occurred, or there has been nothing to show that the words 'issue,' 'children,' or the like have not been intended merely to define or explain the extent of the interest given to the first taker; and I see nothing in these decisions compelling me to hold that where technical words are not used, and where the interest of the first taker is expressly confined to the life-estate, I am bound to act, in the construction of the bequest of personalty on principles derived from laws of tenure and not resting on intention. It was on this distinction that Lord Thurlow acted in the case of *Knight* v. *Ellis* (1) . . . . . I cannot consider that case as having been overruled; I believe it to have been rightly decided; and, at all events, if it was wrongly decided, I think it can only be questioned in the House of Lords."

Lord Justice Turner held that, in construing a disposition by will of personal estate, the Court is not to be absolutely governed by the rules which would be applied at law in the cases of real [535] estate and at p. 226 he said: "The great principle in all cases upon the construction of wills is that the intention of the testator is to be carried out as far as it is consistent with the rules of law, and I am satisfied that the construction put by Lord Thurlow upon the will in *Knight* v. *Ellis* (1) was much more conformable to the testator's intention than the construction which has been contended for in the present case." He stated that he was not inclined to dissent from *Knight* v. *Ellis*, that it was not a case which stood

(1) 2 Bro. C.C. 570.

by itself, there being older authorities to the same effect, among which he would mention *Clare* v. *Clare* (1) and *Warwan* v. *Seaman* (2).

The above two cases were cases of wills. The present one turns upon the construction of a family agreement; and presenting, as it does, features of much novelty and with no authority in point to assist the Court, I conceive that it is my duty to ascertain, from the agreement itself and from the terms in which the parties to it have expressed themselves, what was the intention of those who signed it, and to give effect to such intention so far as the rules of law and equity will allow; or, in other words, in the absence of any specific law or usage applicable to the parties to that agreement, or to the Poway Estate, to decide the point at issue according to justice, equity, and good conscience.

The rule in *Shelley's Case* ought not, I think, to be held applicable to these limitations, in the construction of which the above cited cases of *Sparling* v. *Parker*, (3) *Knight* v. *Ellis*, and *Ex parte Wynch* (4) appear to me to afford much assistance.

The learned Advocate-General further contended that, even if the rule in *Shelley's case* did apply to the limitations of the Poway Estate, the trust was an executory one, a further deed being by the last clause of the agreement contemplated for the purpose of carrying out the limitations, and that in that case the Court would not allow the principal intent of the parties to be frustrated, citing *Lord Glenorchy* v. *Bosville* (5) the cases mentioned in the notes. Mr. Latham, on the other hand, argued that it was absurd to call this an executory trust, which he said only **[536]** existed in two cases, *viz.*, in marriage articles and under wills, and that the leaning of the Courts was against executory trust(6). The principle upon which Courts of Equity have proceeded in such cases may, I think, afford some light in considering the question now before the Court.

In commencing this discussion on the effect of the rule in *Shelly's case* on equitable limitatations Mr. Fearne says (Essay on Contingent Remainders, p. 90) : "The Court of Chancery, indeed, has not considered itself tied up to an implicit observance of the same rule in respect to those limitations which are the immediate object of that Court's jurisdiction. I mean limitations which do not include or carry the legal estate. In the decreeing the execution of marriage articles and in the construction of trust estates, of some descriptions at least, that Court regards the end and consideration of the settlement and the intent of the trusts beyond the legal operation of the words in which the articles of the trusts are expressed. Thus in the case of articles before marriage for making a settlement, if there be a limitation to the parents for life, with a remainder to the heirs of their bodies, the latter words are generally considered as words of purchase, and not of limitation, and the future settlement or conveyance, in pursuance of such articles, will be decreed to be made agreeable to such construction.

In discussing in his next paragraph (p. 113) those cases of trust, other than marriage articles, in decreeing the execution of which the Court of Chancery has so far departed from that which would be the legal operation of the words limiting the trust, if reduced to a common law conveyance, as to construe the words heirs of the body of the *cestui que trust*, although preceded by a limitation for life to the *cestui que trust*, as

(1) Cas. temp. Talbot. 21. (2) Finch. 279. (3) 29 Beav. 450.
(4) De G. M. & G. 188. (5) 1 Wh & T. L. C. 1.
(6) Citing 1 Jar. on Wills, 277 (3rd ed.).

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words of purchase and not of limitation—cases, he says, where some clause repugnant to the nature of an estate tail showed that the donor intended only an estate for life, he expresses himself in the following language. He says (p. 123): "In the meantime we are to consider that trusts were originally creatures of confidence between party and party and totally distinct in almost every quality from those legal estates which were the subjects of tenure. They were in their nature independent of [537] tenure, and therefore, not the object of those laws which were founded in tenure. They were rights arising solely out of the intent of the party who created them, and, therefore, such intent was the great guide in the execution of them. Consequently, when a Court of Equity, in certain cases of trusts estates, deviates from the rule above laid down, it does not, in so doing, depart at all from any rule of law by which it was ever bounden; it only exercises that conscience and discretion to which trust estates were in their nature originally and necessarily subject."

It was not denied that the estates intended to be or actually limited by the family agreement as regards Poway were trust estates. As to whether they were executed or only executory I abstain from giving any opinion, as it is not necessary to do so, having regard to my views upon the other points in the case.

The learned Advocate-General also contended that the Court in construing these executory trusts and limitations might apply the *cy-pres* doctrine to prevent infringing the rule against perpetuities. Mr. Latham cited authorities to show that such doctrine does not apply to personal estate (1).

A very clear statement of the nature of the *cy-pres* doctrine is to be found in Mr. Butler's note in Fearne's Contingent Remainders, p. 204, at the end of Chap. I. s.v. which was cited with approval by the Court of Exchequer in *Monypenny* v. *Dering*, (2) the judgment of the Court being delivered by Lord Cranworth, then Mr. Baron Rolfe. The same case was afterwards sent for the opinion of the Court of Common Pleas, and eventually came before Lord St. Leonards, Lord Chancellor: *Monypenny v. Dering* (3).

Lord St. Leonards also expounds the doctrine in his judgment in the House of Lords in the case of *East* v. *Twyford* (4).

Mr. Butler in the above-quoted note (p. 208 of Fearne's Contingent Remainders) says ,however, that no case has been decided in which the *cy-pres* doctrine has been applied to limitations in a deed, and that this is observed by Lord Eldon in *Breedenell* v. *Elwes* (5).

[538] It appears to me to be premature upon the present occasion to express any opinion as to what interests or estates, whether absolute or otherwise, those members of the family might take in the Poway Estate or the income thereof, who were the children or heirs of those who signed the agreement of the 24th May, 1851, but who were not parties to it. The Assistant Commissioner in his report has certified that all the parties interested in the matter had not been represented before him.

If the Assistant Commissioner was right, as I think he was, in deciding that the individuals who signed the family agreement took under it life interest, and no more, it follows that the children or heirs who would take upon the death of such persons were not represented before that officer, and the suit would appear to be at present defective for want

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(1) 1 Jar. on Wills 281. (2) 16 M. & W. 418. (3) 2 De G. M. & G. 145.
(4) 4 H. L. Cases 517. (5) 7 Ves. Jun. 389.

of such parties. Nanabhoy Framji, as already mentioned, was stated by Mr. Latham to have two sons who have children, and, for aught I know, one or more of the other persons who signed the agreement may have had children whose interests are not at present represented in this suit.

For the above reasons I am of opinion that the special report of the Assistant Commissioner is correct, and that it must be confirmed, and I accordingly confirm it.

By consent of the parties it was arranged that the cost of all the parties appearing on this motion of and incidental thereto should be taxed as between attorney and client, and be paid out of the funds to the credit of the suit. I, therefore, make an order as to costs to that effect.

Solicitors for plaintiffs.— Messrs. *Crawford and Boevey*.

Solicitors for defendant, Nanabhoy Framji.—Messrs. *Tobin and Roughton*.

Solicitors for defendant, Hari Valabdas Kaliandas—Messrs. *Craigie, Lynch, and Owen*.

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[539] ORIGINAL CIVIL.

Before Mr. Justice Bayley.

W. & A. GRAHAM & CO. *v.* MERVANJI NUSSERVANJI AND ANOTHER.* [5th and 6th August, 1881.]

Charter-party—"Safe port or as near thereunto as she may safely get always afloat"—Ship unable to enter port or lie there without previous lightening—Rights of parties.

Where a vessel is chartered to load a full and complete cargo and being so loaded to proceed therewith to a "safe port or so near thereunto as she may safely get, and deliver the same always afloat," the master is not bound to sign bills of lading for, or to sail to, a port where the vessel cannot, by reason of her draught of water, lie and discharge "always afloat" without being previously lightened, even if the cost of the requisite lightening would, by the charter-party, fall on the charterers.

By the terms of a charter-party a vessel was to take in a full cargo at Bombay, and therewith proceed to a "safe port in the Mediterranean (Spanish ports excluded), as ordered on signing bills of lading, or so near thereunto as she may safely get, and deliver the same to the said charterers or their assignees always afloat." Marseilles was at first named as the port of discharge, but subsequently the vessel was ordered to Cette, a French port, a little to the west of Marseilles; and bills of lading, made out for Cette, were tendered to the master for signature. The master refused to sign the bills of lading, or sail, for Cette. The vessel's draught of water when loaded was such that she could not have entered or lain afloat in Cette harbour without discharging a portion of her cargo. The cost of lightening the vessel by lighters outside the harbour would, under the charter-party fall on the charterers, and they were willing to incur the expenses necessary for that purpose.

Held—that it was no breach of the charter-party by the master to refuse to sail to Cette, or to sign bills of lading for that port.

THIS was a suit brought by the charterers of the steam-ship *Ossian* against the agent in Bombay of her owners, and the master of the said vessel.

The plaint set out that on the 22nd of June, 1881, a charter-party was entered into between the plaintiffs and the first defendant, Mervanji Nusservanji, signing as agent on behalf of the owners of the steam-ship *Ossian*, by which it was agreed, *inter alia* that the said steamer

* Suit No. 320 of 1881.

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should load from the charterers or their agents a full and complete cargo, and "being so loaded, should therewith proceed direct all the way under steam *via* Suez Canal, to a safe port in the Mediterranean (Spanish [540] ports excluded), as ordered on signing bills of lading, or so near thereunto as she may safely get, and deliver the same to the said charterers or their assignees always afloat;" that for the purpose of entering the said ship out at the Custom house, Marseilles was named as the port of discharge; that subsequently and before the cargo was completely loaded, the defendants were informed that the destination of the said vessel would not be Marseilles but Cette; that defendants thereupon gave notice that they would refuse to take the ship to Cette, whereupon a dispute arose, and delay was incurred to the damage of the plaintiffs; that subsequently bills of lading for the cargo already loaded were made out for Cette, and were tendered to the defendants for signature, but they refused to sign the same, or to sign any bill of lading for any other port than Marseilles, which refusal was a breach of the charter-party; that Cette was a safe port, and one to which the steam-ship *Ossian* was bound to go under the charter-party; that the cargo was now almost completely loaded, and, unless the defendants were restrained by the order and injunction of the Court, they would carry out their avowed intention of taking the ship out of the jurisdiction of the Court to the port of Marseilles, in breach of their charter-party; that this would be to the great loss and detriment of the plaintiffs, and would leave them without attainable redress. The plaintiffs, therefore, prayed (1) that it might be declared that the plaintiffs were entitled to name the port of Cette as the port of destination of the steam-ship *Ossian*; (2) that the defendants be ordered to sign the bills of lading as tendered, or, in default, to pay damages; (3) that the defendants might be restrained by injunction from employing the said ship in breach of the charter-party.

On the 2nd August, the Hon'ble *J. Marriott* (Advocate-General) presented the plaint, and moved for, and obtained a *rule nisi*, calling upon the defendants to show cause why they, and each of them, should not be restrained by the order and injunction of the Court from removing the steam-ship *Ossian*, in the plaint mentioned, from the port of Bombay, or from employing the said ship in a manner inconsistent with, or which might prevent, or interfere with the performance of the charter-party.

[541] *Interim* injunction in the meantime.

August 5 and 6.—The rule came on for argument.

The facts of the case were shortly these:—On the 22nd of June, the charter-party, the material portion of which is set out above, was entered into between the plaintiffs and the first defendant, Mervanji Nusservanji, signing as agent of the owners of the steam-ship *Ossian*. The plaintiffs subsequently assigned their charter to Remington & Co., merchants of Bombay, who were the real plaintiffs in this suit. On the 14th July, Mervanji wrote to the plaintiffs that the *Ossian* had just arrived, and asked for what port he should enter her out at the Custom-house. The plaintiffs communicated with their sub-charterers, and forwarded to Mervanji, on the same day, Messrs Remington & Co's answer: "her port of discharge will be Marseilles." Marseilles was accordingly entered at the Custom-house as her port of discharge. On the next day, 15th July Mervanji, on behalf of the owners, entered into a contract with third parties to ship for Marseilles 23 tons of horns, intending to use them to dunnage the ship for the voyage. By the charter-party "all requisite dunnage was to be found by the steamer." The right to make such a

contract was at first disputed by the plaintiffs, but after a long correspondence on the point the plaintiffs finally gave way, under protest.

On the 16th of July, Mervanji telegraphed to the owners in London : "*Ossian* loading Marseilles."

On the 20th July, plaintiffs advised Mervanji that it was not at all certain that their sub-charterers would not change the ship's destination from Marseilles to some other Mediterranean port. On the next day, July 21, Mervanji replied that Marseilles having been named, the right given the plaintiffs by the charter-party had been already exercised, and no change in the destination of the ship could now be made.

On July 23, plaintiffs wrote Mervanji : "Steamer's destination will be Cette : please make necessary change at the Custom-house," and at the same time forwarded for signature bills of lading, for the goods already on board, made out to Cette. On the same day Mervanji replied that it was too late to change the steamer's destination ; that Marseilles had been named by the plaintiffs ; **[542]** that the owners of the ship had in consequence been informed by telegraph that she was ordered to Marseilles, and insurances probably ere this had been effected for that port ; that probably further engagements for the ship had also already been entered into on that understanding. Moreover, the cargo of 23 tons of horns (for dunnage) had been taken on board, and bills of lading for the same, for Marseilles, given. And, over and above the previous reasons for refusing to go to Cette, that port, he alleged, was one to which the ship was not bound to go under her charter-party, as it was not a "safe port" for a ship of her draught.

A long correspondence followed, and meanwhile the further loading of the vessel was discontinued by the shippers.

The plaintiffs asserted that Cette was a "safe port" for the *Ossian* into which she could enter fully laden or, at worst, by discharging a small portion of her cargo into lighters outside the port, and maintained that they had the right to change the port of destination up to the moment that the bills of lading were signed. The defendants maintained that there was only from 18 to 20 feet in the harbour, and the *Ossian* drew 21 feet 6 inches fully laden; that they were not bound to incur the risks attendant upon discharging in the open sea-way outside the harbour ; but they offered to take the ship to Cette if the plaintiffs would give an undertaking to indemnify the owners in respect of any loss that might occur from so partially discharging the cargo outside the port, as well as for any loss that might be caused by change of insurance (if any), or loss of charter, if any had already been entered into, and the cost of transhipment of the cargo of horns from Cette to Marseilles. These terms the plaintiffs refused ; and, having completed the loading of the cargo (2,900 tons of wheat) under protest they brought this action.

The evidence as to the character of the port of Cette adduced an affidavit, on one side and the other, was shortly as follows :—

A. Clark, Surveyor to Lloyds' Agency in Bombay, deposed that he was acquainted with the Mediterranean and its roadsteads ; that, to the best of his belief, the steam-ship *Ossian* could safely lie there fully laden ; that, particularly at that time of the year, he thought a steamer would be perfectly safe there, as, to the **[543]** best of his belief, there was no difficuity whatever, either as to anchorage, or otherwise.

J. R. Kirby Johnson, a partner of the firm of J. Mackintosh & Co., Ship-brokers, Bombay, deposed that he had a few months previously effected a charter of the steam-ship *Coniston*, 1,490 tons (the *Ossian* was

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of 1,211 tons (net) register) for Marseilles; and after the charter had been completed, at the request of the charterers, it had been altered so as to give the charterers the option of discharging at Cette, or Marseilles and Cette. This affidavit was answered by one on the other side which stated that 3*s*, 9*d*. extra freight had been charged by the owners of the *Coniston* for the above concession: that the *Coniston* had, as a matter of fact, cleared out for Marseilles alone, and had gone to Marseilles alone, and discharged all her cargo there. There was also some evidence of another steamer, the *Titania*, also somewhat larger than the *Ossian*, having cleared out from Bombay for Cette; but whether she went there or not or whether the charterers paid greater freight for sending her there, or what was the nature of the charter-party in other respects in that case, did not appear. The plaintiffs also filed two affidavits of merchants residing in Bombay to the effect that, in such a charter-party as this, it was a matter of right with the charterer to alter the destination of the ship as often as he pleased up to the time of signing bills of lading. This was denied by a partner of the firm of Mervanji Nusservanji & Co., who said no port need be named until the time came to sign the bills of lading: but if the port was named earlier, the charterers could not afterwards alter the destination, except with the ship-owner's assent. The captain of the *Ossian*, William Tillar, produced a volume of "Sailing Directions" (1) which he said was provided by the owners of the ship, and which was in the habit of being guided by. He also produced his chart of that portion of the Mediterranean in which Cette was situated. In the "Sailing Directions," p. 82, Cette harbour was thus described:—

"To the S.-E. of the mole is a long heap of stones, or jetty of rocks, which serves as a breakwater off the middle of the harbour, and forms two entrances thereto. The N.-E. mouth of the entrance, near the light-house or mole head, has a **[544]** depth of from 18 to 20 feet. At a short distance without the harbour is a shelf of sand, with only 3 fathoms over it, where the sea runs very high, with the winds from E.-S.-E. to S.- W.. which blow on this coast and so obscure it with haze that you cannot see the land until you are very near it.

The plaintiffs, on their side, produced a volume of a similar character, entitled "Dues and Charges on Shipping in Foreign Ports" (2); and a chart in which an enlarged map of the port of Cette was given. The "Dues and Charges," p. 73, thus described the port of Cette:—

"The port of Cette is divided into three basins: the Old Port, the New Port, and the Basin of the South Railway Station. The latter is in connection with the New Port by a large canal, the quays of this canal offer good berths for discharging and loading with great speed and economy of labour. The Old Basin or Port admits vessels drawing 18 feet, the New Port 15 feet, and the South Railway Basin is now dredged to the same depth of water. The harbour is protected by a breakwater running east to west, forming two entrances. The eastern is the best, and the only one practicable. During bad weather vessels drawing 21 feet can enter."

The chart produced by the plaintiffs showed the character of the port of Cette and the various soundings inside and outside of the breakwater which protected the mouth of the harbour. The greatest depth shown inside the breakwater was 19 feet; just in the mouth of the S.-W. entrance was marked 25 feet, and some little way outside the N.-E. entrance

(1) Published by R. H., Laurie, Fleet Street, London.
(2) 4th ed. by John Green, London, 1881.

23 feet. At the hearing of the rule leave was asked on either side to examine witnesses orally on some points left in doubt by the affidavits, and two witnesses were called—William Tillar, captain of the *Ossian*, by the defendants : and J.R. Inch, captain of another steamer, by the plaintiffs.

W. Tillar stated that the *Ossion* was a ship of 1,211 tons (net) register. That he had now on board 270 tons of coal, enough for eighteen days only. That he carried less this season of the year (the monsoon) than at others, as he could not carry any coal on deck. That he should coal at Aden and Port Said ; **[545]** then at Malta. That he should leave Malta with 330 tons (50 of which would be on deck) if going to Marseilles or Cette. He might possibly burn as much as 120 tons before he got to Cette. The French coal was so bad that it was far cheaper to take in coal enough at Malta to take the ship on to Gibraltar or wherever else she might be sent. That his ship drew 3 inches more in the Mediterranean than on this side of Port Said owing to the difference in the density of the water. That, consequently, his draught on arriving at Cette would not be less, if it was not indeed, more than it was now, 21 feet 6 inches. That it would not be safe to have less than 6 inches of water under the keel. That the equinoctial gales sometimes came as early as the beginning of September, and then the Mediterranean was a stormy and dangerous place.

J. R. Inch stated that he had been to Cette as master of a steamer of 900 tons register, drawing then 15 feet of water. When once within the breakwater a ship was in the port, and safe. The N.-E. entrance was the one for large vessels. The depth of water varied a good deal with the wind. No such depth as 25 feet was to be found there. He could not say what was the depth inside. He could not say whether or not vessels of 21 feet could enter. He also gave evidence which shewed that the probable effect in the case of a ship of the size of the *Ossian* of removing 100 tons of cargo or coal would be to lessen her draught by about 5 inches. He confirmed Tillar as to the occasional early occurrence of the equinoctial gales in the Mediterranean.

Inverarity (for the defendant) showed cause.—We have not broken, and do not intend to break, the charter-party. We are asked to go to Cette, and we are not bound to go to Cette under our contract. It is not a "safe port" for the *Ossian* within the meaning of the charter-party. That is my first point ; and, if I am right on it, it will be unnecessary to consider the two other points in our case, *viz.*, that the charterers, having once named Marseilles as the port of discharge, could not afterwards order us to go to Cette ; and next that, if they could have done so originally, they were estopped from doing so after that we, relying on their representation that Marseilles was to be our destination, had taken action and altered our position.

[546] I do not dispute the power of the Court to issue an injunction to restrain an intended breach of a charter-party ; but the cases show that that will only be done on a very strong case being made out, and scarcely ever on an interolcutory application ; at any rate, not unless the party applying for it gives an undertaking to be responsible for any loss or damage that may occur : *DeMattos* v. *Gibson*. (1). In that case there was such an undertaking given. None has been given here. The Court has a great reluctance to grant these injunctions, as it amounts, in effect, not to a mere restraint, but indirectly to compel the performance of some positive act : in this case to compel us to go to Cette if we don't care to

(1) 4 DeG. & J. 276.

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waste our time by remaining in Bombay ; *Lidgett* v. *Williams* (1) ; *Blakemore* v. *Glamorganshire Canal Navigation*(2). It is an indirect manner of making us sign bills of lading in a particular way, as was said in *Grassmain* v. *Littlepage* (3).

Then on the merits it is for the plaintiffs to show that Cette is a "safe port," for such a ship as the *Ossian*, within the meaning of the charter-party. The material clause in our charter-party is practically identical with that in the case of the *Alhambra* (4) ; and it was there held, on appeal, reversing the decision of Sir. R. Phillimore in the Court below, that under such charter-party a ship is not bound to go to a port into which she cannot enter, or in which she cannot lie " always afloat" fully laden. L. J. James there says that " it is no answer to say that with a little manipulation of the cargo (outside) the ship can be made fit to go into the port. That is not the bargain "(5). That was a stronger case than this, as there a custom to lighten ships outside the port by lighters was proved ; that has not been done here. Moreover, in that case there was also a good protected roadstead outside the port itself, which there is not here. The Lords Justices even held that evidence of such a custom could not be given, as it contradicted the plain meaning of the written contract. The evidence, even the plaintiff's own evidence, shows that the *Ossian* could not possibly enter Cette harbour, and lie afloat there fully **[547]** laden, even if there was no coal on board when she entered Cette, and the captain was entitled to take as much coal as in his discretion he thinks is for his owner's benefit. That being so, Cette is not a port to which we are bound to go.

[BAYLEY, J., referred to *Shield* v. *Wilkins* (6) cited with approval by Brett, L. J., in the *Alhambra*.]

That case was the converse of this. Rolfe, B. there says: "The word safely means safely as a loaded vessel."

This very point seems never to have arisen before the case of the *Alhambra*. Other cases that seem very like it have all been cases in which the shipowner has contracted, either by original agreement, or subsequent mutual assent, to go to a certain definite port, or as near thereto as the ship can safely get ; and the only question has been what, in each case, amounts to fulfilment of that contract. Such are *Hillstrom* v. *Gibson*.(7), *Capper* v. *Wallace* (8), and many others. Those cases would be in point if we had contracted to go to Cette, but we have not done so.

My next point is that having named Marseilles as the point of discharge,they cannot afterwards as of right, name another port. The charter-party, it is true, says " as ordered on signing bills of lading" ; but that is a provision merely for the benefit of the charterer, which he can waive. If he names it earlier, he does waive it. Having once named the port of discharge, it is final. Such an alteration as is sought to be made here would amount to a new contract, and would, consequently, require our assent ; *Hall* v. *Brown* (9) : that has never been given.

Then assuming the charterers originally had this right, my next point is that they were too late in seeking to change the port of discharge, we having by that time taken action on their representation that Marseilles would be our destination. We have altered our position materially, and they are in consequence estopped. We had, several days before notice

(1) 4 Hare 465. (2) 1 Mylne & K. 154. (3) 3 W.R. 1 (Moulmien cases).
(4) L.R. 5 P. D. 256 ; 6 P. D. 68 (CA). (5) L.R. 6 P.D. 72.
(6) 5 Exch. 304. (7) 8 Scotch Cess. Cas. 3rd Series, 163.
(8) L. R. 5 Q. B. D. 163. (9) 2 Dow. 367.

of the proposed change, telegraphed to our owners that the ship was loading for Marseilles, in order that insurances for that port might by effected. They would in the ordinary course be effected **[548]** without delay; and no doubt, though we do not know it as a fact, that has been done. It is more than possible, too, that new engagements for the ship on that understanding have been entered into. And, lastly, before we were required to go to Cette, we entered into a contract to carry 23 tons of horns to Marseilles, and shall be liable to an action for damages if we carry them to Cette. There was at one time a controversy as to whether we were entitled to enter into this contract, seeing we had chartered the whole ship to the plaintiffs. By the charter-party we were to daunnage the ship; and these horns were intended, and have been used to dunnage the vessel. The authorities show we are entitled to make profit, if we can, by the carriage of goods used as dunnage: Machlachlan on Shipping, p. 386 (2nd ed.); *Towse* v. *Henderson* (1); *Kinter's Case* (2).

The Hon'ble *J. Marriott* (Advocate-General) in support of the rule.—Our affidavits show it is common and customary in Bombay to change the destination of a ship up to the moment of signing bills of the lading, and that as a matter of right. The charter-party in this case is express on the point. There has been nothing like waiver in the case; Marseilles was named at the request of the defendants simply for the purpose of entering the ship as soon as possible at the Custom-house. That is generally done. And there has been no estoppel. If we had the right contended for, then the plaintiffs acted, as they did, at their own risk. At the very utmost it could only be ground for compensation. Then as to main question, as to whether Cette is or is not a port to which the defendants are bound to take this vessel, Captain Inch's evidence shows that, when once inside the breakwater, you are in the harbour, and perfectly safe. The utmost, therefore, that the defendants can demand is that the *Ossian* shall be able to get within the breakwater. That, as our chart shows, she can do. Just in the mouth of the S.-W. entrance the chart shows 25 feet; the next sounding shown is about the middle of the breakwater, just inside it, where there is 19 feet. From the entrance to that point the bottom must, of course, shelve, and half way between the two there must be about 22 feet. There the *Ossian* could lie, even with her present draught, and she **[549]** would be in the harbour even before she got to that point. Our book, too ("Dues and Charges"), says: "Vessels drawing 21 feet can enter." The *Ossian's* draught should be some inches less than 21 feet when she arrived at Cette. The master cannot claim to carry any more coal than absolutely necessary for the due safety of the ship. To claim more would be to claim the right of incapacitating himself from the due performance of his contract. He is bound to make every effort to carry out his contract. He can in no case claim to go into Cette with more coal than would be necessary to take him on to Gibraltar. His draught then would be some 6 inches less than 21 feet, and the evidence shows that then he could enter. So, even if the defendants are right as to the legal definition of a "safe port" under such a charter-party as this, we have still satisfied the condition imposed upon us, and shown Cette is a safe port, even in that sense. But that, I contend, is not the right definition in this case. The facts in the *Alhambra* (3) were different. There the ship drew

(1) 4 Exch. 890.
(2) Leonard's Rep. 46.
(3) L.R. 5 P.D. 256=L.R. 6 P.D. 68.

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16 feet 6 inches, and the water in the harbour, at low tide, was but 11 feet. A very large portion of the cargo, therefore, would in that case have had to be taken out of the ship before she could have always lain afloat inside the harbour. Here it is not so. At the most, but a trifling amount of cargo would have to be removed by lighters outside, and it must be remembered that by the charter-party that would be done at our expense. We are quite ready to incur that expense. *Hillstrom* v. *Gibson* (1) is exactly in point. The report itself of that case is not procurable here, but the case is quoted at length in Machlachlan on Shipping, p. 356 (2nd ed.). There, as here, the port was not named in the charter-party, the ship was only bound to go to a "safe port, or as near thereunto as she could safely get," and it was held that if she could not get into the port (Glasgow) otherwise than by discharging outside what was necessary sufficiently to lighten her—in that case one-fifth of her cargo—she was bound so to lighten herself. So, too, *Capper* v. *Wallace* (2). Lush, J., at p. 166, says: "The overdraught may be such, and the cargo so easily dealt with, as that the surplus may be removed, and the ship sufficiently lightened, without **[550]** exposing her to extra risk, or the owner to any prejudice, and without substantially breaking the continuity of the voyage; and in such a case, if the consignee is at hand to receive the surplus cargo, and so relieves the overdraught, we are of opinion that it would be the duty of the master to lighten the ship and proceed to the port. This is the principle laid down by the Court of Session in the case of *Hillstrom* v. *Gibson*" (1). All that is directly applicable here; consequently, it is clear that Cette is a port to which the *Ossian* was bound to go, and the Court will, therefore, grant the injunction asked for.

JUDGMENT.

BAYLEY, J.—The rule in this case calls upon the defendants to appear and show cause why they should not be restrained by the order of this Court from removing the steam-ship *Ossian* from the port of Bombay, or from employing the said ship in a manner inconsistent with, or which may prevent or interfere with the performance of the charter-party of the 22nd day of June, 1881. Now the material clause of that charter-party is to this effect: "And being so loaded, shall therewith proceed direct * * * * to a safe port in the Mediterranean (Spanish ports excluded), as ordered on signing bills of lading, or so near thereunto as she may safely get, and deliver the same to the said charterers or their assignees always afloat, agreeably to bills of lading, on being paid freight, &c." The main question to be decided is whether, assuming the charterers or their assignees had power to alter the destination of the ship from Marseilles, the port of discharge at first named, they were justified in directing the ship to the port of Cette,—that is, in other words, whether the port of Cette is a safe port within the meaning of this charter-party. That, of course, is a question of evidence, and a good deal of evidence on the point has been given on either side. It rests on the plaintiffs, who assert it, to prove that Cette is 'a safe port' in that sense. They say that all that it is necessary for them to make out is that this ship can lie within the breakwater, and of that they have given good *prima facie* evidence such as the Court would be justified in acting on. Much reliance has been placed by the plaintiff on the affidavit of Mr. Clark as bearing upon the general character of the harbour of Cette; **[551]** but, besides the generality of the statements therein contained, I think there is another reason for not attaching much weight

(1) S. Scotch Sess. Cas., 3rd Series, 463.

(2) L.R. 5 Q B.D. 163.

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to Mr. Clark's evidence. I think, from expressions he makes use of Mr. Clark is not talking of the harbour itself, but of the bay or roadstead outside the breakwater. He says he believes "a steamer, particularly at this time of the year, would be safe there," and that, "to the best of his belief, there is no difficulty whatever either as to anchorage or otherwise" —of course, inside the harbour itself, there could be little question that a ship would be safe, and no question whatever of anchorage would then arise. For these reasons I cannot attach much weight to this affidavit. The other evidence on the point is documentary; and on that evidence what is the character of this port? Captain Tillar has produced a volume of "Sailing Directions" which he is in the habit of being guided by; and, on the other side, another book of somewhat similar character, but of more recent date, has been produced, entitled "Dues and Charges on Shipping in Foreign Ports." Either side has produced a chart of that part of the Mediterranean, and the chart plaintiff produces gives an enlarged chart of the harbour of Cette. From the "Sailing Directions" it appears that the N.-E. mouth of the entrance has a depth from 18—20 feet; the "Dues and Charges" says: "Vessels drawing 21 feet can enter," while the greatest depth inside the harbour that it gives is 18 feet. These are not very explicit or reliable statements; and I feel much more inclined to rely on the chart which plaintiff produces, which is of comparatively recent date, and shows an enlarged plan of this harbour. We learn from Captain Inch that there are two entrances: that for large ships at the N.-E. end, and that for smaller ships at the S-W. end of the breakwater. Now plaintiff's chart shows the soundings in the neighbourhood of those two entrances. Exactly at the mouth of the S-W. entrance, which is the one for smaller vessels, it must be remembered, 25 feet are recorded; just outside the N.-E. entrance, 23 feet; and inside the breakwater nowhere is there a greater depth recorded than 19 feet. Now, that a ship is not in this port unless she is within the breakwater, is clear. Outside it, Captain Inch's evidence shows, is nothing but open sea, the Gulf of Lyons. There is no protection of any sort outside the breakwater, and the evidence shows what a **[552]** stormy and dangerous place the Gulf of Lyons is. Now this vessel is of 1,211 tons' register, and has on board at the present moment 2,900 tons of cargo, and is drawing 21 feet 6 inches. Evidence has been given to show that if she carried into Cette no more coal than she would require in order to steam to Gibraltar after discharging her cargo, that her draught would be materially diminished. It was urged that the captain was bound to carry no more coal into Cette than was absolutely necessary for that purpose, however much it might be to his interest to do so, as in his evidence he showed that it would be. But there is nothing in the charter-party to prevent the owner carrying as much or as little coal as he thinks best for his own interests; and, if it were necessary to decide that point, I should probably hold that he was entitled to do so. But, however that may be, it is immaterial in this case; as it is clear that, even after all possible deductions are made, the *Ossian* with her present cargo on board could not go into Cette harbour without first discharging outside such a substantial part of her cargo as would materially lighten her. The chart shows only 19 feet inside the harbour; it is quite clear that, laden as she is, she cannot enter and lie afloat in no greater depth of watar than that. She could float where the 25 feet is marked in the chart—that is, at the mouth of the S.-W. entrance—but that is not a place where she could be allowed by the authorities to lie, to the hindrance and obstruction of the

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use of the harbour by others. Nor could she then be said to be within the port. But it is said two steamers, the *Coniston* and the *Titania*, each of them larger than the *Ossian*, have lately cleared out from Bombay for Cette; but one of them we know never went to Cette, and as to the other we know nothing more whatever about her. We do not know her cargo, or whether she was to partially discharge first elsewhere or not. Nor do we know what the terms of the charter-party were in either case; if the master contracted to deliver those cargoes at Cette he must do so in the best way he can. Now, those being the facts, how stand the authorities on the point. In *Shield* v. *Wilkins* (1), a somewhat analogous case, Rolfe, B., said: "The word safely means safely as a loaded vessel." But a direct authority on the point is the late case of the **[553]** *Alhambra* (2), when before the Court of Appeal. I am quite unable to distinguish that case from the present, and every word of the judgments of the three Lords Justices is as applicable here as it was to the facts before them. The wording of that charter-party was almost identical, in this respect, with the wording of this: "always afloat" was amplified there into "always lay and discharge afloat." In that case evidence was given of its being a custom at the port of Lowestoft (the port in question) to lighten ships in the roadstead before bringing them in, and the charterers offered to lighten her at their own expense. But it was held that that was not the contract; James, L.J., says: "That is not the bargain the parties entered into. They never entered into a contract to go somewhere not a safe port, to go to a port which would be safe if they stopped at some other place near it, and with a little manipulation of the cargo made the ship fit to go into that port." Brett, L. J., says: "Secondly, it should be a port in which she might always lay and discharge afloat, and, according to my view, the meaning of that is, that it should be a port in which, from the moment she went into it, in the condition in which she was entitled to go into it, she should be able to lay afloat, and that she should be able to lay afloat until the time when she was fairly discharged. The condition in which she was entitled to go into this port was as fully loaded, and she was not bound to unload before she got into that port. Therefore the meaning of it is that she was entitled to be ordered to a port in which, when she was fully loaded, she would be ableto lay afloat, and a port which would remain in such a condition that she would be able to lay afloat from that moment until she was discharged in a reasonable way." Now the *Ossian* fully loaded draws 21 feet 6 inches, and she is entitled to be sent to a port "in which when fully loaded she would be able to lay afloat"; it is clear, then, that she cannot be ordered to go to Cette, where she would find, at most, but 19 feet of water to lay in.

Taking the view I do on this point in the case it will be unnecessary to go into the other points argued before me. I decide the matter on this short point alone, that, assuming the charterers had power to alter the destination of this vessel after they **[554]** had once named Marseilles—and the present inclination of my opinion is that they had that power under their charter-party—assuming that, still, they could only name a port that was a "safe port;" and on the evidence before me, and on that alone—other and different evidence, it may be, will be forthcoming at the trial—I am of opinion that Cette was not a "safe port," and that the *Ossian* was not bound to go there.

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(1) 5 Exch. 304.

(2) L.R. 6 P.D. 68.

I discharge the rule, therefore, and dissolve the injunction. Costs will be costs in the cause.

Solicitors for the plaintiffs—Messrs. *Crawford and Beevey.*

Solicitors for the defendants—Messrs. *Hore, Conroy, and Brown.*

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Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Birdwood.

DHONDIBA KRISHNAJI PATEL AND ANOTHER (*Original Plaintiffs*), *Appellants v.* RAMCHANDRA BHAGVAT AND OTHERS (*Original Defendants*), *Respondents.** [2nd March, 1881.]

Limitation—Act XV of 1877, *sch. II, art.* 49—*Time when "detainer's possession becomes unlawful"—Sale of immoveable property in the Mofussil—Decree for specific performance operates as a conveyance—Contract for sale of moveable and immoveable property combined—Indian Contract Act, s.* 85—*Joinder of causes of action—Objection, not taken in the Court of first instance, too late—Act X of* 1877, *s.* 44.

In the Mofussil of this Presidency the transfer of the ownership of immoveable property to a vendee who has obtained a decree ordering the specific performance of the contract of sale to himself, does not wait for the execution of a conveyance—even if the vendor is required, as he seldom is, to execute such a conveyance—but is effected by the passing of the decree itself, coupled with the payment of the purchase-money.

A entered into an agreement with B for the purchase of moveable and immoveable property, and paid a deposit. Under such an agreement, by s. 85 of the Indian Contract Act, the ownership of the moveable property would not pass before the transfer of the immoveable property. B, instead of conveying to A the property agreed to be conveyed to him, conveyed it to C, and put him, C, in possession. A brought a suit against C and B. and obtained a decree setting aside the conveyance to C, and ordering B specifically to perform his contract and execute a conveyance of the property to himself, A. This decree was confirmed on appeal. B refusing to execute the conveyance to A, the conveyance was executed by the Court under the provisions of s. 202 of Act VIII of 1859. C still **[555]** detaining possession of the moveable and immoveable property in question. A brought this suit against him to recover possession of the same. The suit was brought within three years of the final decree of the Court of Appeal in the former suit, ordering a conveyance of the property to be executed to A, but not within three years of the date of the agreement to purchase, and it was contended that as to the *moveable* property the suit was time-barred.

Held that the suit for the possession of the moveable property was not time-barred, as the right to possession of both the moveable and immoveable property accrued to A, at the earliest, on the date of the final decree for specific performance of the agreement of sale, and it was from that time that the "detainers' possession" first became unlawful under art. 49, sch. II of Act XV of 1877.

An objection that the plaintiff has joined together causes of action which, by s. 44 of Civil Procedure Code, may not be joined together without leave first obtained, is taken too late if it is taken for the first time in the Court of Appeal after the case has been already heard on its merits.

[F., 16 A. 130; R., 12 A. 234 (285).]

THIS was an appeal from the decision of Rao Bahadur C. S. Chitnis, First Class Subordinate Judge of Poona, in Original Suit No. 52 of 1880.

The plaintiffs, Dhondiba and his partner, brought this suit to obtain possession of certain moveable and immoveable property situated in the village of Agar, near Junnar, in the district of Poona. The following are

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* First Appeal No. 67 of 1880.

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the facts of the case :—On the 26th May, 1874. Dhondiba, plaintiff No. 1, offered to purchase the property in dispute for Rs. 14,000 from Mrs. Dickenson (afterwards Mrs. Bayley, defendant No. 4) on certain conditions, and agreed to deposit immediately the sum of Rs. 1,000 as earnest-money, and to pay the balance of the purchase-money, within one month from that date, on execution of a conveyance of the property by her to him. On the following day his offer was accepted by her through her solicitors, Messrs. Hearn, Cleveland and Peile, to whom, on the same day, he (Dhondiba) paid the earnest-money, as agreed. Instead, however, of conveying the property to Dhondiba, Mrs. Dickenson (defendant No. 4) conveyed it to Waman Ramchandra, Virchand, and Vitho (defendants 1, 2 and 3) by a deed dated the 20th June, 1874, and gave them possession. Dhondiba thereupon brought a suit (No. 799 of 1874) (1) in the Subordinate Court of Poona against the same four defendants for specific performance of the contract by defendant No. 4, and to set aside the conveyance of the property by her to defendants 1, 2, and 3. On the 6th **[556]** November, 1875, the Subordinate Judge made a decree in favour of Dhondiba, holding that the sale by defendant No. 4 to defendants 1, 2 and 3 was fraudulent, and that the plaintiff was entitled to the property as first purchaser. The decree directed defendant No. 4 to fulfil her agreement with the plaintiff (Dhondiba) by executing to him a formal deed of sale of the property. On appeal (No. 55 of 1875) that decree was confirmed by the High Court on the 10th October, 1879. On the 17th January, 1880, Dhondiba and his partner, Hariba, instituted the present suit in the Subordinate Court of Poona against defendants 1, 2 and 3 for possession of the property. Defendant No. 4 was subsequently made a party to it on her own application. The plaintiffs offered to pay the balance of the purchase-money into Court with the presentation of the plaint on the 17th January, 1880, and, again, on the 18th June of the same year; but in fact, though through no fault of the plaintiffs, the money was not paid into Court. The plaintiff Dhondiba also presented on the 17th January, 1880, an application (*darkhast*) to the Court, praying that defendant No. 4 should be made to furnish him with a formal deed of sale of the property as directed by the decree in suit No. 799 of 1874 (Appeal No. 55 of 1875).

Defendants 1, 2 and 3 pleaded, *inter alia*, that the plaintiffs were not competent to bring this suit against them until they (the plaintiffs) had obtained a deed of sale of the property from defendant No. 4, and that the plaintiffs' claim to the moveable property in dispute was time-barred.

On the 10th July, 1880, the Subordinate Judge made a decree in favour of the plaintiffs for the immoveable property, and rejected their claim to the moveable property, holding that the latter was barred, under Act XV of 1877, sch. II, art. 49. The following is his statement of his reasons:—

"The plaintiffs sue to recover possession of property, both moveable and immoveable. Article 49 of sch. II of the Limitation Act (XV of 1877) provides a period of three years for suits for specific moveable property, to be counted from the time when the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful; and art. 144 provides a period of **[557]** twelve years for suits for possession of immoveable property, to be counted from the time when the possession of the defendant becomes adverse to the plaintiff. The plaintiffs have stated in their plaint that the

(1) See 4 B. 126.

cause of action in this suit accrued to them on the 10th October, 1879, being the date on which the decree of this Court in the last suit was confirmed, in appeal, by the High Court. But, according to the provisions of the Limitation Act quoted above, the cause of action with respect to both the moveable and immoveable property must be held to have accrued to the plaintiffs from the time when the defendants' possession became adverse to the plaintiffs. The decrees of this Court and of the High Court did not create any new right in favour of the plaintiffs, or give them any fresh cause of action. They simply made a binding declaration with respect to the right which had already become vested in the plaintiffs, but which was contested by the defendant. The plaintiffs, therefore, cannot date their cause of action from the passing of either of those decrees. On the 20th June, 1874, the first three defendants were placed in possession of the property by Mrs. Dickenson. The possession of the defendants has ever since been adverse to the plaintiffs, and the period of limitation must, therefore, be held to have commenced to run against the plaintiffs since the 20th June, 1874. When the plaintiffs brought their last suit to obtain a declaration of their title, as first purchasers, against defendants 1, 2 and 3, and to compel Mrs. Dickenson to pass to them a formal deed of sale, they could have simultaneously sued the defendants for possession of the property, but they did not do so. The period of limitation against the plaintiffs in this case must be reckoned from the 20th June, 1874, the date on which the defendants 1, 2 and 3 got possession of the property from Mrs. Dickenson."

On the 16th July, 1880, the plaintiffs paid into Court the balance of the purchase-money, and on the 23rd August of the same year they obtained a conveyance of the property executed by the Subordinate Judge on behalf of Mrs. Dickenson (defendant No. 4), under the Civil Procedure Code (Act VIII of 1859, s. 202, and Act X of 1877).

The plaintiffs appealed to the High Court on the 29th September, 1880.

[558] *Farran* (with him *Manekshah Jehangirshah*), for the appellants, contended that the present cause of action dated from the decree of the Appeal Court made on the 10th October, 1879, and that, therefore, the suit was not time-barred.

Inverarity (with him *M. C. Apte*) appeared for respondents 1, 2 and 3, and took the preliminary objection that the plaintiffs had joined together in one suit causes of action which by s. 44 of the Civil Procedure Code may not be joined, except by leave of the Court first obtained.

Russell (instructed by *Chalk and Turner*) appeared for respondent No. 4 (Mrs. Dickenson).

JUDGMENT.

The judgment of the Court was delivered by

WESTROPP, C.J.—The Subordinate Judge has held the suit of the plaintiffs, so far as it regards moveable property, to be barred by Act XV of 1877, sch. II, art. 49, which prescribes the time "when the property is wrongfully taken or injured, or when the detainer's *possession* becomes unlawful" as the point from which the period of limitation begins to run. The question, therefore, is—when did the possession of the detainers, the four defendants, become unlawful? To answer this question we must look at the contract between the plaintiff Dhondiba and Mrs. Dickenson, the fourth defendant, now Mrs. Bayley or Baillie. As stated in the judgment in the specific performance suit

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between the same parties in respect of the same contract (1), the contract was perfected by the payment of the earnest-money (Rs. 1,000), on the 27th of May, 1874, to Messrs. Hearn, Cleveland, and Peile, as the solicitors and authorized agents of Mrs. Dickenson for the sale of the property. The letter of the plaintiff, Dhondiba, of the 26th May, 1874, contained (in its last paragraph) this passage: "I also agree to pay the balance of the purchase-money within a month from this date on execution of the conveyance by the administratrix." That implies that the conveyance was to be executed by Mrs. Dickenson within a month from the 26th May, 1874, and that thereupon the plaintiff Dhondiba would pay to her the balance of the purchase-money, which would be [559] Rs. 13,000—the whole purchase-money being Rs. 14,000. The terms offered by the plaintiff Dhondiba in that letter were, subject to the immediate payment of the earnest-money (Rs. 1,000), accepted by Messrs. Hearn, Cleveland, and Peile, by their letter of the 27th May, 1874. Hence it is clear that the plaintiff would not be entitled to the possession of the immoveable property, the subject of the contract, until the execution of the conveyance (or something equivalent thereto) and the payment or tender of the balance of the purchase-money. Until then the plaintiff had, by the contract, acquired only that equitable lien on the property, usually called an equitable estate, *viz.*, a right to call for a conveyance and possession of the property on payment or tender of the balance of the purchase-money (2). He has throughout been ready and willing to pay that balance, and it is owing to the fraud and misconduct of Mrs. Dickenson and her co-defendants that it was not received, and that the conveyance was not duly executed to him within the time named in the letter of the 26th May, 1874.

That fraud and misconduct compelled him to institute his suit for specific performance, and for a declaration of his right of priority over the present defendants 1, 2 and 3 (which suit was brought without delay and within the period named in Act IX of 1871, sch. II, art. 113—the Limitation Act then in force), and, in that suit, the final decree of this Court on appeal was made in his favour on the 10th October, 1879. The balance of the purchase-money was paid into the Court of the Subordinate Judge on the 16th of July, 1880, and the conveyance was, under the Civil Procedure Code (Act VIII of 1859, s. 202; Act X of 1877, s. 262), in the absence of Mrs. Dickenson, executed on the 23rd August, 1880, by the Subordinate Judge on her behalf. "Where," as here, "an agreement is made for the sale of the immoveable and moveable property combined, the ownership of the moveable property does not pass before the transfer of the immoveable property." This is so enacted by s. 85 of the Indian Contract Act, IX of 1872. In the Mofussil of this Presidency, where there has been a contract for sale of immoveable property and a suit by the vendee for specific performance of [560] it, the decree for the specific performance of the contract, (coupled with the payment of the purchase-money), pass and have been treated, so long as we can recollect, as sufficiently passing, *i.e.*, transferring, the ownership to the vendee, and entitle him to the possession of the property. It has been hitherto extremely unusual for the vendor to be required to go through the form of executing a conveyance to the vendee, or for the Judge, as in the present case, to execute the conveyance for an absent or recalcitrant

(1) 4 B. 126 (137).
(2) See *Lala Chunilal Nagindas* v. *Savaichand Namidas*, 5 W.R. 111 (P.C.).

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vendor—proper as the Act VIII of 1859, s. 202, and Act X of 1877, s. 262, show that course to be. Were we, however, to hold the actual conveyance under such circumstances to be indispensable, we should shake thousands of titles heretofore considered unimpeachable. Without any conveyance the vendee is deemed to be, under the decree and the payment or tender of the purchase-money, full owner, and, as such, entitled to possession, and to maintain an action in the nature of ejectment against all persons bound by the decree and obstructing his right to possession. In the present case that right accrued to the plaintiffs, as regards both the moveable and immoveable property, at the earliest on the making of the final decree in the specific performance suit and the payment or tender of the balance of the purchase-money under it. The period of limitation to the present suit commenced to run then, and not at the date of the original contract, and this suit is, accordingly, quite within the time allowed by art. 49, sch. II of Act XV of 1877,—the plaint having been presented on the 17th January 1880. So far from this suit being open to the impeachment of being too late, as held by the Subordinate Judge and contended for by the defence, the real question is whether it was not premature, the balance of the purchase-money not having been paid when this suit was instituted, or, in fact, until the 16th of July, 1880, *i.e.*, six days after the Subordinate Judge made his decree in this suit—such decree being dated the 10th of July, 1880. We find, however, on examination of the record, that the plaintiffs, simultaneously with the presentation of their plaint, offered to pay into Court the sum of Rs. 13,000, the balance of the purchase-money, and that they again offered to pay it into Court on the 18th of June, 1880. This is established by a **[561]** *darkhast* presented to the Subordinate Judge by the first, second, and third defendants on the 19th of June, 1880. In that *darkhast* it is stated that "while the discussion was going on yesterday in Court, the plaintiffs offered to pay the balance of the purchase-money, Rs. 13,000. To whom should this money be paid—whether to us or to the fourth defendant (Mrs. Dickenson *alias* Bayley) ? With reference to this discussion, we omitted to mention one circumstance. If the Court comes to the conclusion that the fourth defendant should get the purchase-money, she, it should be remembered, has received from us Rs. 5,000. She admits this—"the balance of Rs. 10,000" (alleged by the first three defendants to have been paid by them to Mrs. Dickenson, on their contract with her for purchase—held in the specific performance suit to be fraudulent as against the plaintiff in that suit) "she does not admit to have received. The Court should be pleased to make an order to pay her the remaining sum after deducting Rs. 5,000." The order made on that *darkhast* by the Subordinate Judge on the same 19th of June, 1880, was that this *darkhast* (or petition) should be taken into consideration by him when making his decree in the suit. That the balance of the purchase money was not received into Court together with the plaint, was the fault of the Court, and not of the plaintiffs. The act or omission of the Court cannot be permitted to prejudice the suitor. Again, the non-reception of that balance, when again tendered on the 18th of June, 1880, was due partly to the convenience of the Court and partly to a question raised by the defendants. For this the plaintiffs are not responsible. We must hold that they were entitled to bring this suit when they did, and that it was neither premature nor too late. The objection made in this Court to-day by the learned counsel on behalf of the defendants other than Mrs. Dickenson

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(*i.e.*, the first three defendants), that leave was not obtained to bring this one suit for the immoveable and moveable property together, was not made in the Court below—those defendants being then and there apparently content to have the suit decided on its merits. Such an objection being of a dilatory character, and quite besides the merits, ought, we think, to have been taken in the Court of first instance, and not after the parties have incurred the cost and expended the time **[562]** necessary for a hearing on the merits. If not taken in the Court of first instance, and the defendants have gone to a full hearing on the merits, we think that it must be regarded as waived. It is, therefore, unnecessary for us now to decide whether, in a case like this, *viz.*, a single contract for sale of moveable and immoveable property together, s. 44 of Act X of 1877 renders leave to bring such a suit as this a preliminary step requisite for its nstitution.

We vary the decree of the Subordinate Judge by holding that, neither as regards the moveable nor the immoveable property, is this suit barred by the law of limitation; and by directing that the plaintiffs (Hariba being admittedly in the same interest as Dhondiba) be put into possession of the moveable property as well as the immoveable property respectively mentioned in the plaint. And if it appear to the Subordinate Judge on inquiry that the said moveable property has, since the date of the contract for sale by Mrs. Dickenson to the plaintiff Dhondiba, become deteriorated or to any extent been lost, so that it cannot now be delivered to the plaintiffs in the same condition and to the same extent as it existed at that date, let the Subordinate Judge ascertain and fix the amount in money, which would be a fair compensation to the plaintiffs for such deterioration and loss. And it is hereby directed that all of the defendants shall forthwith pay to the plaintiffs the amount so fixed by the Subordinate Judge. Mrs. Dickenson (otherwise Bayley) must bear her own costs of this suit and appeal. The other defendants must pay to the plaintiffs their costs of this suit and of the appeal.

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5 B. 563=6 Ind. Jur. 38.

[563] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., and Mr. Justice Melvill.

VARJIVAN RANGJI AND OTHERS (*Plaintiffs*), *Appellants v.* GHELJI GOKALDAS AND OTHERS (*Defendants*), *Respondents.**

GHELJI GOKALDAS AND OTHERS (*Defendants*), *Appellants v.* VARJIVAN RANGJI AND OTHERS (*Plaintiffs*), *Respondents.**

[27th January, 1881.]

Hindu law—Widow—Daughter—Alienation—Consent of heirs—Legal necessity.

An alienation, by a Hindu widow, of immoveable property inherited from her husband is invalid in the absence of legal necessity, but the invalidity can be removed by the consent of all the heirs of the widow's husband who are likely to be interested in disputing the transaction: *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (1) followed.

Sale made conjointly by a Hindu widow and her daughter, who subsequently predeceased her mother, of immoveable property inherited by the widow from her husband, in the absence of legal necessity ordered to be set aside; and the grandsons

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* Cross Appeals Nos. 175 and 180 of 1880.

(1) 13 M.I.A. 209.

of the second cousins of the widow's husband held entitled to recover the property on recouping the vendees the expenses incurred on improvements.

[F., 10 C. 225; R., 30 A. 1 (P.C.)=5 A.L.J. 1=9 Bom.L.R. 1348=6 C.L.J. 766=12 C.W.N. 74=35 I.A. 1=17 M.L.J. 605=3 M.L.T. 1=11 O.C. 78 (87); 25 B. 129; 35 C. 1086=8 C.L.J. 120=12 C.W.N. 914; 17 C.L.J. 499 (519)=17 C.W.N. 707; 2 C.P.L.R. 221 (223)]

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THESE were cross second appeals from the decision of S. H. Phillpotts, Judge of Ahmedabad, amending the decree of R. S. Desai, Subordinate Judge (Second Class) at Nadiad.

JUDGMENT.

The facts of the case are thus stated at the outset of the judgment of the High Court delivered by

SARGENT, J.—The plaintiffs in the suit are the grandsons of the second cousins of one Narotam Shevakram, who died leaving a widow, Bai Achrat, and a daughter, Bai Vakhat. Bai Achrat died on the 17th June, 1865, having survived her daughter. The object of the suit is to recover possession from the defendants of one house and six fields, survey Nos. 219, 233, 237, 331, 761, and 762.

The first defendant contended by his written statement—

1. That the suit was barred by the Statute of Limitations.

2. That the fields were sold to him by the widow, Bai Achrat, and her daughter for a necessary purpose on *Poush Sud* 12 of *Samvat*, 1916, and that he thus became the lawful owner of them.

[564] 3. That the house was sold to him by the widow, Bai Achrat, for a necessary purpose on *Poush Sud* lst, *Samvat*, 1921.

4. That the plaintiffs, though aware of the fact of the sales to him, took no objection to the same.

5. That he had spent Rs. 624-11-3⅓ on the property.

Defendant No. 2 by his written statement states—

1. That he purchased the house from the first defendant on 13th *Poush Sud*, 1923, and has spent Rs. 1,400 on improving it.

2. That plaintiffs had full knowledge of his purchase and of the improvements, and never objected.

3. That the suit could not be maintained under s. 8 of Act VIII of 1859.

The defendants 3, 4, 5, 6, 7, 8 and 9 by their joint written statements state—

1. That defendants 3 and 4 purchased the fields Nos. 233 and 237 from defendant No. 1.

2. That defendants 5, 6, and 9, and defendants 7 and 8 purchased fields 761 and 762 from first defendants in equal shares.

Lastly, defendant No. 10 says that field 331 has been in his possession for a very long time, and that neither the widow nor daughter had any right to it. The Subordinate Judge decreed possession of all the fields to plaintiffs on the payment, as regards field 331, of Rs. 51 to defendant No. 10 due on a mortgage created by Narotam, and also ordered that they should be paid Rs. 381 by defendants 1 and 2 for the house. Against this decree three several appeals—Nos. 167, 175, 176, of 1878—were preferred by the defendant No. 10, the plaintiffs and defendants Nos. 1 and 2 respectively. In appeal 167 the District Judge found that it was not proved that Narotam, through whom the plaintiffs claim, mortgaged field No. 331 to defendant 10, and he disallowed their right to redeem.

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In appeals 175 and 176 the District Judge found—

1. That the claim was barred as regards fields 761, 762, 331, but not as regards the house and the other fields.

[565] 2. That the house and fields were not sold for a necessary purpose to the first defendant.

3. That the plaintiffs are the grandsons of the second cousins of Narotam Shevakram and decreed possessions to be given up to the plaintiffs of fields 219, 233, 237; but that plaintiffs should recover Rs. 381 from first or second defendant instead of the house. From this decree in appeals Nos. 175 and 176 the plaintiffs and defendants 1 and 3 now appeal.

[The judgment then proceeds as follows to dispose of the point of limitation raised by the plaintiffs :—]

At the hearing the plaintiffs claimed the right to appeal against the decision of the Court below in appeal 167. Two objections, however, are fatal to this claim. In the first place, they have not filed an appeal against that decision; but, in any case, the finding of the Court below, respecting the mortgage, was on a question of fact, and, therefore, not appealable; and there being no mortgage, the right to recover field No. 331 was clearly barred by the long possession defendant No. 10 had enjoyed of the field. Passing to the other fields in question it is not in dispute that they together with field No. 331, already disposed of, were sold to the first defendant by the widow, and conveyed to him by an instrument bearing date 12th *Poush Sud*, 1912, to which both the widow and her daughter were conveying parties. The present suit is brought by the plaintiffs, as the persons entitled by inheritance to the possession of the lands on the death of the widow, to recover the fields. And their right of action, as such, clearly, therefore, falls under No. 142 of the Limitation Act of 1871, which is admittedly the Act to be applied. The Court below was, therefore, in our opinion, wrong in holding that any part of the plaintiffs' claim was barred.

But the main point argued before the High Court, and upon which the judgment proceeded, was whether the conveyance by the widow, Achrat, and her daughter were valid by the Hindu law. Upon this point the Subordinate Judge made the following observations :—

"I now come to the second ground of the plaintiff's objection to the deed of sale, namely, that the fact of Bai Vakhat being a [566] party to that deed does not alter the character of the transaction, and that it does not do away with the obligation on the defendant No. 1 to prove that Bai Achrat was under a legal necessity to sell the property, and that the sale was a *bona fide* one.

"In *Ram Shevuck Roy* v. *Sheo Govind Sahu* (1) it was held by the Calcutta High Court that a Hindu widow takes with her husband's estate the power of alienation; and conveyance made by her gives a good title, liable only to the superior claim of such of her husband's heirs as may be alive at the time of her death; and, in a case where certain landed property in the possession of a Hindu widow was sold on the alleged ground of necessity, and the execution of the deed of purchase was attested by the then next heirs, it was held by the said High Court that the assent implied in such attestation was not conclusive in law as to the necessity for the sale, though the fact of persons most interested in contesting such a sale being called in to execute the deed is

(1) 8 W.R. 519.

the strongest possible proof of good faith on the part of the purchaser (*Madhub Chunder Hajrah* v. *Gobind Chunder Banerji* (1)); and in the case of *Kali Mohun Deb Roy* v. *Dhananjoy Shah* it was ruled that the consent of the then reversioner to a sale by a Hindu widow, though not binding evidence on the present heir, is strong presumption of the existence of necessity at the time of sale, to be rebutted only by proof of fraud and collusion or of the absence of necessity (2). In *Jwalanath* v. *Kulu*(3) the Agra High Court held that where a daughter was colluding with the widow in making transfer of divided property, the plaintiffs, the next reversioners after the daughter, were competent to maintain the suit to have the transfer declared null and void; and in the case of *Rajlukhee Dabea* v. *Gokool Chundra Chowdhry* (4) the Judicial Committee of the Privy Council ruled that a recital in a deed of sale, by a Hindu widow, of her deceased husband's property, setting forth that the alienation was necessary for the purpose of paying his debts, is not of itself evidence of such necessity; nor does the attestation of a relative import his concurrence. Such a transaction may become [567] valid by the consent of the husband's kindred; but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. 'At all events, there ought to be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and justified by Hindu law. From the above rulings it may well, I think, be laid down that a sale by a Hindu widow, though assented to by the reversioner, who predeceased the widow, may, for want of proof of legal necessity for the same, be set aside at the instance of the heir of her husband who succeeds her on her death, and that the fact of the then reversioner assenting to the sale can only be considered as a piece of evidence to prove the necessity, but liable to be rebutted by stronger evidence on the other side.

"It is argued by Mr. Desaibhai, on behalf of the defendant No 1, that Bai Vakhat, the then reversioner, having been joined by Achrat in the conveyance, it becomes absolute, and cannot be questioned by the person who succeeds the widow on her death; and in support of his argument he relies upon the rulings of the Calcutta High Court in *Gour Hurri Dutt* v. *Radha Gobind Shah* (5) and in *Mohunt Kishen Geer* v. *Busgeet Roy* (6).

"In *Gour Hurri Dutt* v. *Radha Gobind Shah* it was ruled, by a Division Bench of the Calcutta High Court, that a reversionary interest may be sold in execution of a decree; but a Full Bench of the same High Court has ruled, in *Ramchandra Tantra Das* v. *Dharmo Narayan Chuckerbutty*(7), that the interest of an heir expectant on the death of a widow in possession is such a mere contingency that it cannot be regarded as property, and, therefore, is not liable to attachment and sale under s. 205 of Act VIII of 1859. There being thus a Full Bench ruling of the same High Court, the decision of a Division Bench of that High Court cannot be followed.

"In *Mohunt Kishen Geer* v. *Busgeet Roy* it was held, by a Division Bench of the Calcutta High Court, that a Hindu widow in possession and the apparent next taker, by joining in [568] one conveyance, can make a complete title; but the facts, as reported, do not seem to me similar to

(1) 9 W. R. 350. (2) 6 W. R. 51. (3) 3 Agra R. 55.
(4) 12 W.R.P.C. 47. (5) 12 W. R. 54. (6) 14 W.R. 379.
(7) 7 B.L.R. 341.

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5 B. 563 = 6 Ind. Jur. 38.

those of this case. In the case referred to, the suit was brought by a person claiming through the reversioner, who was a party to the conveyance; it was, therefore, unjust and inequitable to hold that a representative of the reversioner was at liberty to contest the validity of the purchase by a stranger who took all possible precaution in purchasing the property. Again, the ruling of the same High Court in *Kali Mohan Deb Roy* v. *Dhananjoy Shah* (1) does not seem to have been overruled in deciding the case of *Mohunt Kishen Geer* v. *Busgeet Boy*. It must, therefore, I think, be distinguished from the present case.

"It is urged, on behalf of the plaintiffs, that, even if it be supposed that the consent, by the then reversioner, to a sale, by a Hindu widow, of moveable property makes the sale absolute, Bai Vakhat was not capable of giving such a consent, and he relies upon the ruling of the High Court of Bombay in *Vijiarangam* v. *Lakshuman* (2), wherein it has been held that as to *stridhan* acquired by inheritance (so far as it consists of immoveable property) a woman's power of alienation must be limited. I think this argument is good. If a woman, who has inherited the immoveable property of her father, cannot alienate at her mere caprice, there are equally strong, if not stronger, reasons for holding that she cannot, at her mere caprice, give an absolute consent to the sale, by her mother, of immoveable property of her husband.

"Under the above considerations I hold that the fact of Bai Vakhat being a party to the deed of sale does not alter the nature of the transaction, and that the said deed of sale cannot be held valid without proof of necessity."

In appeal to the District Judge he held, as has been stated in the part of the High Court's judgment given above, that the plaintiff's claim was barred as to three of the six fields, and that neither the house nor any of the fields was sold under legal necessity; and he decreed that the plaintiffs should recover possession of fields Nos. 219, 233, and 237, but not of the others, and **[569]** that, as regards the house, he should recover from the first and second defendants Rs. 381.

Nanabhai Haridas (Government Pleader), for the original plaintiffs.—The main question involved in these appeals is whether the widow Achrat made valid alienations. The fields were conveyed by her and her daughter, Vakhat; the house was conveyed by her alone. I submit that this fact of the daughter joining with her mother makes no difference, for she possessed only what, in the English law, would be called a contingent remainder which by her death before her mother never became vested in her. In the case of *Mohunt Kissen Geer* v. *Busgeet Roy* (3) it was, no doubt, held that a Hindu widow in possession and the next apparent taker, by joining in one conveyance, could make a complete title, but that was a case in which the claimant claimed through the reversioners. Here the plaintiffs claim adversely to the nearest reversioners. On the point of the consent of heirs which, under certain circumstances, validates a sale by a widow, I would draw attention to the remarks at p. 568 of Mayne's Hindu Law, and the authorities cited there. They show that *all* the heirs seemingly interested must join in giving the consent. The position of a woman is, under the Hindu law, one of dependence; and the consent of a daughter, albeit she is the next reversioner and heir, is insufficient to validate her mother's alienation. As the Subordinate Judge has held, it can be, at

(1) 6 W.R. 51. (2) 8 B.H.C. R. O.C.J. 244. (3) 14 W.R. 379.

best, but strong evidence to prove that legal necessity existed for the alienation, and it is liable to be rebutted by stronger evidence to the contrary. The succession of females, according to the Hindu law, is not regular succession. The theory of spiritual benefit to the manes of the ancestor, upon which the succession of males is based, has no application to the case of female succession: *Gunga Pershad Kur* v. *Shumbhoonath Burmun* (1).

The following authorities were also referred to:—

West and Buhler, 120; 2 MacNaghten's Hindu Law, 309; Cunningham's Digest of Hindu Law, 128; 2 Norton's Leading Cases, 626.

[570] *Gokaldas Kahandas*, for defendant No. 1, Ghelji, and his vendee defendant No. 3, Bhagvandas.—I submit that the conveyance, by the widow and her daughter, as well as that by the former alone, is valid: *Collychund Dutt* v. *John Moore*(2). In that case, where the reversioners had joined the widow, the alienation by her was held to be valid, and the heirs of the reversioner were also held to be bound by her act. *Pratap Chunder Roy* v. *Shreemutty Joy* (3) was a case of relinquishment by a widow in possession in favour of reversioners; and it was further held there that a relinquishment in favour of second reversioners was also valid if made with the consent of the first reversioners In the case of *Gour Hurri Dutt* v. *Radha Gobind Shah*(4) the Court went so far as to hold that a reversionary interest could be sold in execution of a decree. Even so late as 1878 the Calcutta Court held in *Raj Bullubh Sen* v. *Oomesh Chunder Rooz*(5) that a grant by a Hindu widow made with the consent of the next reversioner was valid, and created a title which could not be impeached, on the death of the widow, by the person who, but for such grant, would be entitled as heir of her husband. That affirmed the ruling in *Sham Soonduree* v. *Shurut Chunder Dutt* (6). I, therefore, submit that the sales, both of the house and fields, were good, and the original as well as the subsequent vendee acquired good title.

Shantaram Narayan, for the vendee of the house, relied on the authorities cited by Mr. Gokaldas.

Pandurang Balibhadra, for the original defendant No. 10.

The judgment of the High Court then proceeded to deal with the above point.

JUDGMENT CONTINUED.

SARGENT, J.—Passing to the merits of the case, as the Court below has found that the sale of the fields was not for a necessary purpose, the validity of the first defendant's title under the conveyance of 12th *Poush Sud*, 1912, and that of the eight defendants claiming through him, depends upon the question whether the widow and daughter of Narotam Shevakram could convey an **[571]** indefeasible title as against the persons who (the daughter having died before her mother) became entitled to the property as the next heirs of Narotam on the death of the widow. As Bai Vakhat's interest in the fields at the time of the sale was contingent on her surviving her mother, which she failed to do, her joining in the conveyance could (if at all) only operate to give validity to it as importing the concurrence of the then nearest apparent heir of Narotam to the alienation in question.

Now, it may be taken as well established that the consent of heirs will render valid an alienation by a widow under circumstances which

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(1) 22 W. R. 393.
(2) 1 Fulton's Rep. 73.
(3) 1 W.R. 98.
(4) 12 W.R. 54.
(5) 5 C. 44.
(6) 8 W. R. 500.

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would otherwise not justify it. It was so held by the Privy Council as far back as the case of *Cossinath Bysak* v. *Hurroosondree Dossee*(1); but the question, who are the heirs whose consent will thus render the alienation indefeasible, has led to much conflict of decision. The principle, however, upon which that question is to be answered has, we apprehend, been laid down by the Privy Council in the case of *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*(2). Their Lordships say: "They do not mean to impugn the authorities, &c., which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such cases must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu law." In the present case the plaintiffs, although distant heirs, were the heirs presumptive of Narotam at the time of the sale, entitled to succeed in the event of Vakbat dying before her mother without issue, and, as such, clearly interested in disputing the sale. Nor can the mere concurrence of Bai Vakbat, albeit the nearest in succession (having regard to the state of dependence in which all women are supposed by Hindu law to have their being), be regarded as affording the slightest presumption that the alienation was a justifiable one. On both these grounds, we think, the plaintiffs are entitled to succeed. With respect to the house, the plaintiffs are clearly entitled to it on **[572]** recouping the second defendant what has been actually expended by him in rebuilding it. The decree must, therefore, be varied by directing that the plaintiffs be put into possession of all the fields, except No. 331, and also of the house on payment, by plaintiffs to second defendant, of the moneys actually expended by him in rebuilding it, the same to be determined in execution of the decree, and by directing that the first and other defendants (excepting the tenth defendant, Abheram Nathuram) do pay plaintiffs their costs throughout. Plaintiffs to pay to defendant No. 10 the costs of the second appeal.

Decree accordingly.

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5 B. 572=6 Ind. Jur. 96.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

JAMNADAS (*Defendant*), *Applicant* v. BAI SHIVKOR (*Plaintiff*), *Opponent.** [10th March, 1881.]

Damages on acoount of rent—Suit for use and occupation—Trespass—Ejectment—Mesne profits—Court of Small Causes – Jurisdiction.

The plaintiff, alleging that the defendant, without her permission, removed a lock placed by her on her house and took possession of it, sued in a Court of Small Causes for "damages on account of rent" of which she was thus deprived. The Court, regarding the suit as one for use and occupation, made a decree in favour of the plaintiff.

Held--thas the suit was not rightly regarded as one for use and occupation, for the claim was not based on any contract, express or implied: it should have been regarded as an action of trespass, brought to try a question of title,—an action in which the Court of Small Causes had no jurisdiction. The plaintiff's

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* Extraordinary Civil Application, No. 136 of 1880.

(1) 2 Mor. Dig. 198 Ed. 1849. (2) 13 M.I.A. 209 (228).

proper remedy was by an action of ejectment in the ordinary Civil Courts, to which, if he chose, he could add a claim for mesne profits for the period during which the defendant had been in occupation.

The decree of the Court of Small Causes was, accordingly, annulled.

[F. 31 C. 340=8 C.W.N. 246; R., 6 B. 79; 25 B. 85 (88, 89); 31 C. 1001; D., 15 B. 400 (405); 23 C. 884.]

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THIS was an application for the exercise of the High Court's extraordinary jurisdiction against a decree passed by Khan Bahadur Cursetji Manekji Cursetji, Judge of the Court of Small Causes at Ahmedabad.

[573] The facts of the case are as follows:—

The plaintiff alleged that a house, situate in the city of Ahmedabad, belonged to her husband, a member of a divided family and that on his death she became the sole owner thereof; that, four years and seven months before the date of her plaint, the defendant removed the lock which she had placed on the door, and possessed himself of it; that she had thus lost rent which she otherwise would have got; and she, therefore claimed Rs. 99 as "damages on account of rent." She confined her claim to loss sustained during the three years previous to the suit on account of the operation of the Law of Limitation. The plaint was filed in the Court of Small Causes at Ahmedabad, which treated it as an action for use and occupation.

The defendant denied the plaintiff's ownership, and asserted his own.

The Judge went into the merits of claim; and, finding the title of the plaintiff proved, and that of the defendant not proved, made a decree in favour of the former.

The defendant moved the High Court for the exercise of its extraordinary jurisdiction on the ground that the suit did not lie, and that the Small Cause Court had no jurisdiction, whereupon a *rule nisi* was issued to the plaintiff to show cause why the decree should not be annulled for want of jurisdiction.

Pandurang Balibadra showed cause.—A course of decisions has established that it is permitted to a Court of Small Causes to try a question of title which incidentally arises as a side-issue. The plaintiff alleged that the defendant was a mere trespasser, and the Court has found that he was so. The plaintiff could undoubtedly have ejected the defendant, but did not do so; it must therefore, be assumed that he was in possession of the house by the permission of the plaintiff, who was entitled, therefore, to treat him as her tenant, and sue him in an action for use and occupation.

Shantaram Narayan, contra.—There is no contract, express or implied, between the plaintiff and the defendant; and no suit would lie for use and occupation. Each party asserted his or her [574] title, and the Judge of the Court of Small Causes disposed of the case on that point, which he had no jurisdiction to do.

Turner v. *Cameron's Coalbrook Steam Coal Co.* (1) and *Tew* v. *Jones* (2) were referred to.

JUDGMENT.

MELVILL, J.—This suit was brought by the plaintiff, in the Court of Small Causes at Ahmedabad, to recover "damages on account of rent," in consideration of the occupation of a house by the defendant for three years. The plaintiff alleged that the defendant had had occupation for

(1) 5 Exch. 932.

(2) 13 M. & W. 12.

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four years and seven months; but that, as a portion of the claim was barred by limitation, the suit was confined to the amount due for three years. In her deposition the plaintiff alleged that the defendant had removed her lock from the door of the house, and occupied it without her permission.

On the face of the plaint the suit would appear to be what in England would be called an action for use and occupation; but, as such, it should arise out of contract, and could not be maintained in the absence of an express or implied contract to pay a reasonable sum for the occupation of the house. It was on this ground, and also because we were inclined to think that a Court of Small Causes had not jurisdiction to determine the question at issue between the parties, that we granted a rule to show cause why the decree of the Judge of the Small Cause Court should not be set aside.

At the hearing of the rule it has been argued that the action is an action of trespass, and that, the claim being one for damages, the Small Cause Court had jurisdiction, notwithstanding that a question of title may incidentally have arisen. It is true that this Court has held that a Small Cause Court is not ousted of its jurisdiction merely because a question of title may incidentally arise, and that it may determine such question, so far as may be necessary, for the purpose of the suit. But the present is not a case in which the real object of the suit is to obtain a remedy which a Small Cause Court may properly give, and in which a question of title to immoveable property only incidentally crops up for decision. It is an action of trespass (if that be its nature), of **[575]** which the sole object manifestly is to try the title to the house. It would be very objectionable if persons out of possession were thus allowed to harass persons in possession, by obtaining from a Small Cause Court periodical decrees for damages or mesne profits, founded upon a decision as to title which the defendant would, from the constitution of the Small Cause Court, be debarred from bringing under the cognizance of the superior Courts. The plaintiff's proper remedy, if she has been dispossessed of her house by the defendant, is to bring an action of ejectment in the ordinary Civil Courts,—coupling with her demand, if she see fit, a claim for mesne profits for the period during which the defendant may have been in occupation. We make this rule absolute, and annul the decree of the Small Cause Court; but as no objection to the jurisdiction was there taken by the defendant, we direct that the parties bear their own costs throughout.

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5 B. 575 = 6 Ind. Jur. 98.

APPELLATE CIVIL.

Before Mr. Justice Pinhey and Mr. Justice Nanabhai Haridas.

JAVHERBAI, (*Applicant*) *v.* HARIBHAI, (*Opponent*).* [4th April, 1881.]

The Code of Civil Procedure, Act X of 1877, *ss.* 293, 294, 306, 307 *and* 309—*Court sale—Defaulting purchaser—Failure to pay deposit—Resale—Redress against defaulter—Bidding without permission of Court—Benami purchase.*

A purchaser of property at a Court sale who fails to pay the deposit (25 per cent, on the purchase-money) directed to be paid by s. 306 of the Civ. Pro. Code is a defaulting purchaser within the meaning of s. 293 of that Code, and liable,

* Extraordinary Civil Application, No. 144 of 1880.

as such, to make good any deficiency of price which may happen on a resale, and all expenses attending the same.

A sale at which the decree-holder himself, or some other person for him, without the permission of the Court first obtained becomes the purchaser, is not *ipso facto* void : it is a good sale, unless and until set aside by the Court under the provisions of s. 294 of the Civ. Pro. Code.

[R., 11 B. 588 (590) ; 22 B. 624 (628) ; 10 C. 757; 21 C. 554 (558) ; 12 M. 454; 32 M. 212=1 Ind. Cas. 221=5 M.L.T. 248 ; 3 L.B.R. 225.]

THIS was an application for the exercise of the High Court's extraordinary jurisdiction for the reversal of an order of Bhaskar Shridhar Joshi, Subordinate Judge of Bassein.

[576] The applicant, Javherbai, had made an application to the Subordinate Judge of Bassein for redress against a defaulting purchaser of property sold at a Court sale under s. 293 of the Code of Civil Procedure. She alleged that a house belonging to her judgment-debtors was attached and put up for sale at a court sale, and that one Haribhai bid for it, and was declared to be the purchaser ; that the said Haribhai having failed to pay the deposit of 25 per cent. as provided by s. 306, the house was subsequently resold to one Parshotam, a grandson of the applicant, for Rs. 125 less than Haribhai had bid for it. The applicant accordingly prayed that Haribhai might be directed to make up this deficiency, and pay the expenses incurred in putting up the house to a resale as provided by s. 293 of the Civil Procedure Code. Haribhai contended that s. 293 of the Code did not apply to a resale had in consequence of the failure of the first purchaser to pay the necessary deposit. He also contended that the resale was invalid in consequence of the relationship between the appellant (the decree-holder) and the purchaser, the latter having bid without having first obtained the express permission of the Court. The purchase was, in fact, *benami*.

The Subordinate Judge allowed this contention, and rejected the application of Javherbai, who consequently now applied to the High Court.

Nagindas Tulsidas, for the applicant.
Vinayak Mahadev Pandit, for the opponent.

JUDGMENT.

The judgment of the Court was delivered by

PINHEY, J.—Haribhai was the first purchaser of the house, but he failed to pay the deposit required by s. 306 of the Code of Civil Procedure. Consequently, the house was "put up again and sold." At the resale the house was purchased by Parshotam, the step-grandson of the decree-holder, Javherbai, for Rs. 125 less than Haribhai had bid for it.

Javherbai then applied to recover this sum of Rs. 125 from Haribhai under s. 293 of the Code of Civil Procedure ; but the Subordinate Court at Bassein rejected the application on the grounds :—(1) that the second part of s. 293 does not apply to a case in which property is resold by reason of the first **[577]** purchaser making default in payment of the deposit required to be paid at the time of sale by s. 306 of the Code : and (2) that the purchase of the house by Parshotam invalidated the sale under the provisions of s. 294.

We are of opinion that the Subordinate Court was wrong. It is clear to us that the provisions of s. 293 of the Code apply to resales under the Code, whether made in consequence of default of payment of deposit

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under s. 306, or in consequence of default of payment of the purchase-money under ss. 307 and 308. The fact that Parshotam, the step-grandson of the decree-holder, purchased the house when it was put up a second time for sale did not necessarily invalidate the sale; although, under cl. 3 of s. 294 of the Code, the Subordinate Court might, on the application of the judgment-debtor or any other person interested in the sale have set aside the sale on this ground, if it were proved to the satisfaction of the Subordinate Court that Parshotam had purchased the house for or on behalf of the decree-holder, Javherbai. In his application to the Subordinate Court, Haribhai did, in fact, state that Parshotam, who had purchased the house when it was "put up again and sold," was Javherbai's grandson; but he rested content with making this statement. He did not say a word which can be construed into an application for an order to set aside the sale. In the absence of such an application the Code does not, in s. 294, contemplate a sale being set aside. No fraud or collusion is charged against Parshotam or Javherbai. As Haribhai was at one time willing to bid more for the property than the sum at which Parshotam purchased it, it is not apparent what possible objection can be taken to Parshotam's act.

As neither of the grounds, on which the Subordinate Court proceeded, are good, the order of the Subordinate Court rejecting the application of Javherbai must be reversed, and the application be remanded to the Subordinate Court for disposal on its merits.

Costs in this Court must be borne by the respondent, Haribhai Madhavji.

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5 B. 578.

[578] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.

MOHEYODIN VALAD MASLODIN, (*Applicant*) *v.* CHHOTIBIBI, WIFE OF GHASITA MIYA, (*Opponent.*)*

[6th January, 1880.]

Bombay Act III of 1874—*Act X of* 1876—*Jurisdiction of Civil Courts.*

Neither Bombay Act III of 1874 nor Act X of 1876 contains any provision excluding the jurisdiction of Civil Courts in a suit brought to establish a share in the emoluments of a *vatan* which has ceased to be a service *vatan*.

THIS was an application, under the extraordinary jurisdiction of the High Court, against the decision of E. Cordeaux, Judge of the District Court of Khandesh, in appeal No. 74 of 1878, reversing the decree of the Second Class Subordinate Judge of Nandurbar in suit No. 895 of 1877.

The plaintiff Moheyodin brought this suit for Rs. 75, being the amount of eight years' arrears of his share in a certain allowance received by the defendant from Government in lieu of a service *vatan*. The plaint was filed on the 10th November, 1876. The plaintiff produced a certificate from the Collector of the district, as required by s. 6 of Bombay Act XXIII of 1871, sanctioning the suit.

The defendant among other objections, answered that the allowance was payable at the pleasure of Government, and that the suit was not maintainable.

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* Application under Extraordinary Jurisdiction, No. 108 of 1879.

The Subordinate Judge awarded the plaintiff's claim (4th March, 1878). In appeal, the District Judge reversed the decree of the first Court, and rejected the plaintiff's claim on the ground that Civil Courts had no jurisdiction to entertain the suit under Bombay Act III of 1874 and Act X of 1876. The following are his reasons :—

"The suit is for eight years' arrears of a share in an annual allowance payable from the Government treasury on account of a *vatan*, called *nirkhi*, formerly an office for fixing and recording current prices. It is not disputed that the *vatan* was originally a service *vatan*, and that it has ceased to be such now; that there has been a settlement whereby a certain cash allowance is now paid in **[579]** lieu of service. In (Bombay) Act III of 1874, *vatan* property is described as property appertaining to an hereditary office, and includes cash payments; and the expression 'hereditary office' includes such office, even when the service originally appertaining to it has ceased to be demanded. The Collector is bound to prepare and keep a register of non-service *vatans*, and it is the Collector alone who can determine who are entitled to receive payments of cash allowances; and any settlement made before the date of the Act coming into force for the purpose of relieving the holder of the *vatan*, his heirs, and successor from service, has the same force as if made under the Act. It is urged for the respondent that the present suit is merely to recover a share of the money paid to the appellant by Government, and does not relate to the *vatan*. * * * * * * It is further urged that the present suit has been sanctioned by the revenue authorities. I am of opinion that this has been done under a mistaken view. In *Vasudev Sadashiv Modak* v. *The Collector of Ratnagiri* (1) it was decided by the Privy Council that the District Judge was right in dismissing a suit brought to recover certain emoluments due to the appellant as *deshmukh*, on the ground that it was excluded from the jurisdiction of the Civil Courts by the Pensions' Act XXIII of 1871, s. 3. The decree of the District Judge in that suit was passed in the year 1873, before Bombay Act III of 1874 came into force. The latter Act altogether excludes the jurisdiction of the Civil Courts from cognizance of suits of the present kind, and, therefore, the Collector's sanction was superfluous, and cannot be held to give the Court jurisdiction, however general may be its terms. Legal proceedings with reference to a *vatan* can only be instituted in the manner provided for in s. 6, cl. 1 of Bombay Act III of 1874. Under this view my finding must be that the Court has no jurisdiction, and it is, therefore, unnecessary to consider the other issues. I reverse the decree of the lower Court, and reject the claim of the plaintiff with costs.

"*Note.*—Under the Bombay Revenue Jurisdiction Act X of 1876, no Civil Court shall exercise jurisdiction as to any claim in respect of any injury caused by exclusion from any hereditary **[580]** office, recognized as such under Bombay Act III of 1874. The present suit cannot be considered as between private parties for the purpose of establishing any private right."

The plaintiff thereupon applied to the High Court on the 27th September, 1879, under its extraordinary jurisdiction.

Pandurang Balibhadra, for the applicant.—The District Judge was wrong in holding that the suit was not cognizable by Civil Courts under the Bombay Hereditary Offices Act XXIII of 1871 and Act X of 1876.

(1) 4 I. A. 119=2 B. 99.

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All that was necessary under the said Acts was the Collector's sanction for the institution of the suit. The plaintiff has procured the Collector's certificate and filed it in the suit.

Manckshah Jahangirshah, for the respondent.

JUDGMENT.

The following is the judgment of the Court delivered by

MELVILL, J.—The Court is unable to find, either in Bombay Act III of 1874 or in Act X of 1876, any provision excluding the jurisdiction of the Civil Courts in a suit brought, not on account of exclusion from office or service, but to establish a right to share in the emolument of a *vatan* which has ceased to be a service *vatan*. The Court, accordingly, making the rule absolute, reverses the decree of the District Judge, and remands the case for trial on its merits. Costs of this application to be borne by the defendant.

Decree reversed and case remanded.

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5 B. 580=6 Ind. Jur. 138.

ORIGINAL CIVIL.

Before Mr. Justice West.

LUCKUMSEY ROWJI (*Plaintiff*) *v.* HURBUN NURSEY AND OTHERS (*Defendants*).* [6th September, 1881.]

Defamation—Defamation of a deceased person—Suit by surviving member of family of deceased—Cause of action—Damage to reputation of family of deceased by reason of defamation of deceased.

A suit for defamation can only be brought by the person who has been defamed. The fact that the defamatory statement has caused injury to other persons does not entitle them to sue.

A suit brought by the heir and nearest relation of a deceased person for defamatory words spoken of such deceased person, but alleged to have caused damage to the plaintiff as a member of the same family, *held* not maintainable.

[F., 18 M. 250=5 M.L.J. 89; Appl., 11 A. 104=8 A.W.N. 287; R., 17 B. 573 (575); 19 B. 717 (723); 26 B. 259=3 Bom. L.R. 878; 32 C. 1060=2 C.L.J. 396=9 C. W.N. 847; L.B.R. (1872—1892) 617.]

[581] SUIT for defamation. The plaint stated that the plaintiff was the cousin and the nearest relation and the heir of one Premji Ludha, deceased, who in his lifetime was the headman of the Karad caste, and a man who was generally respected by the Hindu community.

The defendants were leading members of the Dusha Oswal Wania caste, which was so closely connected with the said Karad caste in general and caste relation and by intermarriage as almost to form with it one united caste.

Premji Ludha died on 16th August, 1880, and at his funeral ceremony a large concourse of the said Karad and Dusha Oswal Wania castes, and also of other Hindu castes, assembled out of respect to his memory. The plaint alleged that "the defendants attended at the place where the said ceremony was being performed, and then and there falsely and maliciously spoke and published of the said Premji Ludha that he was 'patit' (thereby meaning that he was a man who had acted contrary to moral and religious principles), and that he was an outcaste sinful man,

* Suit No. 536 of 1880.

and a man at whose funeral it was improper for any of the members of the Dusha Oswal or Karad castes to attend, and threatened that any Dusha Oswal or Karad who continued to attend at the said funeral would be fined by the caste. The term 'patit' is a term of great opprobrium and reproach amongst Hindus." The concluding paragraphs of the plaint were as follows:—

"6. The defendants attended the said funeral ceremony having conspired together to speak and publish the said defamatory words, the said defendants well knowing and intending that such words would and should be hurtful to the feelings of the family and other near relations of the said Premji Ludha, and especially intending, by the use of such words, to disgrace and degrade the plaintiff and the family of the said Premji Ludha, and to lower them in the estimation of the said Dusha Oswal and Karad castes and of the Hindu community in general.

"7. In consequence of the defamatory words so spoken and published by the defendants as aforesaid, a large number of the persons who had assembled at the said funeral ceremony left it, **[582]** and the plaintiff and the family of the said deceased by reason of the premises have been lowered in their reputation, and have suffered much pain of mind, and the damages sought to be recovered in this suit.

"8. After and in consequence of the premises the plaintiff was deprived of the use and enjoyment of, and of all participation in the property of the united Dusha Oswal and Karad castes and of various privileges which up to that time he had enjoyed."

In their written statement the defendants contended (amongst other things) that the plaint disclosed no cause of action against the defendants. At the hearing the issues material for this report were the following:—

1. Whether the facts set forth in the plaint disclose a cause of action by the plaintiff against the defendants.

2. Whether the plaintiff can sue for loss of reputation, pain of mind, and damages sustained by the family of Premji Ludha.

Starling (*Lang* with him), for the plaintiff.—This suit is maintainable by the plaintiff. The plaintiff was a joint member of the family of the deceased Premji Ludha, and lived with him. To call Premji Ludha impure, therefore, was to call the plaintiff impure: Folkard on Libel, p. 76; *Davies* v. *Solomon* (1), *Roberts* v. *Roberts* (2). The only reported case in India is *Subbaiyar* v. *Kristnaiyar* (3). That case may seem to be against us; but there, however, the brother and sister were not living jointly, and the imputation complained of was merely of misconduct on the part of the sister. In England it has been held that a suit will lie for defamation of one partner: *Robinson* v. *Marchant* (4); *Harrison* v. *Bevington* (5).

Inverarity (with the *Advocate-General*), for defendants—The English cases cited are not in point. In *Robinson* v. *Marchant* the firm was slandered and the plaintiff himself was defamed. There is no case in which injurious words spoken of A causing damage to B have been held to give a cause of action to A. A libel on the dead has never been held to be a ground of a civil suit, **[583]** although it may justify a criminal proceeding: Folkard on Libel, p. 655. If Premji Ludha were living, the present plaintiff could not sue. Premji Ludha himself might have been unwilling to

(1) L. R. 7 Q. B. 112; 41 L. J. Q. B. 10.
(2) 33 L. J. Q B. 249.
(3) 1 M. 383.
(4) 7 Q. B. 918.
(5) 8 C. & P. 708.

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bring an action. In *Davies* v. *Solomon* (1) the plaintiff did not allege damage sustained by himself. Here the plaintiff does not say he has been affected in caste; he was only threatened with fine. Loss of hospitality is not the natural consequence of a threat of fine; Folkard on Libel, p. 488; *Vicars* v. *Wilcox* (2). The damages must be wholly attributable to the defamation: *Lynch* v. *Knight* (3). Damages cannot be recovered for injury to another: Folkard on Libel, p. 489.

JUDGMENT.

WEST, J.—No cases have been cited from either the English or the Indian reports which are in point. Slander of A as a ground of action by B would lead to infinite litigation. I must find on the first issue in the negative, and dismiss the suit with costs.

The cases which approach most nearly to the present case are those of a husband joining his wife in suing for defamation, and those of a partner in a firm suing for a slander whereby other members are affected as well as himself. In the case of a husband and wife, the husband sues on account merely of the legal identity subsisting between him and his wife, which identity might also perhaps be considered as necessitating or, at any rate, justifying a similar course under the Hindu law. But the husband does not sue for hospitality denied to himself or other injury sustained by himself through the slanderous imputation cast on his wife. It is for the injury to the person slandered that the action lies, not for any remote injury, however palpable this in practice may be. It is not deemed a necessary or reasonable consequence that the husband should be even socially punished for misconduct imputed only to his wife. In the case of persons less closely connected, the reason is still stronger. It is not a reasonable consequence of a slander of one of two cousins that the other should be refused credit or hospitality, and the slanderer, therefore, is not answerable for such a refusal.

[584] In the case of partners, the one slandered—and, when there are more than one slandered, each of them—may apparently bring his action for the separable injury to himself, but not for the injury to the other. Otherwise, each member of a firm might bring as many suits for a general slander of it as the firm had members.

In India, the only reported case brought to my notice, which was that of a brother suing for defamation of his sister, is against the sufficiency of the cause of action here. The case is not really in point either way. What is important is, that when caste disputes are so frequent, and injurious imputations so common, there should be no example forthcoming of a suit maintained by one member, even of a joint family, for defamation of another.

Here the person defamed was dead, and what was said was that, he being "patit" or impure, those who paid him funeral honors would be fined by the caste. This implied a caste condemnation as the ground for degradation and its consequences. The exclusion from hospitality and use of caste property was not the proper and reasonable consequence of a mere menace of such condemnation. The injury, if any, inflicted has apparently been by those who exclude the plaintiff without reason, not by

(1) L.R. 7 Q.B. 112; 41 L.J.Q.B. 10. (2) 8 East I. (3) 9 H.L.C. 577.

those who said that in certain circumstances he and others might or would be excluded from caste benefits and privileges.

Attorneys for the plaintiff.—Messrs. *Tobin* and *Roughton.*

Attorneys for the defendants.—Messrs. *Jefferson, Bhaishanker* and *Dinshah.*

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5 B. 584.

ORIGINAL CIVIL.

Before Mr. Justice West.

MACKINNON, MACKENZIE & CO. (*Plaintiffs*) *v.* LANG, MOIR & CO. (*Defendants*).* [6th September, 1881.]

Principal and agent—Right to sue—Liability of agent—Charter-party—Undisclosed principal—Actual knowledge—Disclosure of name of principal at time of making the contract—Presumption of liability of agent where name of principal not disclosed—Indian Contract Act, IX of 1872, s. 230.

The plaintiffs by charter-party contracted to let the steam-ship *Oakdale* to the defendants upon certain terms. The first clause of the charter-party stated that the plaintiffs "agreed as agents for owners of the said steamship," [585] and subsequent clauses provided that the owners should bind themselves to receive the cargo on board, and that the master on behalf of the owners should have a lien on the cargo for freight, &c. The charter-party was signed by the plaintiffs and defendants in their own names. The plaintiffs sued the defendants for breach of the charter-party in refusing to load the said steam-ship. *Held*, that the plaintiffs had contracted as agents, and were, therefore, not entitled to sue.

If a contract made by a person who is an agent, is worded so as, when taken as a whole, to convey to the other contracting party the notion that the agent is contracting in that character, he cannot sue or be sued on the contract.

Where one contracting party knows that the other is contracting as an agent for a third person whose name he also knows, the presumption laid down in cl. 2 of s. 230 of the Indian Contract Act (IX of 1872) does not arise, although at the time of making the contract the agent does not disclose the name of his principal. The essential point is the knowledge, and actual knowledge is equivalent to disclosure, the whole object of which would be to convey such knowledge.

[F., 7 B. 51 (65); 27 M. 315; L.B.R. 1872—1892, 658.]

SUIT on a charter-party. The plaint stated that "by a charter-party dated 19th May, 1881, it was agreed between plaintiffs and defendants that the defendants should load on board the plaintiffs' steam-ship *Oakdale* a full and complete cargo, and that the said steam-ship, on being so loaded, should therewith proceed to a safe port in the United Kingdom, and there deliver, &c.

"At the time of the making of the said charter-party the *Oakdale* was not in Bombay, and it was provided by the charter-party that, in case of the said ship not arriving in Bombay, and being ready to load on or before the 22nd day of June, 1881, the charterers or their agents should have the option of cancelling the said charter-party."

The *Oakdale* arrived in Bombay harbour early on the morning of the 22nd June, 1881, with her fore-hold entirely empty and ready to receive cargo. Her main and after-holds had cargo in them, which was all discharged by 1-30 A.M. on the morning of the 23rd June, 1881. The plaintiffs in the plaint charged that the said ship was ready to load on the 22nd day of June, 1881, and notice to that effect was given to the

* Suit No. 275 of 1881.

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defendants by the master of the said ship on the 22nd June, 1881. The defendants, however, claimed their right to cancel the charter-party, on the ground that the ship was not ready to load on the 22nd June, 1881. The plaintiffs claimed to recover Rs. 60,000 damages, for breach of the charter-party.

[586] In their written statement the defendants submitted that the plaintiffs had entered into the charter-party as agents of the owners of the ship *Oakdale*, and were, therefore, not entitled to sue. They also contended that the ship was not ready to load on or before the 22nd June, 1881, according to the terms of the charter-party, and that they, in exercise of the power reserved to them, had cancelled the charter-party as they were entitled to do.

The first clause of the charter-party was as follows :—

" It is this day mutually agreed between Mackinnon, Mackenzie & Co., *as agents for owners* of the good steam-ship, &c., &c. "

The following clauses were contained in the charter-party and were referred to in argument :—

" That the said steamer being tight, &c., shall load for charterers or their agents a full and complete cargo of lawful merchandise which *the owners shall bind themselves* to receive on board and properly stow...and being so loaded shall therewith proceed...to a safe port in the United Kingdom...and deliver same...on being paid freight, &c., &c.

" The master, *on behalf of the owners*, to have a lien on the cargo for all freight, dead freight, and demurrage.

" The master and charterers to be at liberty to add any clause to this charter-party by mutual agreement without prejudice to this agreement. "

The charter-party was signed by plaintiffs and defendants in their own names as follows :—

" Mackinnon, Mackenzie & Co.

" Lang, Moir & Co. "

The only question argued at the hearing was whether the plaintiffs were entitled to bring this suit. It was admitted that the defendants knew the names of the owners when the charter-party was signed.

Inverarity (with him *Carnac*), for the plaintiffs.—The plaintiffs have signed in their own name, and the contract is one on which they would be personally liable: they are, therefore, entitled to sue upon it. Their principals were not disclosed when the charter-party was made, and the plaintiffs sign this **[587]** charter-party in their own name: Indian Contract Act, IX of 1872, s. 230. The fact that in the body of the document the plaintiffs are described as agents, does not exempt them from liability or prevent them suing if they sign the contract without qualification: *Paice* v. *Walker* (1). [WEST, J., referred to *Southwell* v. *Bowditch* (2).] In that case *Paice* v. *Walker* was not cited in argument. It is referred to with approval by Pollock, B., in his judgment. In *Sooppromanian Setty* v. *Heilgers*(3) it was held that the presumption under s. 230 of the Contract Act, might be rebutted, and in that case it was held to be rebutted, because the party contracting was described in the contract " as agent," and signed " for owners." There the name of the principal had been disclosed orally. Counsel cited and commented on *Gadd* v. *Houghton* (4) ; *Lennard* v. *Robinson* (5) ; *Parker* v. *Winlow* (6) : *Tanner* v. *Christian* (7) ; *Hutton* v. *Bullock*(8) ; *Robinson* v. *Mollett* (9).

(1) L.R. 5 Ex. 173.
(2) 1 C. P. D. 100, (374).
(3) 5 C. 71.
(4) 1 Ex. D. 357.
(5) 5 El. & B. 125.
(6) 7 El. & B. 942.
(7) 4 El. & B. 591.
(8) L. R. 9 Q. B. 572.
(9) 7 H. & L. 302.

Unless evidence is given, the presumption is in our favour under cl. (2) of s. 230 of the Contract Act, (IX of 1872), Mackinnon, Mackenzie & Co. are mentioned as agents merely by way of description: *Deslandes* v. *Gregory* (1); Story on Agency, s. 168. The agent may be liable as well as the principal, and, if so, the agent can sue: *Calston* v. *Dowell* (2); *Die Elbinger Altien-Gesellschaft* v. *Claye* (3). All the authorities are in our favour except the *dictum* of James, L.J. in *Gadd* v. *Houghton* (4).

Jardine (with *Lang*) for defendants.—This contract was made by the plaintiffs as agents, and they cannot sue. In *Southwell* v. *Bowditch* (5) it is said that all the terms of the contract must be considered. Here the contract itself was plainly with the owners. It is *the owners* who bind themselves to receive the cargo on board; and the master, *on behalf of the owners*, **[588]** is to have a lien on the cargo for freight; and, further, the *master* and charterers may vary the agreement. Counsel relied on *Gadd* v. *Houghton* (4) and *Southwell* v. *Bowditch* (5), and distinguished the above cases cited for the plaintiffs.

JUDGMENT.

WEST, J.—I think that although fifteen or twenty years ago the common law Courts in England would almost certainly have decided on the contract now in question in favour of the plaintiffs' responsibility and their capacity to sue, yet the more recent decisions in *Southwell* v. *Bowditch* (5) and *Gadd* v. *Houghton* (4) establish that in determining whether a personal responsibility has been incurred by the agent, and, therefore, a personal capacity to sue, the whole of the contract made by him is to be examined. To the same effect is the case of *Soopromanian Setty* v. *Heilgers* (6) recently decided at Calcutta. The result seems to be that if the contract made by a person who is an agent is worded, so as, when taken as a whole, to convey to the other contracting party the notion that the agent is contracting in that character, and that he is the mouth-piece through which the principal speaks, he cannot sue or be sued on the contract. In the present case, Messrs. Mackinnon, Mackenzie & Co. say they make the agreement "as agents" for the owners of the steamer *Oakdale*. No case has as yet apparently decided that this would be enough to exclude their personal responsibility and the corresponding right to sue. In this charter-party, however there is more than this, it contains a clause by which *the owners* undertake to receive the cargo "on being paid freight" at the rate afterwards specified. If the agents intended to contract a personal liability, this engagement would have been differently expressed. It would have been said "which they engage to receive on being paid or on the owners being paid." As the contract stands, I think Mackinnon & Co. have clearly indicated, that they are acting as agents, and that the contract is "entered into by them on behalf of principals, *i.e.*, the owners of the *Oakdale*. They speak from the first as agents; *the owners* are to receive the cargo; *the owners* are to be paid the freight; and the effect of these facts is not done away with by their afterwards signing **[589]** their own name simply. Apart from technical considerations and from predilections derived from cases, the idea conveyed is distinctly that they are

(1) 2 El. & El. 602. (2) L. R. 6 C. P. 486. (3) L. R. 8 Q.B. 313.
(4) 1 Ex. D. 100 (357). (5) 1 C. P. D. 100, 374. (6) 5 C. 71.

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contracting, not for themselves but on behalf of principals indicated, though not named.

A presumption, it is said, arises that an agent may sue and be sued where he has not disclosed the name of his principal. "Disclose," no doubt, means to make known, and here, perhaps, there was no declaration —probably not. But the case may be supposed of the agents having contracted with the same charterers for the same ship shortly before or of the charterers to the agents' knowledge being by other means acquainted with the owners' names. In such a case a disclosure would be impossible, yet I do not think that the presumption would operate. The essential point is the knowledge, and here the name of the ship and the registry number being given, the defendants not only knew that the agents were not owners, but could immediately find out if they did not know before who the owners were. This, I think, was equivalent to actual knowledge, and actual knowledge is equivalent to disclosure, the sole object of which would be to convey such knowledge.

On the first issue I think, inconvenient as it may be, that the plaintiffs are not entitled to maintain this suit. I dismiss the suit with costs.

Attorneys for the plaintiffs.—Messrs. *Craigie, Lynch, and Owen.*

Attorneys for the defendant.—Messrs. *Hore, Conroy and Brown.*

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5 B. 589.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

KONERRAV AND ANOTHER (*Original Defendants*), *Appellants v.* GURRAV (*Original Plaintiff*), *Respondent.** [13th July, 1881.]

Hindu law—Res judicata—*Partition—Account in partition suits.*

In a previous suit between the plaintiff and the defendant, the plaintiff alleged that there had been a partition of the family property into two parcels, and, under a deed of partition drawn up at the time, claimed one of these parcels. The deed being held invalid, the suit was rejected, with [590] liberty to plaintiff to sue for a general partition. In the second suit the plaintiff prayed for a general partition as a member of an undivided Hindu family.

Held that the second suit was not *res judicata*; for, although the plaintiff *might* in the first suit have made an alternative case and prayed for a general partition in case he failed to establish the previous partition which he alleged, yet it could not be said that he ought to have done so.

Held, also, that in the case of joint enjoyment by the members of the whole family, or enjoyment by different members of different portions of the family property, the Court will not, except under special circumstances, order an account to be taken of past transactions, but will make division of the property actually existing at the date of partition: *Lakshman Dada Naik* v. *Ramchundra Dada Naik* (1) followed.

[R., 14 B. 31 (46); 17 B. 271 (278); 27 B. 379 (389); 24 C. 711=1 C.W.N. 565; 7 M. 564; 15 M. 336=2 M.L.J. 130; 32 M. 271=19 M.L.J. 70=5 M.L.T. 145; 9 C.L.J. 137=13 C.W.N. 309=3 Ind. Cas. 241; 4 P.R. 1903; Expl. & D., 25 B. 189 (192, 193); D., 19 B. 532 (536).]

THIS was an appeal against the decision of G. G. Phatak, Subordinate Judge (First Class) at Dharwar.

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* Regular Appeal No. 47 of 1880.

(1) 1 B. 561=5 B. 48.

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The plaintiff and the defendants were members of the same family, the latter being paternal nephews of the former. In 1872 the plaintiff brought a suit against the defendants to obtain a certain share of the family property specified in a document which purported to effect a division of the property into two parcels. This document was held to be invalid, and the suit was rejected by the Court of first instance and by the High Court; but liberty was given to the plaintiff to sue again if so advised, for general partition. The present suit was consequently brought in 1878. In this suit the plaintiff alleged union with the defendants, and prayed for a general partition as a member of an undivided Hindu family. He admitted having been in possession of a small portion of the family lands and a trading business, worth Rs. 25,000, which came to his hands in 1872, when his father died; expressed his willingness to give a share in the profits of the land and the business; and asked for a declaration of his right as a half sharer of the lands, *vatans*, and other property in the hands of the defendants, as well as for a half share of the mesne profits of the same from the year 1872, when the separate enjoyment of the different members of the properties in their possession commenced. The defendants, without denying the plaintiff's right, disputed the accuracy of certain items claimed, and denied their liability as to others. The Subordinate Judge declared the plaintiff entitled to a half share of most of the immoveable properties mentioned in the plaint; and giving to the defendant **[591]** a half share of Rs. 25,000, the value of the trading business, awarded to the plaintiff half a share in the profits of the immoveable properties which the defendants had realised from 1872. On this principle the Subordinate Judge found a balance of Rs. 10,270 due by the defendants to the plaintiff.

The defendants appealed to the High Court.

Inverarity and *Shamrav Vithal*, for the appellants.—This suit is *res judicata*. The two suits are to recover the same property: *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (1). This was a Full Bench ruling, and was followed in *Bheeka Lall* v. *Bhughoo Lall* (2) by Markby and Prinsep, JJ. The Privy Council upheld this principle, and held that where a party, failing to obtain judgment for the possession of land claimed by her in her first suit as *taufir*, brought a fresh suit claiming the land as property belongs to her talook, her second suit was *res judicata*: *Woomatara Debia* v. *Unnopoorna Dassee* (3). In determining whether a suit is *res judicata* the Court will look to the substance of the previous suit rather than its form: *Devrav Krishna* v. *Haiambhai* (4); *Haji Hasan Ibrahim* v. *Manckaram Kaliandas* (5), *Krishna Behari Roy* v. *Brojeswari Chowdranee* (6). The Courts have no power to reserve permission to a plaintiff to bring a fresh suit for the same matter: *Gobind Chunder Paul Chowdhry* v. *Ramkrishen Paul Chowdhry* (7). A plaintiff is bound to bring forward every ground on which he could claim: *Shivlingaya* v. *Naglingaya* (8); *Janaki Ammal* v. *Kamalathammal* (9).

Mesne profits ought not to have been awarded: at least for more than three years before the institution of the suit. The manager of a joint Hindu family is not bound to render an account: West and Buhler, 348, (2nd ed.); *Ranganmani Dasi* v. *Kashinath Dutt* (10). *Lakhsman Dada Naik* v. *Ramchandra Dada Naik* (11). For a suit to recover profits of immoveable property belonging to the plaintiff which have been wrongfully

(1) 2 C. 152. (2) 3 C. 23. (3) 11 B.L.R. (P.C.) 158. (4) 1 B. 87.
(5) 3 B. 137. (6) 2 I. A. 283. (7) 2 W. R. 297. (8) 4 B. 247.
(9) 7 M H.C.R. 263. (10) 3 B.L.R. O.C.J. 1. (11) 1 B. 561=5 B. 48.

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[592] received by the defendant, art. 109, sch. II of Act XV of 1877, provides a limitation of three years.

Manekshah Jehangirshah, for the respondent.—The objection as to the plaintiff's present suit being *res judicata* has now been taken for the first time, and should not be allowed. Even if allowed, it is not good. The cause of action is different; the relief sought is different. Section 13 of the Civil Procedure Code (X of 1877) is the law on the subject of *res judicata*, and it is as strict as that contained in s. 2 of the old Code of Civil Procedure (VIII of 1859). The ground of action in the previous suit was the alleged partition or the document then executed by the parties; in this suit partition is denied, and the union of the family is made the basis of the claim. This suit being on a different cause of action is not *res judicata*: *Bhisto Shankar Patil* v. *Ramchandra Raghunath Jahagirdar* (1). The authority of the Full Bench decision in *Deenobundhoo Chowdhry* v. *Kristomonee Dossee* is considerably weakened by the dissent of Garth, C.J. This case falls within the scope of the decision in *Chinniya Mudali* v. *Venkatachella Pillai* (2). In the present case the cause of action is not only different, but inconsistent with that of the previous suit, and it would be impossible for the plaintiff to make both of such inconsistent grounds the basis of his claim. The award of the Subordinate Judge as to mesne profits is equitable, as the defendants were in possession of the bulk of the property.

JUDGMENT.

MELVILL, J.—The first objection taken to the decree appealed against, *viz.*, that the subject-matter of the suit is *res judicata* was not raised in the Court of the first instance. We are of opinion that it cannot be sustained.

The plaint in the former suit, No. 352 of 1872, alleged that the defendants are the sons of the plaintiff's elder brother; that a bad feeling had sprung up between them and the plaintiff; that, in consequence of this bad feeling, the plaintiff's father, with a view to prevent future disputes, had made, with the consent [593] of the plaintiff and the defendants, a complete partition of the family property, and executed a *farkhat* on the 27th January, 1872, which had been duly registered; that on the 2nd May, 1872, the plaintiff's father had died, and thereupon the family *vatan* and other property had been entered in the names of the defendants, who had been since enjoying it. The moveable property had, the plaint alleged, been reduced into possession; and the suit was brought to obtain possession of the share which had been allotted to the plaintiff in the partition made by his father. The plaintiff expressed his willingness to take either of the two shares into which the property had been divided by his father, but insisted that there had been a valid and binding partition, to which effect ought to be given; and he refused to adopt a suggestion made during the course of the suit by the Subordinate Judge, that he should amend his plaint, and claim a general partition, without reference to the *farkhat* executed by his father.

The Subordinate Judge found that the said *farkhat* had not been executed with the consent of the defendants, and that they were, consequently, not bound by it. He, therefore, rejected the plaintiff's claim, but stated that he did so "without prejudice to his bringing a fresh claim

(1) 8 B.H.C.R. 89.

(2) 3 M.H.C.R. 320.

on proper and equitable grounds for a general partition of the moveable and immoveable common family property."

This decree, which was dated the 11th October, 1875, was confirmed by the High Court on the 19th September, 1877.

The plaintiff, having thus failed to make out his claim to a certain specified portion of the family property on the footing of a partition already made by his father, has brought the present action, in which he asks that a general partition may be made in the ordinary manner between the defendants and himself, as members of an undivided Hindu family.

Several cases have been cited to us, (and especially the Calcutta Full Bench case *Denobundhoo Chowdhry* v. *Kristomonee Dossee*(1),) in which it has been held, though not without some conflict of opinion, that a claimant, who has failed to recover property under one title, cannot bring a second suit to recover the same **[594]** property by a different title. Assuming that that proposition is established, none of the authorities will carry us so far as we are asked to go in the present case. In the suit No. 352 of 1872 the plaintiff's case was that there had already been a valid partition of the property into two parcels, A and B, and he asked that either A or B might be awarded to him. In the present suit his case is that there has been no partition, and he seeks to recover, not A, nor B, but such portion of both A and B as may fall to his share upon a general partition. It appears to us that not only is the cause of action in the two cases not the same, but the relief sought is essentially different; and no authority has been cited to us which would require us to hold that a person, who has failed to recover one property under one title, cannot sue to recover another property under a different title.

The rule of *res judicata*, by which our Courts are to be guided, is now contained in s. 13 of Act X of 1877. It is clear that the matter at issue in the present case was not heard and finally decided in the former suit, unless it be held that it was constructively in issue in the former suit by reason of the provisions of Explanation II to the s. 13, which enacts that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." It is possible that the plaintiff might, in his former suit, have made an alternative case and have prayed that if the Court should come to the conclusion that the title which he set up was a bad one, and that he was not entitled to the relief which he claimed, it should nevertheless award to him a different relief, founded upon a different and antagonistic cause of action. The plaintiff might, we say, possibly have been allowed to combine two such grounds of attack in one suit; but we cannot say that he ought to have done so. The injustice and inconvenience of insisting on such a procedure are very clearly pointed out by Garth, C.J., at p. 162 of the report of the Full Bench case already referred to. *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (1).

Being of opinion that the decree of the Court below cannot be attacked on the ground of *res judicata*, it only remains for us to **[595]** consider certain minor objections taken by the defendants to the award made against them.

They contend that in a suit for partition between members of an undivided Hindu family, who are in possession and enjoyment of different

(1) 2 C, 152.

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portions of the property, the plaintiff is not entitled to demand mesne profits. The ordinary rule, no doubt, is that the members of an undivided Hindu family, when making a partition, are entitled, not to an account of past transactions, but to a division of the family property actually existing at the date of partition : (*Ranganmani* v. *Kashinath* (1) ; *Lakshman Dada Naik* v. *Ramachandra Dada Naik* (2) ; West and Buhler, p. 348). Where one member of the family has been entirely excluded from the enjoyment of the property, there might be good grounds for ordering an account: but in the ordinary case of joint enjoyment by the members of the whole property, or of enjoyment by different members of different portions of the property, the taking of an account would be most difficult and unsatisfactory, and we are not aware of any case in which the Courts have ever ordered it. There seems to us to be nothing in the circumstances of the present case which should induce us to depart from the ordinary rule. It is true that since the death of the plaintiff's father in 1872 the defendants have been in possession of the greater part of the immoveable property ; but the moveable property fell into the hands of the plaintiff. The Subordinate Judge has found that a money-lending business of the value of Rs. 25,000, came into the plaintiff's hands, and, in the absence of evidence as to the present state of the business, has awarded to the defendants one-half of that sum, or Rs. 12,500. This may be a fair estimate of the present value of the business: but since 1872 the plaintiff must have been living by his trade, as the defendants have been living on their land and allowances ; and if the defendants are to be required to give to the plaintiff a half share of all that they have received from their land and allowances since 1872, the plaintiff is bound to account for all the profits which he has received from the money-lending business. It is clear from what the Subordinate Judge says of the plaintiff's conduct that no **[596]** satisfactory account of these profits would be forthcoming ; and in its absence it would be very inequitable to make a one-sided award of mesne profits in favour of the plaintiff. For this, if for no other reason, we think it right to adhere to the ordinary rule, that a Hindu co-parcener seeking a partition, cannot demand an account. It is open to such a co-parcener, if he is dissatisfied, to demand a partition at any moment ; and if he refrain from doing so, it is his own fault. The plaintiff might have obtained a partition many years ago if he had brought his suit in its present form, instead of setting up an invalid *farkhat*, which the Subordinate Judge described as "the offspring of intrigue and dishonesty."

We accordingly, in place of the Subordinate Judge's finding on the 20th issue that the sum of Rs. 10,270-13-9½ is due by the defendants to the plaintiff, substitute a finding that the sum of Rs. 12,500 is due by the plaintiff to the defendants.

The next objection taken to the decree is contained in paragraph (16) of the memorandum of appeal, and is the subject of the 15th issue of the Subordinate Judge. It appears that the beams, planks, and stones, to which this issue refers, are still in existence, and no reason is shown why the plaintiff should not be awarded possession of one-half of the said beams, planks and stones.

The Subordinate Judge's award of Rs. 858 on this account must accordingly be set aside, and in lieu thereof it must be decreed that the defendants do deliver to the plaintiff one-half of the beams, planks, and

(1) 3 B.L.R. O.C.J. 1.

(2) 1 B. 561=5 B. 48.

stones mentioned in the finding on the 15th issue, as being now in the defendants' possession, or that, if delivery be not made, they pay to the plaintiff the sum of Rs. 858.

The objection raised in the 18th paragraph of the memorandum of appeal has been relied upon, but it has not been shown to us that there is any error in the Subordinate Judge's decree in this particular.

The defendants object to the partition of the land, which was the subject of the mortgage effected by the deed, Ex. No. 127, unless the plaintiff pay to them one-half of the sum of Rs. 2,325, which they allege that they have paid for the redemption of the [597] mortgage. This is the point raised in the 19th paragraph of the memorandum of appeal. It must be presumed that the money with which the redemption was effected came out of the profit, realised from the joint property in the possession of the defendants. As we do not require the defendants to account to the plaintiff for the profits which they have realised, they cannot call upon the plaintiff to reimburse them in respect of a single item of expenditure made out of those profits.

We have now dealt with all the objections taken to the Subordinate Judge's decree at the hearing of the appeal: and we are of opinion that that decree should be amended, in respect of the findings on the 15th and 20th issues, in the manner and to the extent indicated in the preceding observations, but that in other respects the decree should be confirmed.

We think the parties should bear their own costs in appeal.

Note.—See also the case of *Shivram* v. *Narayan* (*supra* 5 B, 27). In that case both the plaintiff and the defendant had in the previous suit alleged a partition, but the Court held that no partition had taken place. It does not appear that leave to bring a fresh action was given in the case.

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5 B. 597.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Pinhey.

MOHANDAS (*Original Plaintiff*), *Appellant* v. KRISHNABAI (*Original Defendant*), *Respondent.** [29th June, 1881.]

Hindu law—Inheritance—Bandhus—*Maternal uncles—Mother's sister's sons.*

Maternal uncles are included in the class of *bandhus*, and succeed in priority to mother's sister's sons.

[F., 17 B. 114 (125); R., 30 B. 431 (P.C.)=3 A.L.J. 484=8 Bom. L.R. 446=4 C.L.J. 9=10 C.W.N. 802=16 M.L.J. 446=1 M.L.T. 211=33 I.A. 176; 36 B. 339 (341) =14 Bom. L.R. 89=14 Ind. Cas. 438; 33 M. 439 (445)=5 Ind. Cas. 280=20 M.L.J. 275=7 M.L.T. 203.]

THIS was an appeal against the decision of W. H. Newnham, Judge of the District of Poona.

The facts, in so far as they are material for the purpose of this report, are as follows:—

In the city of Poona there was a firm styled "Sakharam Manchharam," the last sole owner of which was one Liladhar. In 1864, Liladhar made a will by which he appointed two persons to be administrators to carry on the business of the firm and otherwise [598] to give effect to the provisions of his second

* Regular Appeal No. 55 of 1880.

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son, a minor, named Sundarlal. Sundarlal died in 1873 at the age of 13. Previously to his death the administrators of his father's will and some members of the family, with the view of maintaining the old firm, caused Sundarlal to adopt Gopaldas, his mother's sister's son. Sundarlal died, leaving him surviving, his mother, his mother's four sisters, several children of his mother's sisters, (of whom the plaintiff was one), his mother's three brothers, and others whom it is not necessary to mention. To prevent the legality of this adoption from being subsequently questioned, the administrators drew up a document which they induced most of the surviving members of the family to sign for a consideration. The plaintiff's father and elder brother and the plaintiff himself were among the signatories to this document,—the signature of the plaintiff, who was then and at the date of this suit a minor, being made by his father on receiving Rs. 2,000. Sundarlal and his adopted son Gopaldas having both died, the property of the firm came into the possession of the defendant Krishnabai, the minor widow of Gopaldas.

To recover a third share of this property the minor plaintiff Mohandas, represented by his elder brother, now sued in the Court of the Judge of Poona. It was alleged on his behalf that the adoption, by Sundarlal, of the defendant's husband had not really taken place; that if it had, it was illegal: and that the compromise entered into for him by his father was void and of no effect. Against this it was contended, *inter alia*, for the defendant in her written statement that the suit could not be brought during the minority of the plaintiff; that the family arrangement was for a consideration and valid, and could not be disturbed; and that the plaintiff was not entitled to the third share claimed, or any other share. The District Judge found for the defendant on all these contentions, and rejected the plaintiff's claim. The plaintiff thereupon appealed to the High Court.

Inverarity with *Mahadev Chimnaji Apte*, for the appellant.—Taking Sundarlal to be the last owner of the property, we find that he died, leaving, amongst others, his adopted son Gopaldas *alias* Govardhandas, [assuming the adoption to be both genuine and valid] Sundarlal's mother's sister, her sons Narotamdas and [599] Mohandas, the plaintiff, and their three maternal uncles. Gopaldas died shortly after his adoption, leaving his minor widow, the defendant Krishnabai. The principal question is, who is the nearest heir of Sundarlal, and this depends upon whether by Hindu law maternal uncles inherit before mother's sister's sons. We contend that they do not. The mother's sister's son is a *bandhu*, the rule of whose succession is laid down at p. 55 of West and Bühler (2nd ed.). The rule is that "on failure of *samanodakas* the estate of a separate householder descends to the *bandhus*, or *bhinnagotra sapindas*." The nine *bandhus* are then enumerated, the mother's sister's sons being assigned the second place. From p. 200 of the same work it will be seen that the *bandhus* are (1) the man's own cognates,—that is, the father's sister's sons, the mother's sister's sons, and the maternal uncle's sons; (2) the man's father's cognates; and (3) the man's mother's cognates. The man's maternal uncles are not mentioned. Then the question arises. "Are they *bandhus* at all?" Upon the authorities quoted at pp. 201 and 202, West and Bühler incline to the opinion that maternal uncles are *bandhus*. Taking them to be *bandhus*, the next question is whether they take before or after nine *bandhus* enumerated at pp. 55 and 200. Fully recognizing the difficulty of the question, the learned compilers say at p. 203: "It would seem, however, that 'nine *bhandhus*' mentioned in the law books ought to be

placed first, according to the principle of the Mayukha, that 'incidental persons are placed last.' "

It was also contended for the plaintiff that the adoption of Gopaldas by Sundarlal was invalid, and that the compromise entered into by the plaintiff's father was prejudicial to the plaintiff's interest, and not binding.

Hon'ble *J. Marriott*, Advocate-General (with him *Shantaram Narayan*, *Jefferson*, *Bhaishankar* and *Dinshah* and *Shivram V. Bhandarkar*), for the respondent.--The adoption was valid at the time it took place in 1873. The compromise was in the nature of a family arrangement to settle a doubtful claim, and, therefore, valid. The fundamental rule of succession amongst Hindus is laid down by Manu, in chap. ix, verse 187; "To the nearest *sapinda*, male or female, after him in the third degree, the inheritance next **[600]** belongs." This rule is adopted by Vrihaspati (see Coleb. Dig., vol. ii, pl. 437, p. 569): "Where many claim the inheritance of childless man, either paternal or maternal, he who is the nearest of them shall take the estate." *Bandhus* are *sapindas* belonging to a different *gotra*. Therefore the above rule applies to *bandhus*; and the question is: who is nearer to a man, his maternal uncle's or his mother's sister's sons? As stated for the appellant, the maternal uncles are not included in the list of *bandhus*; but the list of *bandhus* is by no means exhaustive. There are many more *bandhus* than the nine there enumerated: Mayne's Hindu Law, p. 488 (2nd ed.); *Gridhari Lall Roy* v. *The Bengal Government* (1). The opinion in West and Bühler is incorrect, and is based upon the rule of construction given in the Mayukha that "incidental persons are placed last," which does not apply here. The author of the Mayukha applies the rule with reference only to the order of inheritance known as the Baddha Kram or the compact series: "The wife, and the daughters also, both parents, brothers likewise, and their sons" (Stokes' Hindu Law Books, 427, pl. 2). The enumeration of the nine *bandhus* is not a compact series. A sister's son, although not an enumerated *bandhu*, has been held to take in preference to a mother's sister's son, an enumerated *bdndhu* and a person occupying exactly the same position as the plaintiff in this case: (*Gunesh Chunder Roy* v. *Nil Komul Roy* (2)). A man's maternal uncle is nearer to him than his mother's sister's son. This contention is supported by Viramitrodaya: *Gridhari Lall Roy* v. *The Bengal Government* (1); *Amrita Kumari Debi* v. *Lakhminarayan Chuckerbutty*.(3)

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—As we have come to the conclusion that the minor plaintiff is not one of Sundarlal's heirs, it is unnecessary for us to decide whether, if he had any right to the inheritance, he would have been bound by the compromise entered into by his father on his behalf.

[601] Among other relatives who survived Sundarlal were three brothers of his mother. The plaintiff's mother, who is still alive, was a sister of Sundarlal's mother; and it may well be doubted whether the plaintiff would be entitled to succeed in preference to his own mother, through whom he claims. It is sufficient, however, for our present purpose, that we should confine ourselves to what may perhaps be a somewhat simpler question, *viz.*, whether the plaintiff, as standing in the

(1) 12 M.I.A. 448=10 W.R. 32 (P.C.).
(2) 22 W.R. 264.
(3) 2 B.L.R. 28 (F.B.).

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relationship to Sundarlal of mother's sister's son, is entitled to preference over his own and Sundarlal's maternal uncles.

The rule relating to the succession of cognates (*bandhus* or *bhinnagotra sapindas*) is contained in the first placitum of the sixth section of the second chapter of the Mitakshara. Nine heirs are specified, of whom the first three are the father's sister's sons, the mother's sister's sons, and the maternal uncle's sons. The maternal uncle is not specified: but it was held by the Judicial Committee in *Gridhari Lall Roy* v. *The Bengal Government* (1) that the enumeration of *bandhus* in the text of the Mitakshara is illustrative, and not exhaustive; and that the maternal uncle is a *bandhu*, and, failing nearer *bandhus*, is entitled to inherit. Similarly, a sister's son is not among the specified relations; but both in Calcutta and Madras it has been held that he is in the line of heirs: *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty* (2); *Chelikani* v. *Rajah Suraneni Vencata* (3). None of the above cases determine the position of the maternal uncle or the sister's son with reference to other *bandhus*; and it was argued for the plaintiff that, even though they be admitted to be *bandhus*, they must still take rank after all the heirs enumerated in the text. From West and Bühler, page 203, it would seem that the learned authors of that Digest rather incline to this view; but they speak with some hesitation on the subject; and the passage of the Mayukha to which they refer appears to us to be hardly sufficient to support their conclusion. In that passage (Mayukha, ch. iv, sec, viii, pl. 18) Nilkant is discussing the position of the paternal grandmother. He quotes the text of Manu: "The mother also being dead, the father's mother shall take the heritage," and then adds: "Even **[602]** though she is here mentioned immediately next to the mother, she is to be entered at the end, after the brother's sons, after the manner of incidental persons at the end, because the placing her in the middle is in violation of the rank fixed for each, as far as brother's sons." The principle here stated of placing incidental persons after those expressly specified is here applied by Nilkant only to the "compact series of heirs," *i.e.*, to the list of heirs ending with the brother's sons (Mitakshara, ch. ii, s. 5, pl. 2; Stokes' Hindu Law Book, 446); and it does not follow that he intended to apply it to the list of *bandhus*. Placitum 22 treats of the *bandhus*, and, after quoting the text in which they are enumerated, Nilkant adds: "Here also the order of succession is even the order of the text;" but this he seems, to intend no more than is stated in the Mitakshara, (ch. ii, s. vi, pl. 2), *viz.*, that, "by reason of near affinity, the cognate kindred of the deceased himself are his successors in the first instance; on failure of them, his father's cognate kindred; or, if there be none, his mother's cognate kindred." There does not appear to us to be anything in the Mitakshara or the Mayukha which can be construed into a direction that the nine specified *bandhus* are to take precedence of all unspecified *bandhus*; and if there be no such direction, then the text of Manu "to the nearest *sapinda* the inheritance next belongs," and that of Brihaspati, "where many claim the inheritance of a childless man, whether they be paternal or maternal relations (*sakulya*), or more distant kinsmen (*bandava*), he who is the nearest of them shall take the estate,"[2] seem to furnish the proper ground for decision. Nor are we without judicial authority on the point. We have already referred

(1) 12 M.I.A. 448=10 W.R. 32 (P.C.).
(2) 2 B.L.R. 28. (F.B.)
(3) 6 M.H.C. 278.

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to a Full Bench judgment of the Calcutta High Court, in which it was held that a sister's son is entitled to a rank as a *bandhu*. This decision was followed in *Ganesh Chunder Roy* v. *Nil Komul Roy* (1) by Markby and Mitter, JJ., who held that, according to the general principles of Hindu law, a sister's son is a preferential heir to a mother's sister's son, as being capable of conferring greater spiritual benefits upon the soul of the deceased. This is a distinct authority for holding that the nearest of kin inherits in preference to a more distant **[603]** *bandhu*, though the latter may be among those specified in the text. Again the passages from the Mitakshara, quoted at pp. 40 and 41 of the judgment in the Calcutta Full Bench case *Amrita* v. *Lakhinarayan* (2), already referred to, tend to show that the maternal uncle was regarded by Yajnavalkya as the principal, or representative *bandhu*; while the passage from the Viramitrodaya, cited at p. 42, is still more clear upon the point. This passage was one of those relied upon by the Judicial Committee in *Gridhari Lall Roy* v. *The Bengal Government* (3) : and the translation of it given by their Lordships at p. 466 of Moore's Reports seems in some respects more correct than that given by Mr. Justice Mitter in the Calcutta case. "The term 'cognates' (*bandhus*) in the text of Yajneswara or Yajnavalkya must comprehend also the maternal uncles and the rest: otherwise the maternal uncles and the rest would be omitted; and their sons would be entitled to inherit, and not 'they themselves, [or 'then they themselves,'] though nearer in the degree of affinity; a doctrine highly objectionable." The Viramitrodaya is an authority in this Presidency illustrative of, and supplementary to, the Mitakshara; and in the above passage we find a distinct declaration that maternal uncles must take before the sons of maternal uncles, though the latter are among the specified *bandhus*. It being thus established that maternal uncles have priority over the mother's brother's son, there would seem to be no possible ground for holding that they have not priority over the mother's sister's son. When it is once admitted that the list of *bandhus* given in the text is not exhaustive, and that certain other relatives take before some of those specified in the list, there is no other logical conclusion except that the relative who, as nearest of kin, is capable of conferring the greatest spiritual benefit on the soul of the deceased, must in all cases be preferred to a more remote *bandhu*. Applying this principle, we come to the conclusion that the plaintiff had no share in the inheritance of Sundarlal, as there were preferential heirs in existence at Sundarlal's death; and for this reason we confirm the decree of the District Court with costs.

Decree confirmed.

(1) 22 W.R. 264.
(2) 2 B.L.R. 28 (F.B.).
(3) 12 M.I.A. 448=10 W.R. 32 (P.C.).

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5 B. 604.

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[604] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice M. Melvill.

SHANKARAPA DARGO PATEL (*Original Plaintiff*), *Appellant v.* DANAPA VIRANTAPA (*Original Defendant*), *Respondent.**

[25th March, 1881.]

Dekkhan Agriculturists' Relief Act XVII of 1879, *ss.* 20, 74—*Mortgage-decree—Decree in suit in mortgage—Payment by instalments—Civil Procedure Code (Act X of* 1877), *s.* 210.

The words "decree passed against an agriculturist" in s. 20 of the Dekkhan Agriculturists' Relief Act XVII of 1879 mean a decree passed against an agriculturist *personally*, and do not include a decree for the recovery of money by the sale of mortgaged property.

The effect of that section must be taken to be an enlargement of the indulgence granted by s. 210 of the Civil Procedure Code (Act X of 1877), but only in those cases to which the latter section applies. By s. 210 of the Civil Procedure Code the Court may, after the passing of a decree in money suits, order the amount to be paid by instalments, provided the decree-holder consents. By s. 20 of Act XVII of 1879 the Court may make the same order in similar suits, *without the consent* of the decree-holder.

In the case of a debt secured by a mortgage, the agriculturist's remedy lies in a suit, not for an account, but for redemption; and the only decree which can be made in such a suit, in the absence of any special provision in the Act, is the ordinary decree for payment of the whole amount within six months, or, in default, for foreclosure.

Hardeo Das v. *Hukan Singh* (1) referred to and approved.

[R., 5 B. 614; 7 B. 332 (335); 15 C.W.N. 1083=11 Ind. Cas. 736; D., 20 B. 469 (471).]

THIS case was submitted for the decision of the High Court by M. B. Baker, Senior Assistant Judge at Sholapur in the District of Poona, under s. 617 of Act X of 1877. The case came before him in appeal, and was stated by him, with his own opinion thereon, as follows :—

"This is an appeal against an order passed by the Second Class Subordinate Judge of Sholapur on the 30th day of July, 1880, in application No. 24 of 1880 of his file.

"Plaintiff appeals on the grounds that—

"Under s. 20 of Act XVII of 1879 instalments can only be awarded in decrees for money. His decree is to recover money by the sale of mortgaged property, and the Subordinate Judge, consequently, erred in awarding payment by instalments.

[605] "In Original Suit No. 963 of 1878 plaintiff sued to recover Rs. 400 principal and Rs. 400 interest, deducting as received Rs. 246-8-0 under a mortgage-deed, dated April 26th, 1873. In default of payment, he sought to recover by the sale of certain land situated at Sangdari and Chusti.

"On December 5th, 1878, plaintiff obtained a decree, *ex parte*, awarding him Rs. 551-8-0, to be recovered from the mortgaged property.

"On January 11th, 1879, plaintiff presented a *darkhast* for execution, and a warrant for attachment was issued. On September 17th, 1879, plaintiff petitioned that the sale might not be conducted by the Collector, but by the Court. On February 27th, 1879, one Sheewapa Rewapa

* Civil Reference No. 13 of 1881.

(1) 2 A. 320.

petitioned to raise the attachment on half of the property, on the ground that it belonged to him, and the attachment was raised accordingly on June 14th, 1879.

"On January 18th, 1880, defendant petitioned, asking that he might be allowed to pay off the debt by yearly instalments of Rs. 25.

"The Subordinate Judge ordered that defendant should pay Rs. 100 per annum, until he had paid Rs. 625, the amount of the decree and costs with interest at six annas per cent. till date of payment. In default of payment, the amount to be recovered by sale of the mortgaged property as well as from defendant personally.

"The issues on appeal are—

"I. Whether the provisions of s. 20 of Act XVII of 1879 apply to decrees passed on mortgage-deeds. II. Whether the provisions of the said section apply to proceedings pending at the time when the Act came into force.

"No further issues are desired.

"The decree from which these proceedings have arisen was passed on a mortgage-bond. Execution proceedings were taken out before Act XVII of 1879 came into force, and only the actual sale remained for their completion when, on January 18th, 1880, respondent appeared for the first time and applied, under s. 20 of Act XVII of 1879, to have the decree made payable by instalments. The Subordinate Judge granted the application, holding that the **[606]** words 'any decree against an agriculturist' includes decrees passed on mortgage-bonds.

"So far as I can find, the points raised in the present appeal have never been authoritatively decided by the High Court; and as these points are of importance, and I have arrived at my decision with considerable hesitation, I have determined to refer it to the High Court under s. 617, Civil Procedure Code."

"The words 'any decree' in s. 20 are very wide, and at first sight bear the construction which the Subordinate Judge has put upon them; but, considering the place which s. 20 occupies in the Act and the provisions of s. 22, I am in doubt whether this construction is right. It seems to me that the provisions of chap. iii, as far as s. 21, refer to money decrees, and it is clear that this is not a 'money decree' within the meaning of the Act. The effect of the Subordinate Judge's order is not only to vary the decree in a manner which is not allowed by the Civil Procedure Code, but also to alter entirely the contract made between the parties. The provisions of s. 20 are retrospective, while those of s. 22 are prospective; but it seems to me that, notwithstanding the object of the Act, it can hardly have been intended that the holder of a decree on mortgage before the Act came into force should be put in a worse position than he would be if he had obtained a decree after the Act came into force. The agriculturist debtor would certainly be relieved, but the creditor would suffer more than he would do, if the procedure laid down in s. 22 were adopted. It has been held in *Dipchand* v. *Gokuldas* (1) that s. 21 does not apply to decrees passed before November 1st, 1879, and this decision seems to favour the view which I have taken; for, if the holder of such a money decree can imprison his agriculturist debtor as well as attach and sell his immoveable property, *a fortiori* should a decree-holder be entitled to recover from property specifically mortgaged.

(1) 4 B. 363.

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"Act XVII of 1879 is silent as to pending proceedings. It is true that no sections of the Civil Procedure Code are expressly repealed, but some of them are superseded. Under these circumstances, [607] I think that in spite of the words 'at any time' in s. 20, s. 6 of the General Clauses Act applies, and that s. 20 has not a retrospective effect, so far as pending proceedings in execution are concerned.

"I find on both issues in the negative, contingent on the opinion of the High Court, and I reverse the Subordinate Judge's order. Each party to pay his own costs in appeal."

There was no appearance for either of the parties in the High Court.

The following is the judgment of the Court :—

JUDGMENT.

MELVILL, J.—We think that the Senior Assistant Judge is right in holding that the words "decree passed against an agriculturist" in s. 20 of Act XVII of 1879 mean a decree passed against an agriculturist *personally*, and do not include a decree for the recovery of money by the sale of mortgaged property.

The Allahabad Court has held (1) (and we think rightly) that s. 210 of the Code of Civil Procedure (which by s. 74 of Act XVII of 1879 governs proceedings under that Act) does not empower a Court to make payable by instalments a decree for the recovery of money by sale of mortgaged property. Nor is there anything in Act XVII of 1879 which enables a Court, at the time of passing such a decree, to order it to be payable by instalments. Sections 16 and 17 seem to indicate a contrary intention. They provide that in certain cases suits may be brought by an agriculturist for an account; and that the amount ascertained may be decreed to be due, and be made payable by instalments. But comparing the words of s. 16 with the words of s. 3, cl. (*w*), it is clear that the debts in respect of which an account may be sued for, are debts *not secured by mortgage*, and that it is only in respect of such debts that s. 17 authorizes an order for payment by instalments. In the case of a debt secured by a mortgage, the agriculturist's remedy lies, not in a suit for an account, but in a suit for redemption (s. 3, cl. (*z*)); and there being no special provision in the Act authorizing instalments, the only decree which can be made in such a suit is the ordinary decree for payment of the whole amount within six [608] months, or in default for foreclosure. If it had been intended to give to an agriculturist mortgagor the benefit of instalments, it may reasonably be supposed that ss. 16 and 17 would have been made applicable to suits under cl. (*z*), as well as under cl. (*w*) of s. 3; but, as we have said, the wording of s. 16 shows that this is not so.

There being, therefore, no special provision in the Act authorizing a decree in a mortgage suit to be made payable by instalments, we must fall back on the provisions of s. 210 of Act X of 1877, and these do not authorize such a decree. It seems to us to follow that s. 20 of the Act cannot be made applicable to decrees in mortgage suits. It is impossible to suppose that the Legislature would authorize a Court to convert a decree made according to law into a decree which, if it had been made in the first instance, would have been contrary to law. And, speaking generally, we may say that it is very improbable that the Legislature would authorize the Courts to compel the sale of immoveable property in small lots, and

(1) 2 A. 320.

at different times,—a procedure which would be likely greatly to reduce the selling price, and be certain to multiply the law costs.

The effect of s. 20 of Act XVII of 1879 must be taken to be an enlargement of the indulgence granted by s. 210 of Act X of 1877, but only in those cases to which the latter section applies. By s. 210 of the Code the Court may, after the passing of a decree in money suits, order that the amount be paid by instalments, provided that the decree-holder consent. By s. 20 of Act XVII of 1879 the Court may in the same suits make the same order *without the consent* of the decree-holder.

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[609] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

R. AND N. MODHE, *Paintiffs v.* S. DONGRE, *Defendant.**
[2nd August, 1881.]

Civil Procedure Code (Act X of 1877), ss. 32, 34 and 53—First hearing—Plaint—Practice—Amendment of plaint—Issues.

The words in paragraph 1 of s. 53 of the Code of Civil Procedure (Act X of 1877) "at or before the first hearing" are merely directory and not mandatory, and, therefore, a plaintiff may, subsequently to the "first hearing," amend his plaint, provided such amendment does not alter the original character of his suit.

The plaintiffs (mortgagors) in a suit against their mortgagees sought only for production of the mortgage-deed or for an account, although the averments in the plaint warranted a prayer for redemption. Subsequently to the first hearing of the suit they applied to be allowed to amend the plaint by adding a prayer for redemption. *Held* that the provisions of s. 53 of the Civil Procedure Code (Act X of 1877) did not preclude the Court from permitting the amendment to be made.

It is competent to a Court, at any time before passing a decree, to frame an additional issue embracing a matter not included in the plaint (provided it be not inconsistent with it), or in the written statement, but which may appear upon the allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties or persons.

Section 34 of the Civil Procedure Code (Act X of 1877) limits the time within which a defendant may object for want of parties, but it does not so limit the right of the plaintiff to add parties. In some cases s. 34 would not prevent even a defendant from objecting to the want of a proper party *after the first hearing*, *e.g.*, where after the first hearing and before decree a co-parcener or remainderman or reversioner is born, or where a woman (who is a party) is married to a man who is not a party to the suit. The objection did not exist at or before the first hearing, and, therefore, could not have been made or waived by the defendant; and if he made it at the earliest opportunity after it came into existence, he would have satisfied the spirit of s. 34.

[**Diss.**, 7 A. 79 (97—101); **R.**, 7 B. 155 (161); 13 B. 664; 14 B. 31 (39); 22 A.W.N. 35; 4 Ind. Cas. 488 (489); 110 P.R. (1882); 159 P.R. (1889).]

THIS was a reference from Rao Saheb V. V. Wagle, Subordinate Judge, at Shevgaon in the Ahmednagar District, under s. 617 of Act X of 1877.

The suit was under s. 16 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The plaintiffs alleged that in the year 1869 or 1870 they passed to the defendant a deed of mortgage for Rs. 100, and made over possession of two fields as security, the profits of which he was to enjoy for five years; that this period had elapsed, but the defendant

* Civil Reference No. 22 of 1881.

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would not restore the [610] fields ; and they prayed for the production of the alleged deed of mortgage and for an account. The defendant denied the mortgage, and set up an absolute conveyance.

During the pendency of this suit the High Court in *Shankarapa Dargo Patel* v. *Danapa* (1) held that, in the case of a debt secured by a mortgage, the remedy of an agriculturist lay, not in a suit for an account, but in a suit for redemption under s. 3, cl. (*z*) of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The plaintiffs in consequence, on the suggestion of the Special Judge, Dr. Pollen, moved the Subordinate Judge to permit him to amend the plaint and add a prayer for redemption of the fields from the mortgage. To this the defendant objected that, under s. 53 of the Civil Procedure Code, the amendment could only be made "at or before the first hearing," and that the "first hearing" had already taken place. The Subordinate Judge deeming the point important and applicable to a majority of the suits in his Court, and having regard to the fact that his decision was not appealable, made this reference to the High Court. Upon a consideration of the rulings on s. 29 of Act VIII of 1859, which corresponds with s. 53 of Act X of 1877, the Subordinate Judge held that the amendment was permissible, and that it did not alter the character of the plaintiff's original suit.

The parties did not appear in the High Court.

JUDGMENT.

The judgment of the Court was delivered by

WESTROPP, C. J.—The question, whether the plaint may be amended after the first hearing, is not altogether free from difficulty. The relief sought by the plaint, as at present constituted, is the production of the alleged mortgage and an account of what, if anything, is due to the defendant upon that mortgage. The amendment suggested by Dr. Pollen, and which the plaintiffs have expressed their readiness to make (adding the necessary stamps to their plaint accordingly) is a prayer for redemption of the land from the mortgage. The averments, already contained in the plaint, would warrant such a prayer for additional relief. The defendant has denied the existence of the mortgage. Whether [611] such a mortgage was executed must be determined in the suit. The defendant also contends that the first hearing having passed, s. 53 of Act X of 1877 precludes the making of the proposed amendment. That section says : "The plaint *may*, at the discretion of the Court, and *at or before the first hearing*, be rejected, returned for amendment within a time to be fixed by the Court, or amended then and there, upon such terms as to the payment of costs occasioned by the amendment as the Court thinks fit, '(*a*) if it does not state correctly and without prolixity the several particulars hereinbefore required (2) to be specified therein ; or' under the other circumstances mentioned in cls. (*b*), (*c*), (*d*), (*e*) and (*f*)." The words "and at or before the first hearing," the defendant contends, imply that an amendment, after the first hearing, in any of the particulars referred to or mentioned in s. 53, cannot be permitted. It must, however, be observed that there are not any negative words in that section prohibiting an amendment at any time subsequently to the first hearing, and there is this further and stronger reason for not implying such a prohibition from the words "at or before the first

(1) 5 B. 604.

(2) *Vide* ss. 42, 43, 50, &c.

hearing," that, by making such an implication, we should bring cl. (*f*) of the 53rd section into direct conflict with the second passage of s. 32. So far as s. 53 *per se* is concerned, the words "at or before the first hearing," whatever their respective value may be, apparently regulate cl. (*f*) of that section to the same extent as those words regulate any other portion of s. 53. Clause (*f*) is that which allows amendments "if it (the plaint) is wrongly framed by reason of *non-joinder* or *misjoinder of parties*, or because the plaintiff has joined causes of action which ought not to be joined in the same suit." If the words "at or before the first hearing" be construed so to govern this cl. (*f*) as to prohibit by implication an amendment by way of *adding parties*, such a construction by implication would be in direct contravention of the express provision in the second passage in s. 32, which runs thus: "And the Court may *at any time*, either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, *and that the name* **[612]** *of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effictually and completely to adjudicate upon and settle all the questions involved in the suit be added.*" It may be said that this passage might be rendered consistent with the construction of s. 53 contended for by the defendant, by confining the words "at any time" to any time before the hearing, but such a limitation of the words "at any time" is absolutely precluded by the fact that those words "at any time" employed as they are in the second passage of s. 32 in relation to the making of new parties, are used in direct antithesis to the words "on or before the first hearing," employed with reference to the misjoinder of parties in the first passage of s. 32.

As to s. 34, which enacts that "all objections for want of parties or for joinder of parties who have no interest in the suit, or for misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, *and in all cases before the first hearing*; and any such objection not so taken shall be deemed to have been waived by the defendant;" it limits in point of time the right of the defendant to object for want of parties, but it does not so limit the right of the plaintiff to add parties. Often a defendant may be indifferent to the absence of persons who ought to be parties; but it, nevertheless, may be most important for the plaintiff to add them in order that they may be bound by the decree in the cause. The plaintiff may not, until an advanced stage in a cause, become aware that persons ought to be made parties who have not been so made. The defendant may be well aware that those persons ought to be made parties, but purposely lets the first hearing pass without objecting to their absence from the suit, and thus, so far as he is concerned, waives the right to object. But his waiver of that objection would not affect the absent parties, and a decree made in their absence would not bind them. Hence it is that, although s. 34 limits the defendant's right to object, the second passage of s. 32 leaves it open to the plaintiff "at any time" before decree to obtain permission to make new parties. Cases might occur in which s. 34 would not prevent even the **[613]** defendant from objecting to the want of a proper party after the first hearing, *viz.*, where after the first hearing and before decree a co-parcener or remainderman or reversioner is born, or where a woman (who is a party) is married to a man who is not a party to the suit. The objection did not exist at or before the first hearing, and, therefore, could

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not have been made or waived by the defendant, and, if he made it at the earliest opportunity after it came into existence, he would have satisfied the spirit of s. 34.

The only part of s. 53 which contains an express negative enactment is the proviso near its end, "that a plaint cannot be altered so as to convert a suit of one character into a suit of another and inconsistent character;" but this is restrictive as to the nature only of the amendment, and not as to the time within which it may be made. There not being in s. 53 any positive prohibition of the amendment of the plaint at any time before decree, and the result of holding that the words "at or before the hearing" constitute an implied prohibition of an amendment after the hearing, being to create a conflict between cl. (*f*) of s. 53 and the second passage in s. 32, which it is not to be supposed that the Legislature intended, and the Legislature having used negative words where it resolved to prevent amendments wholly inconsistent with the case originally made in the plaint, we incline strongly to the opinion that the words "at or before the hearing" are merely directory and not mandatory, and, therefore, that the amendment, whereby the plaintiffs would seek redemption of the mortgage, may be made, although the first hearing of the suit has passed. We can well understand why the Indian Legislature should not imperatively limit the power of amendment when we have regard to the many infirmities in pleading which present themselves especially in the Mofussil Courts. It is a matter of familiar experience to us that when a party has launched his case in an inappropriate or erroneous manner, he would, if not permitted to amend after the first hearing, and if compelled to bring a fresh suit, find such new suit barred by the Law of Limitation. To prevent such a hardship, the Privy Council has, when a cause was in its most advanced stage, permitted an amendment of the plaint: *Mahomed* **[614]** *Zahoor Ali Khan* v. *Mussamat Thakoorance Rutakoer* (1). It is also unjust to a plaintiff to put him to the great expense of fresh Court-fees for a new suit when a reasonable amendment, not inconsistent with his case as it originally stood, might equally well answer his purpose as the new suit.

Even if the plaintiffs be not, as we think they are, entitled to amend their plaint by praying that they may be at liberty to redeem the mortgage, it is competent for the Subordinate Judge under s. 149 of the Civil Procedure Code, "at any time before passing a decree," to frame an additional issue. The sources whence an issue may be framed are stated in ss. 146 and 147. An issue as to whether a plaintiff is entitled to redeem a mortgage on which his suit is founded, and in respect of which his plaint prays an account, is not inconsistent with his case as launched. The Court, it will be seen upon reference to those sections, is not confined to the written pleadings, *viz.*, the plaint and written statements (2). Allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties or persons, afford proper materials.

The Subordinate Judge should permit the plaintiffs to amend their plaint by adding a prayer for redemption of the lands from the mortgage in the plaint mentioned, and should also frame an issue as to whether the plaintiffs are entitled to redeem that mortgage, and such other issues as may be necessary for the proper determination of the cause.

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(1) 11 M.I.A. 468 (487).
(2) *Vide Apaya* v. *Rama*, Printed Judgments of 1879, p. 297 (*a*).

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Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice M. Melvill.

HARI AND ANOTHER (*Plaintiffs*) *v.* LAKSHMAN AND ANOTHER (*Defendants*).* [17th August, 1881.]

The Dekkhan Agriculturists' Relief Act XVII of 1879, *s.* 16—*Mortgage—Suit by a mortgagor for account only—Decree—Execution of a money decree obtained by mortgagee.*

Under the Dekkhan Agriculturists' Relief Act XVII of 1879, s. 16, an agriculturist mortgagor has no right to sue his mortgagee in a mere action for account.

[615] Ordinarily a suit for an account upon a mortgage cannot be maintained by a mortgagor, unless he asks for redemption also. Where a mortgagee is entitled to a personal decree against the mortgagor, or his heir, or representative, and takes a mere money decree against him upon the mortgage without any direction that the amount of the decree shall be recovered by sale or otherwise from the mortgaged property, the mortgagee has nevertheless the right to attach and sell that property under the money decree, and such sale transfers to the purchaser the interest both of mortgagor and mortgagee in the same manner as if the sale had been made under an express direction in the decree. Even though the officer of the Court should mention merely the right, title, and interest of the mortgagor as what is sold, the interest of the mortgagee who has promoted the sale passes by way of estoppel, although the mortgage executes no conveyance to the purchaser.

The only difference in execution between a money decree upon a mortgage and one not upon a mortgage is that where the mortgaged lands are attached under the former, their sale is deferred until six months or some other reasonable period expires, in order to give the mortgagor an opportunity to redeem, which he would have in a suit for foreclosure or redemption.

[F., 7 B. 377; **R.**, 12 B. 678 (682) ; 18 B. 444 (447) ; **D.**, 20 B. 469 (471).**]**

THIS case was referred for the opinion of the High Court by Dr. A. D. Pollen, Special Judge, under Act XVII of 1879, with the following remarks :—

" As any decision passed by me is final, I have the honour to refer the question—whether a mortgagor may bring a suit for an account under s. 16 of the said Act—for the decision of the Honourable Judges of the High Court. I think he may, as otherwise s. 16 would be almost inoperative ; but, having regard to ss. 42 and 43 of the Civil Procedure Code, I entertain some doubts, and as many such suits are pending, I think it right to submit the question."

Shantaram Narayan appeared for the defendants, and contended that the right of a debtor to sue for an account and no other relief was new, and not extended by Act XVII of 1879 to mortgagors or those deriving title under them.

There was no appearance for the plaintiffs.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C.J.—The plaintiffs, who are agriculturists in the Deccan, have, as mortgagors of immoveable property, instituted this suit against their mortgagees in possession, the defendants, by virtue of a mortgage, dated Shake 1789 (July 5th, A.D. 1867), for Rs. 1,997, praying

* Civil Reference No. 36 of 1880.

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simply for an account in respect of the [616] mortgage and no other relief. In the absence of any prayer for redemption and the mortgagors being unable to pay the Court-fee requisite for a redemption suit, the Subordinate Judge of Talegaon rejected the plaint. The Special Judge of the Dekkhan having, under s. 53 of Act XVII of 1879, called for the proceedings in the suit, has referred to this Court the question whether a mortgagor may bring a suit under s. 16 of Act XVII of 1879 for an account, and no more.

Ordinarily a suit for an account upon a mortgage cannot be maintained by a mortgagor unless he asks also for redemption (1). The 42nd and 43rd sections of the Civil Procedure Code are opposed to the maintenance of such an action: inasmuch as it would not afford ground for a final decision and would not include the whole of the plaintiff's claim in respect of the cause of action. It remains to be considered whether the Dekkhan Agriculturists' Relief Act XVII of 1879 has, contrary to the ordinary law, conferred upon the agriculturists, to whom that Act is applicable the right to bring against their mortgagees a mere action to account. In the recent case of *Shankarapa* v. *Dannpa* (2), where the question was whether a decree in a mortgage suit might be made payable by instalments, which question we ruled in the negative, we incidentally expressed an opinion on the present question as follows: "Nor is there anything in Act XVII of 1879 which enables a Court at the time of passing such a decree, to order it to be payable by instalments. Sections 16 and 17 seem to indicate a contrary intention. They provide that in certain cases, suits may be brought by an agriculturist for an account; and that the amount ascertained may be decreed to be due, and be made payable by instalments. But comparing the words of s. 16 with the words of s. 3, cl. (*w*), it is clear that the debts, in respect of which an account may be sued for, are debts *not secured by mortgage*, and that it is only in respect of such debts that s. 17 authorizes an order for payment by instalments. In the case of a debt secured by a mortgage, the agriculturist's remedy lies, not in a suit for an account, but in a suit for redemption (s. 3, cl. (*z*), and, there not being any special [617] provision in the Act authorizing instalments, the only decree which can be made in such a suit is the ordinary decree for payment of the whole amount within six months, or, in default, for foreclosure. If it had been intended to give to an agriculturist mortgagor the benefit of instalments, it may reasonably be supposed that ss. 16 and 17 would have been made applicable to suits under cl. (*z*), as well as under cl. (*w*), of s. 3; but, as we have said, the wording of s. 16 shows that this is not so." In a recent supplemental communication, received from the learned Special Judge of the Deccan, he makes the following suggestion: When a mortgagor brings a suit for an account, he does not seek either to redeem his land, or to be allowed to pay by instalments. He simply asks that the present state of his money debt may be ascertained or determined. In most mortgage bonds the debtor, besides charging his lands, binds himself to repay the money personally, and in most suits for the sale of mortgaged property, the creditor also asks for a decree against the defendant personally. In most mortgage cases, therefore, it is possible to conceive of the money debt apart from the property on which it is secured, and, from this point of view, it might be argued that the debtor has a right to bring a suit for an account in order to see how his money debt is affected by the provisions of ss. 12 and 13 of the Act, and to judge whether he is yet in a position to demand, or

(1) 2 Fisher on Mortgages (3rd ed.), p. 716, pl. 1170. (2) 5 B. 604.

sue for redemption of his lands." In relation to those remarks, we should observe, first, that Reg. V of 1827, s. 15, enacts that " when a creditor is placed in possession of property by mortgage, or otherwise as security for a debt, his claim over such property shall, in the absence of other special agreement, constitute his sole security for payment of the debt, or such part of it as the said property may have been given in security for, and interest thereon is to be considered as included in the said security." Secondly, assuming that the debtor has specially agreed or covenanted to pay the amount, which may become due upon the mortgage, such an agreement or covenant would personally bind himself alone and would not justify a personal decree against his heir or other representative, unless such heir or respresentative had received assets of the deceased mortgagor, and, instead of applying them in **[618]** due course of administration, had wasted or misappropriated them, so that those assets were not available for payment of the debts of the mortgagor. This was always so in the island of Bombay (while under British rule) with respect to all persons, even including Hindus, and has been made so in the Mofussil of this Presidency, as regards Hindus also, by Mr. White's Act (Bombay Act VII of 1866). Previously to that Act, Hindus were, in the Bombay Mofussil, an exception to the general rule, and were held personally responsible for the legitimate debts of their fathers and grandfathers independently of the receipt of assets sufficient to meet those debts. The non-liability of heirs and representatives for their ancestors' debts, except where those heirs or representatives have received and misapplied assets of the ancestors has the effect of greatly limiting the number of cases in which personal decrees in mortgage cases could be obtained by mortgagees. Thirdly, even when the mortgagee is entitled to personal decree against the mortgagor or his heir or representative, and takes a mere money decree against him upon the mortgage without any direction that the amount of the decree should be recovered by sale or otherwise from the mortgaged property, the mortgagee nevertheless would have the right to attach and sell that property under the money decree, and such sale would transfer to the purchaser the interest both of the mortgagor and mortgagee in the same manner as if the sale had been made under an express direction in the decree: *Syed Iman Momtazoodeen Mahomed* v. *Rajkumar Ghose* (1), *Narsidas Jitram* v. *Joglekar* (2). Even though the officer of the Court may merely mention the right, title and interest of the mortgagor as what is sold, the interest of the mortgagee who has promoted the sale passes by way of estoppel (3), although the mortgagee executes no conveyance to the purchaser. We perceive that an inference to the contrary was sought to be drawn in the argument in *Narsidas Jitram* v. *Joglekar* from *Tukaram* v. *Ramchandra* (4). That inference, however, is not sustainable, inasmuch as the money decree in *Tukaram* v. *Ramchandra*, under which the sale was made, was not obtained in **[619]** respect of the mortgage, but upon another cause of action vested in the mortgagee and wholly unconnected with the mortgage. The only difference, which we make in execution between a money-decree upon a mortgage and a money-decree not upon a mortgage, is that, where the mortgaged lands are attached under the former, the sale of them is deferred until six months, or some other reasonable period expires in order to give to the mortgagor the

(1) 14 B.L.R. 408 (421), (F.B.) (2) 4 B. 57.
(3) *Vide* 11 B.H.C. R. 142, and cases cited at p. 140, and see 5 B. 8 (13).
(4) 1 B. 314.

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opportunity of redeeming, which would be afforded to him in a suit for foreclosure or redemption.

Reverting to Act XVII of 1879, we find that its 3rd section treats of two classes of suits, *viz.*:—"(*a*) suits *for an account* instituted on or after the 1st day of November, 1879, *by an agriculturist* in the Court of a Subordinate Judge under the provisions hereinafter contained," and "(*b*) suits of the description next hereinafter mentioned and instituted on or after the same date." The descriptions of suits referred to in cl. (*b*) are specified under letters (*w*), (*x*), (*y*) and (*z*). All of these are, with the single exception of those falling under (*z*), suits *against* an agriculturist; suits under (*z*), being suits for redemption of mortgaged property, would be brought *by* agriculturist mortgagors, their heirs, or representatives. Suits under (*y*) and (*z*) relate exclusively to mortgages, and when the Legislature intended to subject such suits to certain provisions of the Act relating also to other suits, we find that it did so in express terms, as, for instance, in s. 12, which enables the Court to inquire into the history and merits of the case from the commencement of the transactions between the parties in the manner subsequently pointed out in s. 13. Section 12 expressly includes the three different species of suits falling under cls. (*w*), (*y*) and (*z*) in s. 3. So the Legislature makes it perfectly clear that in mortgage cases, as well as cases described in cl. (*w*), the history of each case is to be investigated *ab initio*. But when we come to s. 16, which enables the agriculturist debtor to take the initiative by suing for an account, we find that the transactions specified in that section', in respect of which he may so sue, are *verbatim* the same as those described in cl. (*w*) of s. 3 only. No doubt that clause comprises (*inter alia*) suits for the recovery of money due "on a written or unwritten engagement for the payment of **[620]** money," as s. 16 comprises cases where money is due by the agriculturist plaintiff, to the defendant on such an engagement; but the subsequent cls. (*y*) and (*z*), of which the one relates to suits for possession, foreclosure, or sale in respect of mortgages, and the other to redemption of mortgages, show that mortgages, being thus specially provided for, were not intended to be included amongst the written or unwritten engagements for the payment of money falling within cl. (*w*) of s. 3, and, therefore, not within s. 16, where the class of cases mentioned in cl. (*w*) of s. 3 only is specified. And this omission of mortgage cases from s. 16 is what might have been expected. Ordinarily, in respect of the transactions comprised in cl. (*w*) of s. 3 and in s. 16, the debtor could not, under the pre-existing law, sue for an account, whereas the mortgage-debtor could do so by bringing a suit for redemption—the species of suit the subject of cl. (*y*) of s. 3. But, in such a suit, the mortgage-debtor was and is bound to pay the balance (if any) found due by him under the mortgage within a reasonable time allowed for redemption—usually six months, and the decree, if properly drawn, contains a direction for foreclosure or sale (usually the latter) if he do not pay within the given time. We can well understand why the Legislature should refrain from giving to mortgagors the power to harass their mortgagees in possession with suits *de anno in annum* to ascertain what those mortgagees annually received from the lands over and above their necessary expenses in relation to those lands, such suits being brought without any present intention on the part of the mortgagors to pay to the mortgagees the balance due upon the mortgage, and without liability to a decree therein either for foreclosure or sale. The Legislature seems to have thought that it had done quite enough for the mortgagors by

providing, as it has, that in suits for foreclosure or sale by the mortgagees, and in suits for redemption by mortgagors, the account between the parties should be taken on the abnormally favourable principles laid down in ss. 12, 13 and 14 of the Act for the guidance of the Courts of the Deccan in such cases. It must be further observed that it is manifest that, if suits for an account, and no more, can be brought against mortgagees under s. 16, decrees for payment of the money [621] due upon mortgages by instalments may be made under s. 17. This we have already, without doubt, held not to be sanctioned by the Act (1), and we have pointed out that, if it had been so sanctioned, the sale of the mortgaged lands piecemeal in order to meet the unpaid instalments would be detrimental alike to debtor and creditor. We do not perceive any sufficient ground for altering the views which we entertained in that case.

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Our reply to the question "whether a mortgagor may bring a suit for an account under s. 16 of Act XVII of 1879?" is in the negative.

We leave to the Special Judge of the Deccan the disposal of the question as to the costs of this reference. In relation to that question we should mention that there was not any appearance here for the plaintiff; but Mr. Shantaram Narayan appeared and argued the case on behalf of the defendants, who have been successful.

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APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

KASTUR BHAVANI, SON AND HEIR OF THE DECEASED BHAVANI RAMCHANDRA (*Original Defendant*), *Appellant v.* APPA AND SITARAM HARJIRAV, MINORS (*Original Plaintiffs*), *Respondents.** [10th August, 1876.]

Hindu law—Sale of ancestral property by father for debts incurred for immoral purposes—Son's interest in ancestral estate—Evidence—Stamp—Intention to defraud Government of stamp revenue—Reg. XVIII of 1827, *s.* 13—*Act XXXIV of* 1860, *s.* 13—*Act X of* 1862, *s.* 15—*Admissibility of insufficiently stamped documents—Issues.*

Where a document was admitted in evidence by the Court of first instance without any objection by the parties, but the Assistant Judge in appeal held it inadmissible, because it was insufficiently stamped, although no objection was made to it in the memorandum of appeal.

Held, that the Assistant Judge ought not to have excluded it from his consideration.

[622] On documents insufficiently stamped under Reg. XVIII of 1827, the question does not properly arise under s. 13 of that Regulation whether the intention of the parties is not sufficiently stamping them was to defraud Government of its revenue. That question was rendered important, first, by s. 13 of Act XXXVI of 1860, and subsequently, in a more explicit manner, by s. 15 of Act X of 1862.

The plaintiffs (two of whom were minors) sued to set aside the sale and recover possession of certain ancestral lands, on the ground that they had been sold by their father to pay off debts contracted for immoral purposes. The documentary evidence in the case showed that the lands had been originally mortgaged by the grandfather and father of the plaintiffs to the father of the defendant for Rs. 1,600; that they had subsequently taken from him other loans which, together with

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* Special Appeal No. 124 of 1876.

(1) *Shankarapa* v. *Danapa*, 5 B. 604.

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the mortgage-debt, amounted to Rs. 4,400-15-0; that on the 23rd May, 1858, an agreement (Ex. No. 38) was made between the plaintiffs' father and the father of the defendant, by which the former was to sell the equity of redemption in the mortgaged property to the latter in consideration of the latter releasing the former from the said debt of Rs. 4,400-15-0 and paying him the sum of Rs. 235; that, accordingly, on the 25th May, 1858, the plaintiffs' father conveyed the property to the defendant's father for Rs. 235 by a deed of sale (Ex. 17) which, however, did not refer either to the agreement (Ex. 38) or to the debts for Rs. 4,400-15-0. There was no allegation or evidence in the case showing that the plaintiffs' grandfather had contracted the debt of Rs. 4,400-15-0 for any immoral purposes, nor that their father applied the sum of Rs. 235 to the payment of debts incurred for immoral purposes, although it was in evidence that he drank to excess. The Court of first instance dismissed the suit, holding, *inter alia*, that the plaintiffs had failed to prove the property to have been sold by their father for debts incurred for excessive drinking. One of the issues raised by the Assistant Judge in appeal was whether there was any necessity for the sale of the property by the plaintiffs' father. He found this issue in the negative, and held the sale invalid, except as to the plaintiffs' father's own share. On special appeal to the High Court.

Held, that on the above facts the plaintiffs had failed to establish any case entitling them to set aside the sale of the lands by their father.

Held, also, that it ought to have been ascertained whether the minor plaintiffs were born before the date of the sale, *viz.*, 25th May, 1858, because if they had not been born before that date, their suit would have been unsustainable, as they never could have had any interest in the property.

Quære.—Even supposing that the plaintiffs' father had applied the sum of Rs. 235 to the payment of debts incurred for the immoral purpose of excessive drinking, whether that trivial amount would have justified the setting aside of the sale of the 25th May, 1858, the main consideration for which was the release of the pre-existing debts for Rs. 4,400-15-0.

[R., 5 B. 630; 4 Bom. L.R. 587 (597).]

THIS was a special appeal from the decision of E. Hosking, Acting Assistant Judge at Thana, amending the decree of the Second Class Subordinate Judge of Murbad.

[623] This suit was brought by Lakshman and his two brothers, Appa and Sitaram, alleging that certain ancestral lands had been sold by their father Harjirav to Bhavani (deceased), father of defendant No. 1 (Kastur), and that the sale was illegal and void, because it was made to pay off debts contracted for immoral purposes. They prayed that the sale should be set aside and the lands restored to them. The plaint was filed on the 4th April, 1872. Appa and Sitaram were minors, and were represented by their mother as their guardian.

Kastur (defendant No. 1) answered, *inter alia*, that the suit was barred by limitation, and that the sale was for necessary family purposes. Defendants Nos. 2 and 3 replied that they were in possession of some of the lands in dispute as purchasers under defendant No. 1.

The Subordinate Judge held that the claim of Lakshman (plaintiff No. 1) was barred by limitation, and that it was not proved that the sale was made by Harjirav for the payment of debts contracted for immoral purposes.

Two of three issues raised by the Assistant Judge in appeal were—(1) whether the plaintiff Lakshman's claim was barred by limitation, and (2) whether there was any necessity for the sale by the plaintiff's father. He found the first issue in the affirmative and the second in the negative. The following are his reasons:—

"On the 23rd May, 1843, plaintiff's grandfather Mahadevrav and their father Harjirav mortgaged certain lands to Bhavani Ramchandra,

the father of Kastur (defendant No. 1), for Rs. 1,600. Subsequently Mahadevrav and Harjirav executed several money bonds to the said Bhavani for different amounts, and on the 23rd May, 1858, Harjirav had an agreement executed to him by Bhavani to the effect that Bhavani should release Harjirav from a debt of Rs. 4,400-15-0, owing on the said mortgage bond (Ex. 16) and on other bonds, and that Harjirav should sell the equity of redemption of the property to Bhavani for Rs. 235. Plaintiffs were served with a notice to produce the original agreement, but they failed to do so, plaintiff Lakshman merely stating that he had not got it (Ex. 155). Defendants **[624]** put in evidence Ex. 38 as a copy of this agreement; and I find that it is proved that an agreement, of which Ex. 38 is a copy, was executed to plaintiff's father Harji by Bhavani on a stamp of the value of one rupee. Two days after the execution of this agreement Harji executed a deed of sale (Ex. 17), setting forth that he sold 23 bighas rice land and 4 bighas warkas land in Sonawali village, and 33 bighas rice land and 26 bighas warkas land in Ekleher village to Bhavani for Rs. 235 cash. The deed of sale contains no reference to any previous mortgage or to any other consideration for the sale than this cash payment, and it is executed on a stamp paper of the value of eight annas. Within a year after this deed of sale had been executed, Bhavani sued Harjirav upon it for possession of the lands, obtained a decree, and was put in possession on the 27th March, 1860.

"For the defendants it is contended that Exs. 17 and 38 should be read together, in order to ascertain the real consideration for the land sold under Ex. 17. The lower Court read the two documents in this way, and no objection appears to have been raised on the ground that the documents are insufficiently stamped. But I consider that the documents are insufficiently stamped, and that the circumstances of the case show that there was an intention to defraud Government. Under Reg. XVIII of 1827 the stamp on the deed of sale (Ex. 17) is of the proper value for the consideration expressed in the document. It is contended that the sale was only of the right of redemption, and that for this the sole consideration was Rs. 235 cash. But in the first place, the sale does not purport to have been only of the equity of redemption, and secondly, if it be held to have been a sale of the equity of redemption, the consideration was not merely Rs. 235; for the debts relinquished under Ex. 38 were not only on account of the mortgage, but in great part were on account of the money bonds. The agreement, of which Ex. 38 is a copy, is altogether invalid. Exhibit 38 proved that it was on a stamp of the value of one rupee, while the proper stamp under the said Regulation would have been of the value of Rs. 8.

"Defendant Kastur has applied to be allowed to pay the deficient stamp duty and the penalty, but I have refused to allow him **[625]** to do so, as I am of opinion that there was an intent to defraud Government. The pleader for respondent relies upon the ruling of the Bombay High Court in *Antaji Nilkant* v. *Janardan Vasudev* (1). That ruling seems to me inapplicable to this case, as the circumstances of the two cases are very different. Had the actual consideration for the sale been expressed in Ex. 17, and had it then been not stamped at all, or had it been insufficiently stamped, there might have been no reason for imputing an intention to evade payment of the proper stamp duty. But in the present case the consideration was

(1) 10 B. H.C.R. 358.

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wrongly stated, and the proper stamp was used for the amount of consideration expressed in the deed of sale. What was the object of this erroneous statement of the consideration and of the omission of any reference to the mortgage and other bond debts? The use to which the deed of sale was put shortly after its execution, shows that the object in wrongly stating the consideration was not merely to evade payment of the proper stamp duty, which was, at the most, Rs. 6½ above what was paid, but that it was mainly to enable the vendee to sue upon the deed of sale for property, thus purporting to be valued at Rs. 235, while its actual value was Rs. 4,635. Consequently the vendee paid a fee of Rs. 20 on the institution of his suit instead of paying a fee of Rs. 150, as required under Reg. XVIII of 1827, and he paid other necessary fees in the suit as if the value of the subject-matter of the suit were Rs. 235 and not Rs. 4,635. The completeness of the deed of sale (Ex. 17) when read by itself and without any knowledge of the agreement (Ex. 38), and its incompleteness when read in the light of the said agreement are alone sufficient to raise strong suspicion that there was a bad motive for the erroneous statement of the consideration in the deed of sale * * * *

"For these reasons, I refuse to admit the agreement (Ex. 38) as evidence. I must, therefore, hold the consideration for the sale to have been merely for the cash payment of Rs. 235, and this being so, it is evident that there was no necessity for the sale, because, after the passing of this deed of sale, the vendor was able to borrow Rs. 428 from the vendee on a money bond (Ex. 31) executed a month after the said deed of sale * * *

[626] "Plaintiffs' father's share in the property sold under Ex. 17 was one-fourth. Therefore, excluding his share and the share of Lakshman, Lakshmibai as the guardian of her minor sons, Appa and Sitaram, is entitled to recover one-half of the property claimed, after payment of Rs. 117-8-0 as half of the consideration expressed in Ex. 17 and after paying half the debt due under the mortgage, Ex. 16, taking into account half the profits received by defendants from the mortgaged property."

Defendant No. 1 (Kastur) appealed to the High Court.

Shamrav Vithal, for the appellant.—The plaintiffs impugned the sale on the ground that it was made for immoral purposes. The Assistant Judge, therefore, was wrong in raising the issue whether there was any necessity for the sale. The proper issue was whether the plaintiffs proved that the property had been sold by their father for any immoral purposes. There is no evidence in the case to support that allegation, although it is in evidence that he drank to excess. Exhibits 16 and 38 show that the property had been originally mortgaged by the plaintiffs' grandfather and father to the appellants' father, and that they subsequently borrowed more money from him. All those debts amounted to Rs. 4,400-15-0, and the plaintiffs' father sold the property in discharge of those debts and on receipt of a further sum of Rs. 235. Under these circumstances, the Assistant Judge was wrong in holding that the sale was only for Rs. 235, and that it was not binding on the plaintiffs. They are bound by the sale according to the rule of Hindu law laid down in *Girdhari Lall* v. *Kantoo Lall* (1) and *Muddun Gopal Lall* v. *Mussamut Gowrunbutty* (2). Again, it was not competent to him to go into the question whether Exs. 17 and 38 were sufficiently stamped or not, as they were admitted by the Court of

(1) 1 I.A. 321 = 14 B. L. R. 187 = 22 W. R. C.R. 56. (2) 15 B. L. R. 264.

first instance without any objection. Besides, they were executed while Reg. XVIII of 1827 was in force.

M. C. Apte, for the respondents.

JUDGMENT.

[627] WESTROPP, C.J.—The plaintiffs in their plaint alleged that their father Harjirav sold the lands, the subject of this suit, to Bhavani Ramchandra, father of the first defendant, in order to pay debts contracted for immoral purposes, and, therefore, that the sale should be set aside, and the lands restored to the plaintiffs. The second and third defendants Hari and Ganu were made parties as having purchased some of the lands from Bhavani and the first defendant.

The sale sought to be set aside was by the agreement of the 23rd May, 1858 (Ex. 38), and the deed of the 25th May, 1858 (Ex. 17).

The copy of the agreement of the 23rd May, 1858, the Assistant Judge has, as the original appears to have been insufficiently stamped, declined to regard as evidence in the cause; but inasmuch as it had been admitted in evidence by the Subordinate Judge without objection by either party, and no objection was made in the memorandum of regular appeal to the District Court, we think that the Assistant Judge ought not to have excluded it from his consideration.

The Subordinate Judge made a decree in favour of the defendants.

The plaint was filed on the 4th April, 1872, *i.e.*, nearly fourteen years after the alleged sale, and it appearing that the elder plaintiff Lakshman was then upwards of nineteen years of age, the Assistant Judge as well as the Subordinate Judge held the suit, barred by lapse of time as brought by him, and he has not appealed against that decision.

The Assistant Judge, however, has held the second and third plaintiffs entitled to recover a moiety between them of such of the lands as were ancestral. The question is whether he was right in thus holding.

In the first place, we think that, looking at the mode in which the plaintiffs launched their case in the plaint, the second issue, as framed by the Assistant Judge, *viz.*, "was there necessity for the sales by the plaintiffs' father" was not correct.

The plaint admitted that the sale was made in order to pay debts, and sought to avoid the sale by alleging that those debts **[628]** were incurred for immoral purposes. The issue, then, ought to have been whether that allegation was true, *viz.*, "were those debts, in respect of which the sale was made, incurred for immoral purposes."

But, further, Ex. 38, the execution of which is not denied, shows that those debts consisted of a mortgage-debt upon the lands in dispute amounting to Rs. 1,600 incurred as well by the plaintiffs grandfather Mahadevrav as their father Harjirav; and seven money bonds executed by both of those same persons, which together with the mortgage-debt, amounted to Rs. 4,400-15-0, all being due to Bhavani, the father of the first defendant and that Harjirav was to sell the equity of redemption to Bhavani in consideration of Bhavani releasing Harjirav from the said debts amounting to Rs. 4,400-15-0, and further paying to Harjirav the sum of Rs. 235. The deed of sale of the 25th May, 1858, though not referring to the agreement (Ex. 38), nor to the debts (Rs. 4,400-15-0), but conveying to Bhavani the lands in question in consideration of Rs. 235, was manifestly executed in pursuance of the agreement contained in Ex. 38.

The first observation to be made on this state of facts, and it also applies to the plaint, is that there is neither allegation nor any evidence of

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immorality on the part of Mahadevrav, the plaintiffs' grandfather, in contracting the debts for Rs. 4,400-15-0, or that he was not bound by them; nor is there any evidence whatever that Harjirav applied the Rs. 235 to the payment of debts incurred for immoral purposes, although there is evidence that Harjirav drank to excess.

Such being the case, not only the plaintiff Lakshman, but both of the other plaintiffs have wholly failed to establish any case entitling them to set aside the sale in May, 1858.

Further, even if it should have appeared that Harjirav had applied the sum of Rs. 235 obtained from Bhavani in payment of debts incurred in procuring liquor, the amount is so trivial as compared with the amount of the pre-existing debts, the release of which constituted the main portion of the consideration for the sale in 1858, that, having regard to the case of *Girdhari* **[629]** *Lall* v. *Kantoo Lall* (1) and *Muddun Gopal Lall* v. *Mussamut Gowrunbutty* (2), we doubt whether, where so small a portion of the consideration was applied to debts incurred for the immoral purpose of excessive drinking, we should be justified in setting aside the sale. However it is unnecessary to decide the case on that ground.

We may further point out that the question, which the learned Assistant Judge put to himself, whether the intention of the parties to Ex. 38, in not sufficiently stamping it, was to defraud the revenue, is not a question which properly arises on documents, the stamping of which is provided for by Reg. XVIII of 1827 relating to stamps, under s. 13 of which the necessary stamp might be obtained from the Collector on payment of the penalty and duty. The language of s. 13 of Act XXXVI of 1860 first rendered that question important. Act X of 1862, s. 15, is still more explicit; but, in the present case, the Exs. 17 and 38 being both executed in 1858 before either of those enactments came into force, the question did not arise. The point has been similarly ruled in other cases in this Court.

Lastly, although in the view that we take of this case, the question is not now of importance; it ought to have been ascertained whether either the second or third plaintiff had been born before the 25th of May, 1858. If, as is extremely, probable, they were not so, this suit would have been unsustainable by them, as they never could have had a vested interest in the lands.

We reverse the decree of the Assistant Judge and restore that of the Subordinate Judge, and direct the special respondents' guardian and mother to pay to the special appellant the cost of the special appeal. She and the plaintiff Lakshman must pay to the defendants the cost of the suit and of the regular appeal.

Decree reserved.

NOTE.—See *Narayana Charya* v. *Narso Krishna*, 1 B. 262.

(1) 1 I.A. 321.

(2) 15 B.L.R. 264.

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[630] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

RAMBHAT (*Original Defendant*), *Appellant v.* LAKSHMAN CHINTAMAN MAYALAY (*Original Plaintiff*), *Respondent.**

[27th June and 5th July, 1881.]

Hindu law—Conveyance by a Hindu without male issue—Adoption pendente lite*—Adoption from improper motive—Will—Gift.*

A conveyance by a Hindu, without male issue at the date thereof, will bind his subsequently born or adopted male issue. Such issue at birth takes a vested interest in such property only as is that of their father at that time.

C, a Hindu Brahmin without male issue, executed, on the 10th September, 1856, a *bakshishpatra* (a deed of gift) to M containing words to the following effect: "I have given to you as gift and charity my property at———, together with my moveable property. (Here follow the particulars of the property). The garden and house, &c., &c., I have given to you as gift this day of my own accord, and I have made the same over to you. You shall pay the Government assessment and village expenses, and you and your grandsons should enjoy the same property generation after generation, and live in peace there. As long as I live I will take the profits, and you should maintain me as if I were one of the members of your family * * * * I have no ownership whatever in the property; the ownership belongs to you from this day. This day I owe no money to anybody. Whatever property there may be after the death, other than that described above, is all given to you. No person has any claim thereto; the entire ownership belongs to you. I have given in writing this deed in sound mind of my own accord. The document was registered on the 4th October, 1856. M was put in possession of the property, and managed it for some time. He paid the Government assessment, and held receipts for the same. On the 6th January, 1858, C addressed a letter to the Assistant Magistrate of the place, purporting to revoke the *bakshishpatra*, and he (C) was restored to possession by that officer. In 1859, M brought a suit (No. 446 of 1859) against C for the property. Before any decree was passed in it, C, on the 6th June, 1859, adopted the plaintiff, who was then eight years of age. The plaintiff was not made a party to that suit. On the 2nd April, 1860, the Munsif made a decree in favour of M, holding that C had executed the *bakshishpatra* and given possession of the property to M under it. He directed the property to be restored to the possession of M to be held according to the terms of the *bakshishpatra*. C appealed but subsequently withdrew his appeal, admitting the execution of the *bakshishpatra* and agreeing to give over the property to M according to the terms of the Munsif's decree. M accordingly obtained possession of the property. On the 16th March, 1874, the plaintiff brought the present suit against the grandson of M (M then being dead) for moiety of the property, on the ground that C, his adoptive father, could not alienate more than one-half of the property. Both the lower Courts allowed the plaintiff's claim,—the Court of first instance being of opinion that the document was a gift, and did not bind the plaintiff, and the appellate Court holding that it was not a gift but a will, and that it had been revoked by the testator before his death. On appeal to the High Court.

[631] *Held* that the document was a conveyance and not a will, and that it vested the property in M, the donee, subject to a trust regarding any surplus that remained of the income after payment of the Government assessment and village expenses in favour of C as long as he lived, and that the donor could not revoke it, inasmuch as the document contained no power of revocation.

Held also that inasmuch as the plaintiff had been adopted before the hearing and decree in suit 446 of 1859, and might have been made a party to it, but was not, he could not be bound by the proceedings in that suit, and that he was, therefore, at liberty to re-open the question whether the *bakshishpatra* was intended by C, when executing it, to operate as a deed or as a will. An adoption *pendente lite* is not to be regarded in the same light as an alienation *pendente lite*. If a legitimate son had been born to C during the suit, such son to be bound by

* Second Appeal No. 412 of 1879.

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a pending suit affecting his father's ancestral property must have been made a party, and a son adopted during the suit was in the same position. The one at his birth and the other at his adoption would take a vested interest in his father's property according to the Hindu law in the Presidency of Bombay. The circumstance that C might have adopted the plaintiff for the purpose of endeavouring to defeat the *bakshishpatra*, did not alter the case. As a sonless Hindu he had a right to adopt a son, and he was not under any obligation to M not to adpot; and even if he had so contracted, *quære* whether such a contract would affect the validity of the adoption.

[R., 11 B. 469 (472); 33 M. 304 (306) = 7 Ind. Cas. 357 = 20 M.L.J. 519 = 8 M.L.T. 139; 1 C.L.J. 388 (401); 17 C.L.J. 38 (48) = 17 C.W.N. 280 (289) = 18 Ind. Cas. 625; 42 P.L.R. 1901; **D.**, 33 B. 88 = 10 Bom. L.R. 1029 = 1 Ind. Cas. 647.]

THIS was a second appeal from the decision of A. L. Johnstone, Acting Assistant Judge at Ratnagiri, affirming the decree of Makundrav Bhaskar, Second Class Subordinate Judge at Dapoli.

The plaintiff brought this suit for possession of certain immoveable property. The defendant Rambhat, *inter alia*, relied upon a *bakshishpatra* (Ex. No. 44) executed in favour of his grandfather by the plaintiff's adoptive father, Chintaman, on the 10th September, 1856. The facts of the case are fully stated in the judgment of the High Court.

The Subordinate Judge allowed the plaintiff's claim, holding that the *bakshishpatra* (Ex. 44) was a gift made for no valid reason and that it did not bind the plaintiff, because the donor had no right to alienate the whole of his ancestral property. In appeal, the decision of the Subordinate Judge was upheld by the Assistant Judge, who was, however, of opinion that the *bakshishpatra* was a will and not a gift, but that it was revoked by the testator before his death. Both the lower Courts held that the proceedings in suit No. 446 of 1859 were not binding upon the plaintiff.

The defendant appealed to the High Court.

[632] The Hon'ble Rao Saheb *V. N. Mandlik*, for the appellant.—Exhibit No. 44, as its name signifies, is a gift and not a will, as wrongly held by the Assistant Judge. The donee was actually put in possession and himself managed the property for some time. The gift was irrevocable. The plaintiff was adopted during the pendency of the suit No. 446 of 1859. His adoption, therefore, was *pendente lite*, and he was bound by all the proceedings in that suit. It was not necessary to make him formally a party to them. The learned pleader cited *Chittar Lalsing* v. *Shewakram* (1); *Kalee Dass Roy* v. *Khiroda Sundree Debia* (2); Mayne's Hindu Law, pl. 179 (2nd ed.); The Indian Evidence Act I of 1872, s. 13.

Shantaram Narayan, for the respondent.—The document is a will, as it distinctly states that Chintaman was to enjoy the proceeds of the property till his death. Morbhat was to take no beneficial interest in the income of the property during the lifetime of Chintaman. Morbhat managed the property as Chintaman's agent. Taking it to be a will, it was revoked by Chintaman by his letter of the 6th January, 1858. The plaintiff's right was not affected by the decree in suit No. 446 and all the subsequent proceedings therein, as Morbhat did not choose to make him (plaintiff) a party to them.

JUDGMENT.

WESTROPP, C.J.—On the 10th of September, 1856, Chintaman (*alias* Chinto) Mayalay, a Konkani Brahmin, advanced in years, and then without male issue, executed in favour of Morbhat Ramkrishnabhat Upadya (a Brahmin of the same caste) a document, which, after describing itself as

(1) 5 B.L.R. 123.

(2) 16 W.R.C.R. 300.

a *bakshishpatra*, and after stating its date and the names of the donor and donee and the name of the village of the former, proceeded thus: "Deed of gift is given in writing as follows: I have become old and have no male issue. You are a Brahmin and a fit object of charity (*sat patra*), and you are my protector. Up to this day you and your ancestors protected me. As I have no male issue, I have given to you, as gift and as charity (*dharmast*), my property at the Kasba aforesaid, together with my movable property. The particulars thereof are as follows: My own *thikan* (garden, or field) **[633]** situate at, &c., there is my house standing thereon—a cowshed adjacent—warkas and grass land. The garden and house, &c., &c., I have given to you as gift this day of my own accord, and I have made the same over to you. You shall pay the Government assessment and village expenses, and you and your grandsons should enjoy the same property, generation after generation, and live in peace there. As long as I live I will take the profits and you should maintain me as if I were one of the members of your family. The property I have mentioned above I have given to you of my own accord, and I have made the same over to you. I have no ownership whatever therein; the ownership belongs to you from this day. This day I owe no money, &c., to anybody. Whatever property there may be after my death, other than that described above, is all given to you. No person has any claim thereto; the entire ownership belongs to you. I have given in writing this deed in sound mind and of my own accord." This document was in the handwriting of Balaji Hari Sathye, a Brahmin of the same caste as the donor and donee. It was duly signed by the donor, and attested by several witnesses. On the 4th October, 1856, it was registered. Possession was given to the donee Morbhat. He for some time managed the property, and paid the Government assessment of the garden, &c., and held receipts for the same. About fifteen months after the execution of the *bakshishpatra*, Chintaman, the donor, appears to have repented his act, and he, on the 6th January, 1858, addressed a *yadi* or letter to the Assistant Magistrate, purporting to revoke the *bakshishpatra* of the 10th September, 1856, and he was, by the Assistant Magistrate, restored to possession. Morbhat brought a civil suit (No. 446 of 1859) in the Munsif's Court to recover the property. Upon the 6th of June, 1859, and before any decree was made in that suit, Chintaman adopted Lakshman (the plaintiff in the present suit) then a child in his eighth year. Lakshman was not made a party to Morbhat's suit. The Munsif made his decree on the 2nd of April, 1860, in the suit (446) of *Morbhat* v. *Chintaman* in favour of Morbhat, and found that Chintaman executed the *bakshishpatra* when in his full senses and that possession had been given by him to Morbhat under that document. The Munsif directed the property to be **[634]** restored to the possession of Morbhat to be held in accordance with the *bakshishpatra*, and ordered Chintaman to pay the costs of the suit. Chintaman appealed against that decree, but subsequently, on the 12th July, 1860, withdrew his appeal, admitted the execution of the *bakshishpatra*, and stated that he was willing to give over the *thikan*, and the rest of the property, to Morbhat in accordance with the terms of the Munsif's decree. This was done. The natural father of Lakshman then, upon an alleged mortgage to himself by Chintaman, and on the ground that Morbhat had fraudulently obtained a decree against Chintaman in his own favor, instituted a suit against Morbhat, but was defeated by him in the Munsif's Court, the Assistant Judge's Court, and the High Ccurt successively.

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Lakshman, within three years after attaining his majority, instituted the present suit, on the 16th March, 1874, to recover, from Rambhat, the grandson of Morbhat (who is dead), a moiety of the property, on the ground that Chintaman could not, as against his adoptive son Lakshman, alienate more than one-half of the property. The Subordinate Judge and the Assistant Judge have respectively decreed in favour of Lakshman.

The main question is whether the *bakshishpatra* was by Chintaman, at the time he executed it, intended to operate as a deed or merely as a will? The preliminary question, however, arises whether Lakshman, not being a party to Morbhat's suit, No. 446 of 1859, is bound by the decree therein made against Chintaman and by Chintaman's withdrawal from his appeal in that suit.

The date, on which the plaint in that suit was presented, is not in evidence in this suit. Assuming, however, most favourably to the defendant Rambhat, that the filing of that plaint was (as is probable) anterior to the adoption of Lakshman, we are of opinion that, inasmuch as Lakshman was certainly adopted before the hearing and decree in that suit, and might have been made a party to it, but was not, the proceedings therein do not bind him, and that, accordingly, he is at liberty to re-open the question whether the *bakshishpatra* was intended by Chintaman, when executing it, to operate as a deed or as a will. We cannot regard the adoption *pendente lite* as in the same predicament as an alienation [635] *pendente lite* (1). If a legitimate son had been born to Chintaman during the suit, such son, to be bound by a pending suit affecting his father's ancestral property, must be made a party, and we think that a son adopted during the suit would have been in the same position. The one at his birth, and the other at his adoption would take a vested interest in his father's ancestral property according to the Hindu law in this Presidency (2). We do not think that the circumstances, that Chintaman may have adopted Lakshman for the purpose of endeavouring to defeat the *bakshishpatra*, alters the case. Whatever evil motive may have influenced Chintaman, he was doing that which, as a sonless Hindu, he had a right to do, and he was not under any obligation to Morbhat not to adopt; and even if he had so contracted with Morbhat, we doubt that such a contract could affect the validity of the adoption, although the right of Morbhat to retain the property, under the *bakshishpatra*, if it be a deed and not a will, may not be disturbed. Lakshman, an infant in his eighth year, was an innocent party, and the ceremony of giving and taking being duly performed by persons with full authority, he cannot be relegated to the family of his natural father. Taking this view of the adoption, we permitted Lakshman's pleader to argue that the *bakshishpatra* must be regarded as a will, and not as a deed. If that proposition could have been maintained, we may observe that Lakshman should have sued for the whole and not for a moiety only of the property, inasmuch as Chintaman, being a member of an undivided family at the time of his death, could not have devised away any part of the property from his co-parcener, *i.e.*, his adopted son, according to the Hindu law of this Presidency (3).

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(1) 11 B.H.C. R. 64, 24, 139; 7 M.H.C.R. 104; 1 DeG and J. 566.

(2) Mitak., ch. i, sec. 1, pl. 23, 27; Vyav. May., ch. iv, sec. 1, pl. 3; Datt. Mim., sec. vi, pl. 8; Suth. Syn. iv, pl. 4; 7 M.I.A., 169, 184, *et seq*; Mayne's H.L. (2nd ed.), pl. 178, 179. The Viramitrodaya transl. by Golapchandra Sarkar Sastri, ch. i, pl. 49 to 54.

(3) *Vide* cases cited 5 B. 637, note (2).

The question remains to be solved—Was the *bakshishpatra* intended by Chintaman, when executing it, to be a conveyance by [636] way of deed or to be only a will to operate from the time of his death? In favour of its being intended to be only a will, is the circumstance that Morbhat could not beneficially enjoy any portion of the income of the property until after the death of Chintaman. The true construction of the document evidently is that Morbhat was to pay the Government assessment and village expenses out of the income, and to make over to Chintaman or to apply, in his maintenance and for his benefit, the residue of the income. On the other hand, the name of the document, given in itself, "*bakshishpatra*," indicates a deed and not a will. This, *per se*, is not much. If the conduct of Chintaman or the provisions of the document showed that his intentions were purely testamentary, the name of the document would not be very important. But Chintaman not only caused it to be registered within a month after its execution, but actually gave over the management and possession of the property to Morbhat, who could not, indeed, pay the Government assessment and village expenses, or maintain Chintaman out of the income of the property, as the document required him to do, unless Morbhat received that income for the purpose. Finding that the document contemplated the management of the property by Morbhat, and that Chintaman, being then old, should be relieved of that trouble, and that possession of the property itself was fully given to Morbhat, we think that the Munsif was right, when, in his decree of 1860, he held the *bakshishpatra* to be a conveyance and not a will.

Therefore, we must hold that it vested the property in Morbhat on the 10th of September, 1856, subject to a trust as regarded the income, left after payment of the Government assessment and village expenses, in favour of Chintaman so long as he lived. It did not contain any power of revocation, and Chintaman's attempted revocation in 1858 was futile in law. Chintaman having in 1856, nearly three years before the plaintiff's adoption, conveyed all of his estate in the property to Morbhat except a life interest, had not, at the time of the adoption, any estate of inheritance in the property, a share of which could vest in Lakshman at the time of his adoption. A conveyance by a Hindu, without male issue at its date, will bind his subsequently born or [637] adopted male issue (1). Such issue at their birth take a vested interest in such property only as is that of their father at that time. Here Chintaman had parted with his inheritance before the adoption, which, in the case of an adopted son, occupies the same position as birth with a natural born son. If the *bakshishpatra* had been executed *after* the adoption or birth of a son to Chintaman, it could not prevail to any extent against such a son, inasmuch as an alienation by a member of an undivided family without valuable consideration does not, in this Presidency, any more than a will, bind, even to the extent of such member's own share,

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(1) *Krishnarav Ganesh* v. *Rangrav*, 4 B. H. C. R. A. C. J. : 1 4, *Kusturē Bhavani* v. *Appa*, 5 B. 621. And see 1 Stra. H. L.,261, cl. 1; West and Buhler (2nd ed.), pp. 372, 382; 2 Norton, L. C., 424 ; 2 M. I. A., 54, *Mt. Goura Chowdhrain* v. *Chummun Chowdhry*, W. R. Special No. for 1864, p. 340 ; and the decision of the High Court of Calcutta as to *Mahabeer Pershad*, mentioned in *Girdharee Lall* v. *Kantoo Lall*, 1 I. A., 321, (322, 326, 329.) and not appealed against ; *Bamundos Mookorjea* v. *Mt. Tarinee*, 7 M. I. A. 169; Mayne's H. L., (2nd ed.), pl. 178, 179 ; *Sri Raghunadha* v. *Sri Brozo Kishoro*, 3 I. A. 154, (193.)

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his co-parceners (1). They, in such cases, take the whole property by survivorship. But here the adoption came after the alienation.

We must reverse the decrees of the Courts below, and make a decree for the appellant, the defendant. The parties respectively must bear their own costs of the suit and of both appeals.

Decrees reversed.

5 B. 638.

[638] TESTAMENTARY JURISDICTION.

Before Sir Charles Sargent, Kt., Justice.

IN THE MATTER OF THE WILL OF PITAMBER GIRDHAR.
SOORJI JIVANDAS (*Petitioner*). [27th July, 1881.]

Probate—Revocation—Indian Succession Act (X of 1865), s. 234—Practice—Review in testamentary matters.

Section 234 of the Indian Succession Act (X of 1865) applies to Hindus, and an application to revoke probate of the will of a Hindu may be made under that section.

When once probate in solemn form has been granted, no one who has been cited or has taken part in the proceedings, or who was cognizant of them, can afterwards seek to have it cancelled : *Quære*—whether a review may not be granted.

The practice in India in testamentary matters previously to Act V of 1881 was the same as that of the Ecclesiastical Court in England, except so far as that practice might be inconsistent with the Civil Procedure Code.

[R., 11 C. 492 (494) ; 18 C. 45 (47) ; 27 C. 927 (935) ; 17 M. 373 ; 11 C.L.J. 623 (630) = 6 Ind. Cas. 301 ; 13 C.L.J. 547 (549) = 15 C.W.N. 1021 (1022) = 10 Ind. Cas. 434 (435) ; 10 Ind. Cas. 717 (718) = 14 O. C. 77.]

IN this case the petitioner, on the 7th March, 1881, obtained a rule *nisi* calling upon one Navivahoo to show cause why a citation should not be issued calling upon her to bring in to the Registry the probate of the last will and testament of the said deceased granted to her on the 9th August, 1880, and to show cause why such probate should not be revoked and cancelled.

The testator, Pitamber Girdhar, died on the 10th August, 1879, while on pilgrimage, having left Bombay on the 8th February, 1879.

On the 14th January, 1880, Navivahoo applied for probate of the will of the testator dated the 5th February, 1879, and on the 12th February, 1880, Soorji Jivandas, the petitioner, entered a caveat. He alleged that the will propounded by the applicant was a forgery ; and he produced a will made by Pitamber Girdhar and dated 1st February, 1879, whereby the petitioner and three other persons were appointed executors. The petitioner stated that on the 8th February, 1879, just before the testator's departure from Bombay, he (the testator) had handed over this will for safe custody to Kuverji Narsi, one of the executors, in whose possession it had ever since remained. He also stated that several letters had been received by the said executors, written shortly before the testator's death, in which he had referred to the will which he had left with Kuverji Narsi.

(1) *Gangubai* v. *Ramanna*, 3 B H. C. R. A. C. J. 66; *Vrandavandas* v. *Yomunabai*, 12 B. H. C. R. 229 and see 3 B. H. C. R. 9; 11 B. H. C. R. 80; 2 Stra. H. L. 261. ol. 2.

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The case came on for hearing on the 18th June, 1880. It was not denied that the testator had made the will of the 1st February, 1879, as above stated, in which a large proportion of his property had been left to charity, but it was alleged by the widow [639] Navivahoo that four days subsequently, *viz.*, on the 5th February 1879, at her request he had revoked it, and had made a fresh will, in which he left all his property to her.

At the close of the evidence given in support of this latter will, the caveator, without having called any evidence, declined to proceed with the case, on the ground that as he was not personally interested, he did not wish to incur the risk of having to pay costs in case his opposition should prove unsuccessful. The Court thereupon found in favour of the will of the 1st February 1879, and probate thereof was granted on the 9th August 1880.

On the 28th February 1881, Soorji Jivandas presented a petition, praying that inquiry should be made as to the genuineness of the alleged will, and that the same might be declared a forgery; that the probate thereof might be recalled and cancelled, and that he might be at liberty to prove in due form the will of the 1st February 1879.

In support of his petition he stated that he had recently discovered that Navivahoo had, previously to the hearing in June 1880, through her solicitor, submitted the will of the 5th February 1879 to the examination of an expert, Mr. G. W. Terry, of the Sir Jamsetji Jijibhoy School of Art, and that Mr. Terry had pronounced it to be a forgery; that he (petitioner) had recently again submitted the said will to Mr. Terry and other experts, who were of the same opinion.

The petitioner obtained a *rule nisi* on the 7th March 1881, which now came on for hearing. He and the other executors, appointed by the will of the 1st February 1879, filed affidavits in which they set forth the circumstances which they were prepared to prove in support of their allegation that the latter will of the 5th February 1879 was a forgery. The other executors stated that they were willing that their names should be joined in the present proceedings if necessary.

Inverarity showed cause.—Section 234 of the Indian Succession Act (X of 1865), under which these proceedings are taken, does not apply to Hindus. The Hindu Wills Act (XXI of 1870) only extends to Hindus so much of part XXX of the Succession Act as applies to grants of probate. The new Probate Act V of 1881 expressly makes this section applicable to Hindus. It is, therefore, to be inferred that it did not previously apply. Probate when [640] granted after proof in solemn form cannot be revoked at the instance of one who had been caveator or who was cognizant of the previous application for probate: Coote's Probate Practice, p. 239: Brown's Probate Practice, p. 101. This is an application for a re-hearing. The Civil Procedure Code (X of 1877) applies, and the petitioner is too late.

Kirkpatrick (with *Marriott*, Advocate General) *contra*.—The words "grant of probate" in the Hindu Wills Act must be held to include such applications as the present, and to extend s. 234 of the Succession Act to Hindus. There is no express decision on the point, but the Courts appear always to have assumed it; *Kommollochun* v. *Nilrutton* (1); *Mohundass* v. *Lutchmundass* (2); *Nobeen Chunder* v. *Bhobosoonduri* (3). As to the right of one who has been a party to previous contentious proceedings, to

(1) 4 C. 360. (2) 6 C. 11. (3) *Ibid*, 460.

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apply subsequently for revocation, there is nothing prohibitory in the Succession Act. The strict English rule has not been adopted. Here there is a clear case of fraud and forgery: *Barnesley* v. *Powell*(1). If Soorji Jivandas cannot apply, he having been concerned in the former proceedings, the petition may be amended by substituting the names of other executors. Navivahoo and her solicitor were guilty of fraud on the Court when they applied for probate, in suppressing the fact that they had obtained an adverse opinion as to the genuineness of the will.

Inverarity in reply.— The amendment of the petition would be useless, as the other executors knew of the former proceedings, and that is enough to bring them within the rule. Navivahoo was not bound to disclose Mr. Terry's opinion.

JUDGMENT.

SARGENT, J.—The application in this case has been made under s. 234 of the Indian Succession Act. It has been objected that this section does not apply to the case of a Hindu will, inasmuch as it is not a section which, in the words of the Hindu Wills Act, "relates to the grant of probate." I am, however, of opinion that, on a fair construction of the Act, it must be held that this section does apply, and that such an application as the present may be made in the case of a Hindu will under the provisions of this section.

[641] It was next contended that the petitioner, having been concerned in the proceedings which resulted in the grant of probate, is precluded from now seeking to have this probate revoked. The rule in England is clear, that when once probate in solemn form has been granted, no one who was been cited, or who has taken part in the proceedings, or who was cognizant of them, can afterwards seek to have it cancelled. The only question is, whether that rule is applicable here. By the rules of the Supreme Court (2), it was laid down that "the practice of the Ecclesiastical Court of the diocese of London is adopted in this Court with respect to Probates and Letters of Administration, or as near thereto as the circumstances of the country permit." The High Court Charter of 1865, cl. 37, gives the High Court power to make rules and orders for the purpose of regulating all testamentary proceedings, provided that the High Court should be guided, as far as possible, in making such rules by the provisions of the Code of Civil Procedure Act VIII of 1859 and of any law which has been made amending or altering the same: and under that power was made rule I, ch. II of the High Court Rules, which provides that "the procedure of this Court in its Testamentary and Intestate Jurisdiction, as heretofore, shall continue to be the same as that of the Supreme Court at the time of its abolition." The result, then, appears to be that the practice here in testamentary matters—at any rate previously to Act V of 1881—was the same as that of the Ecclesiastical Court in England, except so far as that practice might be inconsistent with the Civil Procedure Code. I have not been able to discover any testamentary case in England in which a review has been permitted. The power of reviewer, however, is expressly given to the Courts in India in civil cases by the Civil Procedure Codes of 1859 and 1877; and as our rules in testamentary proceedings are to be consistent with those Codes, it might

(1) 1 Ves. 80; Williams on Executors (7th ed.), 553.
(2) Supreme Court Rules (Ecclesiastical), No. 488.

be right, under proper circumstances, to allow a review in testamentary matters.

But, assuming that such a review could be granted, I do not think the facts of the present case are such as would justify it. In the month of June last, the petitioner had an opportunity of laying his case before the Court. He did so partially, at all **[642]** events. In the exercise of his own discretion he thought proper to withdraw his opposition at the close of the evidence given in favour of the propounded will, and thereupon probate of that will was granted by the Court. Now, however, he says that he has discovered that Mr. Terry was, and is, of opinion that the alleged will was a forgery, and on this ground he seeks to have the whole question of the validity of the will re-opened. If this circumstance were to be held sufficient to justify a review, there would be no limit to such applications as the present. It would always be possible for a party to a cause to discover some individual whose opinion was favourable to his case, but it can hardly be contended that the fact of his having obtained such an opinion would entitle him to ask the Court to set aside its former decision, and allow a re-hearing of the case. It was suggested, however, that Mr. Terry having examined the will and pronounced it a forgery, was a circumstance which Navivahoo or her solicitor ought to have disclosed, and that their having suppressed it, amounted to a fraud on the Court. I do not think there was any obligation upon them to disclose the fact. Whatever their duty might have been if this had been an uncontested matter, and if they had been applying for probate in common form, I cannot hold that where there are two parties contesting the validity of a will, and each of them endeavouring to establish his case in a Court of law, it is in any sense the duty of either to give evidence which he has discovered to be adverse to himself and favourable to his opponent.

On behalf of the petitioner's case it was argued that, although the petitioner might be precluded from applying for revocation of the probate by reason of his having been caveator in the former proceedings, the other executors named in the will of the 1st February, 1879, did not labour under the same disability, as they had not joined in the caveat, nor had they been cited by the widow, and it was contended that the petition might be amended by inserting their names. It is admitted, however, that they were fully aware of the former proceedings, if, indeed, they were not actively engaged in supporting the case of the caveator; and I think, therefore, that they are equally bound with him by the decision of the Court, and that the rule laid down in *Radcliff* v. **[643]** *Barnes* (1) and *Newell* v. *Weeks* (2) prohibits them also from applying for revocation of the probate that has been granted.

Rule discharged with costs.

Attorneys for applicant.—Messrs. *Hearn, Clevelānd, and Little.*
Attorney for opponent.—Mr. *Khanderav Moroji.*

(1) 2 Sw. &. Tr. 486.

(2) 2 Phill. 224.

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Before Mr. Justice West and Mr. Justice Pinhey.

LOTLIKAR (*Applicant*) *v.* LOTLIKAR (*Respondent*).*

[24th and 27th July, 1881.]

The Code of Civil Procedure, Act X of 1877, *s.* 484 – *Attachment—Security.*

The defendants were, on the 10th of March 1881, called upon, under s. 484 of the Civil Procedure Code (Act X of 1877) to furnish security for the satisfaction of a decree that the plaintiff might obtain against them, or to show cause on the 28th March 1881 why security should not be furnished. To this direction the order was appended, which is provided by the form at the end of the Code of Civil Procedure for a provisional attachment under s. 484. The defendants, to avoid the attachment, gave security on the 12th March 1881 for satisfaction of the decrees, and the attachment was not carried out. On the 28th March 1881, they showed cause why security should not be furnished; but the Subordinate Judge, as security had been furnished, thought the matter was at an end, and that he could not cancel the security bond.

Held—that the Subordinate Judge was wrong; the security so given was really not the security expressly provided under s. 484, and did not preclude the defendants from showing cause why no security should be furnished.

THIS was an application for the exercise of the Court's extraordinary jurisdiction against the decision of Rao Bahadur K. S. Joglekar, Subordinate Judge (First Class) at Ratnagiri.

The facts appear in the following judgments.

The Hon. Rao Saheb *V. N. Mandlik*, for the applicant, moved for a rule, which was granted.

Shamrav Vithal, for the respondent, showed cause.

JUDGMENTS.

WEST, J.—The defendants were, on the 10th March 1881, called on to furnish security for the fulfilment of a decree that the plaintiff might obtain against them, or to show cause on the 28th March 1881 why security should not be furnished. To **[644]** this direction the order was appended, which is provided by the form at the end of the Code for a provisional attachment.

The defendants, to avoid that attachment, gave security on the 12th March, 1881, for satisfaction of the decree, and the attachment was not carried out. On the 28th March, 1881, they showed cause why security should not be furnished; but the Subordinate Judge, as security had been furnished, thought the matter was at an end, and that he could not cancel the security bond.

Section 484, under which he issued his order, speaks of a "conditional attachment" as within the competence of the Court. This might mean an attachment to be made conditionally on the security not being furnished or cause shown by the prescribed day, or it might mean an immediate attachment of a provisional kind conditioned to become plenary if security should not be furnished, or cause shown according to the terms of the order. The form shows that the latter was the intention of the Legislature. Had the attachment, therefore, in the present case, been actually made, it would, in the first instance, have been only a temporary one: the defendants showing cause on the 28th March, 1881, would have

* Extraordinary Civil Application, No. 67 of 1881.

had it set aside. The question is, whether, by taking the only step open to them in order to prevent the discredit and inconvenience that would arise from the attachment, they have excluded themselves from the further remedy which would otherwise have been open to them. The order for attachment was supplementary to that for furnishing security, and the order for furnishing security was itself, if the defendants chose, dependent on their failing to show cause on the 28th March, 1881. Primarily, therefore, they had till that date to prepare their reasons, and the additional order for intermediate attachment could not deprive them of that right. Neither, therefore, should the giving of security to avoid the pressure of that order. As the continuance of the order beyond the 28th March, 1881, was subject to the revision of the Subordinate Judge on that day, so, too, should the continuance of the security given in substitution for the attachment. The security furnished is not really the security expressly provided for by s. 484. It was given under pressure, and follows the nature of the process in lieu of which it was given and accepted.

[645] The Subordinate Judge, therefore, had authority to set aside the security on cause shown on the 28th March, 1881, why it should not be furnished for the ulterior purposes of the suit, and he should now proceed to consider the reasons assigned for his taking that course. His order is set aside. Costs to follow the event of the suit.

PINHEY, J.—On the 10th March, 1881, the plaintiff filed a plaint in the First Class Subordinate Court at Ratnagiri against the present applicant and his father for partition of the family property of the parties. Along with the plaint the plaintiff put in an application, accompanied by an affidavit, praying that the defendants might be required to give security for the satisfaction of any decree that might be passed in the suit, or that, in default of their doing so, certain moveable property, valued at Rs. 17,622-15-8, might be attached pending the further order of the Court.

The Subordinate Court examined the plaintiff, and ordered the attachment of the property indicated in the plaintiff's application, and further ordered the defendants to show cause why they should not, on or before the 28th March 1881, be required to give security in the sum of Rs. 12,000 for the fulfilment of the decree in the suit. On the same day—the 10th March 1882—the nazir of the Court proceeded to attach the property in the possession of the defendants. The second defendant, the applicant here, at once went to the Subordinate Court, and begged that a security for Rs. 12,000, which he produced, should be at once taken and the nazir be directed to refrain from attaching the defendants' property. On receiving this application, the Subordinate Court ordered the nazir, on defendant giving security for Rs. 17,000, to stop from making the attachment.

On the 11th March, 1881, the applicant prayed that three sureties might be accepted instead of one surety, as the sum increased by the Subordinate Court to Rs. 17,000 was a very large one. This prayer was granted by the Subordinate Court. On the 12th May, the applicant gave one sufficient surety for the fulfilment, by the defendants, of any decree that might be passed in the suit.

On the 28th March, 1881 (the date on which the defendant had been originally required by the notice served on them to show **[646]** cause why they should not be required to give security for the fulfilment of the decree that might be passed in the suit), the applicant appeared before the Subordinate Court, and prayed that the surety given might be

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discharged on the ground that, in the circumstances of the case, neither an attachment before judgment nor security were necessary.

On the 31st March, the Subordinate Judge refused this application on the ground that as defendants had given security it was not now competent to them to show cause against the conditional order made on the application of the plaintiff presented at the same time as the plaint.

But the Subordinate Court was wrong in so holding. The date fixed by the Subordinate Court for the defendants to show cause against the conditional order of the 10th March, 1881, was the 28th March, 1881. Until that date it was not open to the defendants to show cause against the order: but it was clearly within the right of the defendants, and the Subordinate Court so ruled on the petition of the defendants, to prevent the interim attachment of their property by giving the security required by the Court. The fact of the defendant giving this security at once in no way took away their right to show cause on the 28th March, 1881, why it was not necessary, in the circumstances of the case, to order the attachment of their property before judgment, nor for the defendants to be required to give security for the fulfilment of the decree of the Court.

The order of the Subordinate Court, dated 31st March, 1881, must, therefore, be set aside, and the Subordinate Court directed to allow the defendants to show cause why the order of the Subordinate Court, dated 10th March, 1881, requiring defendants to give security for the fulfilment of the decree of the Court, should not be discharged.

Costs of this application should be costs in the cause.

Order accordingly.

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5 B. 647=6 Ind. Jur. 139.

[647] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Birdwood.

HAJARIMAL, (*Plaintiff*) *v.* KRISHNARAV AND ANOTHER (*Defendants*).* [29th March, 1881].

The Dekkhan Agriculturists' Relief Act XVII of 1879, *s.* 72—*Limitation Act XV of* 1877, *sch. II, art.* 59—*Non-agriculturist principal—Agriculturist surety—Remedy against principal barred, but surety held liable—The Indian Contract Act IX of* 1872, *ss.* 126 *to* 147.

On the 11th September, 1880, a suit was instituted against a non-agriculturist principal and agriculturist surety for Rs. 88-8-0, being principal and interest due on a bond dated the 5th August, 1877, and payable on demand. The action being barred against the principal debtor under the Limitation Act XV of 1877, sch. II, art. 59, the question was referred to the High Court, whether, under s. 72 of the Dekkhan Agriculturists' Relief Act XVII of 1879, the agriculturist surety was still liable for the amount sued for.

Held—that although the suit was barred as against the principal debtor under art. 59, sch. II of the Limitation Act, yet the surety, being an agriculturist, was still liable, inasmuch as s. 72 of the Dekkhan Agriculturists' Relief Act, which extends the period of limitation in the case of suits against agriculturists, applies to all agriculturists, whether principals or sureties, in the districts affected by that Act.

Sections 126 to 147 of the Indian Contract Act IX of 1872, relating to contracts of guarantee, considered in connection with the effect of s. 72 of the Dekkhan Agriculturists' Relief Act XVII of 1879.

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* Civil Reference, No. 34 of 1880.

[N.F., 11 A. 310; 24 A. 504=A.W.N. (1902) 166; 2 N.L.R. 42; U.B.R. (1892—1896) Vol. II. 308; **F.**, 9 Ind. Cas. 742=98 P.L.R. 1911=14 P.W.R. 1911; **Appr.**, 12 C 330; **R.**, 7 B. 146 (148); 9 B. 320; 28 B 248=5 Bom. L.R. 1020 (1023); 33 M. 308=7 Ind. Cas. 898=20 M.L.J. 633 (638)=8 M.L.T. 321; 9 Ind. Cas. 204 (205)=21 M.L.J. 457=9 M.L.T. 215=(1911) M.W.N. 41; 16 Ind. Cas. 387 (389); U.B.R. (1897—1901) 331.]

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UNDER s. 617 of Act X of 1877, this case was referred for the decision of the High Court by Dr. A. D. Pollen, Special Judge under the Dekkhan Agriculturists' Relief Act. He stated the case, with his opinion thereon, as follows :—

"The suit was brought against a non-agriculturist principal and an agriculturist surety to recover Rs. 50 principal and Rs. 33-8-0 interest due on a bond dated 5th August, 1877, the condition of the loan being that it should be repayable on demand. The cause of action, therefore, accrued when the loan was made, namely, on the 5th August, 1877. The plaint was not presented till the 11th September 1880. It appears, therefore, that it was time-barred as against the non-agriculturist principal on that date; but as against the agriculturist surety the time is extended to six years by s. 72 of the Dekkhan Agriculturists' Relief Act. The question is, whether a decree can be passed against the surety, when the principal debtor is discharged by lapse of **[648]** time and the omission of the creditor to sue him before such lapse. Having regard to s. 134 of the Indian Contract Act and to the general principles regulating the relation of principal and surety, I think the surety is discharged. As I feel some doubt on this point, I have the honour to refer it for the decision of the High Court."

The parties did not appear.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—The reference in this case arises in a suit upon a bond, dated the 8th of August, 1877, conditioned for payment of Rs. 50, principal, payable on demand. Under Act XV of 1877, sch. II, art. 59, the period of limitation on such a bond would be three years from the making of the loan, *i.e.*, in the present case, the date of the bond. The principal debtor is not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, but the surety is such an agriculturist. The plaint was presented on the 11th September, 1880, *i.e.*, more than three years after the date of the bond, which, accordingly, as against the non-agriculturist principal debtor was then barred by the enactment in the Limitation Act of 1877 just referred to. The question is, whether the effect of s. 72 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is to leave the surety still liable for the amount of principal and interest due on the bond. The learned Special Judge under that Act having some doubt on the point, referred it to this Court, his opinion, however, inclining against the liability of the agriculturist surety, notwithstanding s. 72 of the last-mentioned Act, which enacted that, "in any suit against an agriculturist under this Act for the recovery of money, the following periods of limitation shall be deemed to be substituted for those prescribed in the second column of the second schedule annexed to the Indian Limitation Act, 1877 (that is to say) :—(*a*) when such suit is based on a written instrument registered under this Act or any law in force at the date of the execution of such instrument,—twelve years; (*b*) in any other case, six years. Provided that nothing herein contained

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shall revive the right to bring any suit which would have been barred by limitation if it had been instituted immediately before this Act comes into force."

[649] That concluding proviso does not apply to the present case—the right of action on the bond not having been barred by Act XV of 1877, sch. II, art. 59, when the Dekkhan Agriculturists' Relief Act came into force, *viz.*, on the 1st of November, 1879 (s. 1)—the three years' period of limitation did not expire until the 8th of August, 1880. Section 72 of the Dekkhan Agriculturists' Relief Act occurs in its eleventh chapter, and contains no exception of a surety,—a circumstance rendered important by the fact that the case of a surety was evidently present in the mind of the Legislature when framing that Act, and is mentioned in two parts of it, *viz.*, in cl. (*y*) of the third section which occurs in chap. II of the Act; and, secondly, in the first passage of s. 12, which occurs in chap. III. In both of these instances the case of a defendant "not being merely a surety of the principal debtor" is excepted from the operation of the portions of the Act in which those exceptions are made, but those exceptions have not any bearing upon the enactment as to limitation contained in s. 72, save in rendering more remarkable the absence of any such exception from that section. Hence in accordance with the familiar rule of construction, *expressio unius est exclusio alterius*, we think that we are bound to infer that s. 72 was intended by the Legislature to apply to all agriculturists in the districts affected by the Dekkhan Agriculturists' Relief Act XVII of 1879, whether filling the character of principals or sureties. The intention of the Legislature in extending the period of limitation was to remove the frequent pressure on agriculturist debtors to execute fresh and probably more stringent deeds or bonds than those originally given by those debtors, and thus to benefit such agriculturists. The Legislature might perhaps have, advantageously to agriculturists, excepted sureties from the operation of s. 72, but it has not made any such exception. Were we to do so, we should be acting as legislators and not as judges.

Assuming that the result of the barring, by the Limitation Act of 1877, of the action against the principal debtor is that the right is gone as well as the remedy barred, or, in other words, that he is discharged from the debt to the obligee in the bond by virtue of s. 2, cl. (*j*), of the Indian Contract Act IX of 1872, **[650]** which enacts that "a contract, which ceases to be enforceable by law, becomes void when it ceases to be enforceable," (which enactment is however, qualified by s. 25, cl. 3, of the same Act, which treats a debt barred by the law for the limitation of suits, as a good consideration for a fresh promise in writing signed by the party to be charged or his agent to pay such debt in whole or in part), we proceed to consider such portion of the same Act (extending from s. 126 to s. 147) as relates to contracts of guarantee and is relevant to the present case.

The first of these which it is important to notice is s. 128, which enacts that "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract." This is merely a re-enactment of the Common Law—(see Theobald on Principal and Surety, chap. IV). Although this co-extensiveness is laid down in s. 128, the same Legislature, which there so enacted, might subsequently vary or modify that provision, and has done so by s. 72 of the Dekkhan Agriculturists' Relief Act in extending the period of limitation

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of suits against all agriculturists—without regard to the distinction between principal and surety. If this can be regarded as a variance in the contract, yet not being a variance made by the principal debtor and the creditor, but by the Legislature, it does not fall within s.133, and, therefore, does not discharge the surety. Section 134 especially demands our consideration. It runs thus :—"The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor." The omission of the creditor to sue the principal debtor within three years from the date of the bond, has undoubtedly (having regard to s. 2, cl. *j*, already mentioned, and to the Limitation Act of 1877) produced the legal consequence of the discharge of the principal debtor ; and, *prima facie*, if we were not to look beyond s. 134, we should hold the surety to be discharged. But this view is dispelled by s. 137, which qualifies s. 134 by enacting that "mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him, does not, in the absence of any **[651]** provision in the guarantee to the contrary, discharge the surety." Mere forbearance means a forbearance not resting upon or in consequence of such a promise to give time to, or not to sue the principal debtor, as is the subject of s. 135. The next section to be mentioned is s. 139, which as follows :—" If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged." As to this section, Messrs. Cunningham and Shephard in their commentary upon the Contract Act, p. 214 (Ed. 1873), say: " It must be inferred from s. 137 that it is no part of the creditor's duty to sue the principal debtor at any particular time." That remark appears to us to be well founded. To hold otherwise would be to treat s. 137 as a dead letter. The illustrations to s. 139 are not inconsistent with that view. We may observe that, although the creditor's right to sue the principal debtor is barred, such will not be the case with the surety's right to sue the principal debtor, if the surety be compelled to pay the amount of the bond or any part of it to the creditor : inasmuch as the period of limitation to the surety's suit against the principal debtor would not commence to run until such payment. Even when the action against the surety has been commenced within the period of limitation applicable to the principal debtor (who may at the time of the institution of such action be beyond the jurisdiction, and, therefore, not joined as a defendant in the action) it must often happen that the decree or execution against the surety under which he is compelled to pay is not made until after the period of limitation has expired as against the principal debtor, yet the latter must recoup the surety whose cause of action does not accrue against the principal debtor until payment by the surety. The contract between the creditor on one side and the principal debtor and surety on the other, which as regards the principal debtor is avoided by expiration of the period of limitation, is distinct from the contract implied by law from the former on the part of the principal debtor to recoup the surety if he be compelled to pay the debt. That latter contract is still in full force.

[652] Our attention has been drawn to a passage in M. Merlin's Repertoire de Jurisprudence, Vol. II, page 445, Tit. Caution (Bail, Surety, Security). It occurs under the sub-division V, which treats of the manner in which contracts of suretyship (cautionnements) are terminated, and

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gives in pl. 5 an instance of one of the modes of such termination, which when translated is as follows :—"When the period of limitation has elapsed since the contract of suretyship. For example, I have guaranteed to a tradesman payment for trimmings which he has furnished to my friend for a dress. That tradesman, instead of compelling payment within the time which the law allowed to him, has permitted that period of limitation to run against him. It is certain that, although, according to custom, he may yet put my friend to his oath (1) as to the payment for what has been supplied to the latter, the affirmation which he may make as to his still owing the money, cannot injuriously affect me, because it is to be presumed that I had not any intention that any suretyship should endure longer than the time within which the right to bring the principal action existed. At the moment when the period of limitation accrued, I had the right to suppose that the tradesman was paid, and no longer to trouble myself as to the solvency of my friend." There is, between the case thus put by M. Merlin and the present case, this vital distinction, that, in the case of M. Merlin, the prolongation of the liability beyond the period of limitation was the act of the principal debtor, *i.e.*, his oath that he had not paid the price, and he could not by his act without the concurrence of the surety vary the liability of the latter, whereas the prolongation of the liability in the present case is the act of the Legislature, which may control alike the principal debtor, the surety, and the creditor.

Our reluctant reply to the Special Judge must be that the action as against the surety is not barred by reason of the action being barred as against the principal debtor by Act XV of 1877, sch. II, art. 59. Although upon our rendering of the Dekkhan Agriculturists' Relief Act, arrived at in conformity with **[653]** the settled principles of the construction of statutes, we have come to that conclusion, we have not any difficulty in supposing that the Legislature may not actually have contemplated or foreseen such a consequence of s. 72 of that Act. The remedy, however, is easy, and lies in its own hands. We understand that there either now is, or there is about to be submitted to it a bill for amending the Act. In that bill an exception of the case of a mere surety for a principal debtor may be introduced in s. 72, and it would not be any great hardship to creditors if such an amendment were made retrospective.

(1) See Pothier on Obligations by Evans, Vol. I, p. 470, pl. 684 to 688, and Merlin Rep., Vol. XVI, Tit. Serment, S 2, Art. II, pp. 93, 94, and see Vol. VI, Tit. Exception, pp. 331, 332.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

ICHHARAM KALIDAS, DECEASED, HIS HEIRS, HIS WIDOWS NATHBAI AND OTHERS (*Original Defendants*), *Appellants v.* GOVINDRAM BHOWANISHANKAR (*Original Plaintiffs*), *Respondent.**

[12th September, 1881.]

Registration Act III of 1877, *s.* 50—*Priority between registered and unregistered documents—Optional and compulsory registration—Acts XVI of* 1864, *XX of* 1866, *and VIII of* 1871—*Interpretation of statutes.*

The registration of documents under Acts XVI of 1864, XX of 1866, or VIII of 1871, does not give them effect as against documents which might have been, but were not, registered under one of those Acts. Section 50 of Act III of 1877 has no retrospective operation upon such documents: the preference which it gives to registered over unregistered documents is confined to documents registered under Act III of 1877.

According to the registration law, as it stood before Act III of 1877 came into force, there was no competition grounded upon registration between documents, optionally and documents compulsorily registrable.

The Legislature, while possessing the power to divest existing rights, is not (in construing statutes) to be understood as intending to exercise that power retrospectively to any greater extent than the express terms of, or necessary implication from, its language requires.

A and B (two brothers) purchased a house on the 19th July 1871, and mortgaged it to the plaintiff for Rs. 585, by a *san* mortgage, dated the 21st July 1875, and duly registered. In 1874, the plaintiff sued upon his mortgage, and obtained a decree, directing satisfaction of his claim by the sale of the house. The house was accordingly sold by the Court and purchased by the plaintiff for Rs. 325. He obtained a certificate of sale, dated the 15th October 1875. The certificate was duly registered. On applying to **[654]** the Court for possession of the house, the plaintiff was resisted by the defendant on the ground that he was in possession under two mortgages dated the 20th July, 1871, and executed, the one by A and the other by B. These mortgages were not registered, both of them being for sums less than Rs. 100. The plaintiff's application, having been rejected by the Court, he brought a suit for possession of the house. Both the lower Courts allowed his claim, holding that his mortgage and certificate of sale, being registered, were entitled to priority over the unregistered mortgages of the defendant under s. 50 of Act III of 1877. On appeal to the High Court.

Held—that the case was governed by the law of registration as it stood before Act III of 1877 came into force, and that the registration of the plaintiff's mortgage and certificate of sale, both of which were compulsorily registrable, did not confer upon them any priority over the defendant's unregistered mortgages, which were optionally registrable.

Kanitkar v. *Joshi* (1) referred to and approved.

[R., 6 B. 168 (192); 13 B. 229; 20 B. 158 (164).**]**

THIS was a second appeal from the decision of S. H. Phillpotts, District Judge of Ahmedabad, affirming the decree of Harderam Anupram, Second Class Subordinate Judge of Umreth.

The plaintiff sued for possession of a house under the following circumstances:—Ambaram and Shrikrishna, the sons of one Gaurishankar, purchased a house on the 19th July, 1871, and mortgaged it to the plaintiff's son, Bhalashankar, for Rs. 585 by a *san* mortgage (Ex. 27), dated the 21st July, 1871. The mortgage was duly registered. In 1874, the plaintiff Govindram, as guardian of his grandson Harikrishna (the son of

* Second Appeal, No. 438 of 1880.

(1) 5 B. 442.

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Bhalashankar, deceased) brought a suit on the mortgage, and obtained a decree, directing payment of the mortgage debt by the sale of the house. It was accordingly sold by the Court and purchased by the plaintiff himself for Rs. 325 on the 13th September, 1875. He obtained a certificate of sale (Ex. 18), dated the 15th October, 1875. It was duly registered. On the plaintiff's applying to the Court for delivery of the house to him, the defendant Ichharam opposed the application on the ground that he was in possession under two mortgages (Exs. 7 and 8), dated the 20th July, 1871, and executed to his brother Haribhai on behalf of their firm, the one by Ambaram and the other by Shrikrishna. (These mortgages, Exs. 7 and 8, were not registered, being each for less than Rs. 100). The Court having rejected the plaintiff's application, he brought the present suit for possession of the house.

[655] The defendant Ichharam answered, *inter alia*, that he was in possession of the house by virtue of the two mortgage deeds (Exs. 7 and 8).

Both the lower Courts allowed the plaintiff's claim. The Subordinate Judge held that the plaintiff's certificate of sale (Ex. 18) being registered, was entitled to priority over the unregistered mortgages (Exs. 7 and 8) set up by the defendant. The District Judge held that the plaintiff's mortgage (Ex. 27), if not his certificate of sale (Ex. 18), prevailed against the defendant's unregistered mortgages. Both the Courts were of opinion that s. 50 of Act III of 1877 applied to the case. They did not think it necessary to find on the genuineness or otherwise of the two mortgages (Exs. 7 and 8).

The defendant appealed to the High Court.

Gokuldas Kahandas, for the appellant.—The lower Courts were wrong in applying s. 50 of Act III of 1877 to the case. The mortgage deeds (Exs. 7, 8 and 27), relied upon respectively by the appellant and respondent, were executed while Act VIII of 1871 was in force. The effect of s. 50 of Act III of 1877 is not retrospective, as held in *Kanitkar* v. *Joshi* (1). According to that case, the registration of documents compulsorily registrable did not give them preference over unregistered documents subject to optional registration, before Act III of 1877 came into force.

Nagindas Tulsidas, for the respondent.

JUDGMENT.

WESTROPP, C.J.—This is a suit to recover a house situated in Umreth in the district of Ahmedabad and province of Gujarat. That house was purchased by Ambaram Gaurishankar and Shrikrishna Gaurishankar from Haribhai Purshotam bin Kasidas on the 19th July, 1871, and was conveyed to those purchasers by that vendor by a registered deed of sale of that date (Ex. 17). The brothers Gaurishankar having thus become the owners of the house, mortgaged it for Rs. 585 by way of *san* mortgage (Ex. 27) on the 21st July, 1871 (which deed of *san* mortgage was registered) to Bhalashankar, the son of the present plaintiff Govindram. Govindram, his son Bhalashankar and grandson Harikrishna constituted an undivided family. A suit by Harikrishna, minor son **[656]** of Bhalashankar, deceased, through his grandfather and guardian Govindram Bhowanishankar, having been instituted against the brothers Gaurishankar on that mortgage, a decree was obtained on the 22nd January, 1875, for sale of the house in satisfaction of the amount found due on the mortgage. At the auction-sale on the 13th September, 1875, held pursuant to that decree,

(1) 5 B. 442.

Govindram Bhowanishankar purchased the house for Rs. 325, and having obtained a certificate of that sale, dated October 15th, 1875, (Ex. 18), which certificate has been registered, applied to the Court of Subordinate Judge for possession of the house. That purchase as well as the mortgage (Ex. 27) must be regarded as for the benefit of the undivided family of which Govindram, the plaintiff, is the head.

The defendants relying on two alleged mortgages from the Gaurishankar brothers, respectively, dated the 20th July, 1871, (Exs. 7 and 8), and asserting that they (the defendants) were in possession under those mortgages, resisted delivery of possession of the house to Govindram under the certificate of sale to him. The application of the plaintiff for possession having, in consequence of this resistance, been refused, the present action was brought by the plaintiff to recover possession.

The plaintiff denies, and apparently not without some reason, the *bona fides* of those mortgages relied upon for the defence. They purport to have been executed on the 20th July, 1871, by the Gaurishankar brothers to Haribhai Kalidas as representing the firm of his father, of which he and his brother Ichharam Kalidas were members. That day intervened between the day (the 19th July, 1871), on which the Gaurishankar brothers purchased the house and the day (21st July, 1871), on which they mortgaged it to Bhalashankar. The mortgages to Haribhai Kalidas (Exs. 7 and 8), of which Ex. 7 purports to have been executed by Ambashankar Gaurishankar and Ex. 8 by Shrikrishna Gaurishankar, were respectively for Rs. 95 and Rs. 99, *i.e.*, each for a sum not exceeding Rs. 100, and therefore, were optionally, not compulsorily, registrable. They were not registered. There seems, however, to have been no good reason for having two mortgages instead of one, except to evade the necessity for registration. Secondly, the indorsements of the stamp-vendor **[657]** on the stamped papers on which those mortgages were written show that those papers were sold to Haribhai Kalidas on the 12th September 1867, that is to say, nearly four years before the alleged execution of those mortgages; and, thirdly, the defendants, although claiming priority in time for their mortgages over the registered mortgage of the plaintiff, did not obtain or produce the title-deed of the Gaurishankar brothers, the same having been made over to Bhalashankar, on behalf of whose father, the plaintiff, it was produced in Court. These circumstances have been earnestly dwelt upon on behalf of the plaintiff as affording strong grounds for believing that the defendant's mortgages have been fabricated since the execution and registration of the plaintiff's mortgage (Ex. 27), and made to bear date on the only day intervening between the day of the Gaurishankar's purchase of the house and their mortgage of it to Bhalashankar in order to give an apparent priority to the defendant's mortgages.

The Subordinate Judge, holding that the plaintiff's certificate of sale as being registered had under the 50th section of the recent enactment as to registration (Act III of 1877) priority over the unregistered mortgages of the defendants, made a decree that the plaintiff do recover possession of the house. The District Judge affirmed that decree, he being of opinion that, although it may be a matter of doubt whether the registered certificate of sale gave to the plaintiff a right preferable to that of the defendants, yet the plaintiff's mortgage certainly did confer such priority under s. 50 of Act III of 1877. The learned Judges, holding those opinions as to the effect of that enactment, did not deem it necessary to try and determine the issue framed as to the *bona fides* and validity of the defendants' mortgages.

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5 B. 653.

That question, therefore, still remains to be decided, if this Court takes a different view of that enactment, which has indeed already in *Kanitkar* v. *Joshi* (1) been held not to be retrospective so as to give priority over optionally registrable but unregistered documents to a document of subsequent date registered under any Act prior to Act III of 1877. We think that case was rightly decided. The 50th section of Act III of 1877 is as follows:—

[658] "Every document of the kind mentioned in cls. (*a*), (*b*) and (*d*) of s. 17, and cls. (*a*) and (*b*) of s. 18, shall, if duly registered, take effect, as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

"Nothing in the former part of this section applies to leases exempted under the proviso in s. 17 or to the documents mentioned in cls. (*e*), (*f*), (*g*), (*h*), (*i*), (*j*), (*k*) and (*l*) of the same section.

"*Explanation.*—In cases where Act No. XVI of 1864 or Act XX of 1866 was in force in the place and at the time in and at which such unregistered document was executed, 'unregistered' means not registered according to such Act, and, where the document is executed after the 1st day of July, 1871, not registered under Act VIII of 1871, or this Act."

This concluding explanation, that the term 'unregistered,' used in the commencement of that section, means, not only documents which might be, but are not registered under this Act (III of 1877), but also documents which might have been, but were not registered under Acts XVI of 1864, XX of 1866 and VIII of 1871, when contrasted with the marked omission to state that the term 'registered,' used in the same portion of that section, includes documents registered under the three last-mentioned Acts, points directly to the conclusion that the Legislature did not intend to bestow upon documents so registered any better position in relation to unregistered documents, which might have been registered under any one of those three Acts, than the former occupied previously to the coming into force of Act III of 1877; and that the new preference over *such* unregistered documents accorded to registered documents is confined to documents registered under that Act. This construction of s. 50 is in unison with what we believe to be one of the safest rules for the interpretation of statutes, *viz.*, that the Legislature, while possessing the power to divest existing rights, is not to be understood as intending to exercise that power retrospectively to any greater extent than **[659]** the express terms of, or necessary implication from, its language requires. Amongst many illustrations of that rule are *Moon* v. *Durden* (2) *Williams* v. *Smith* (3); *Ratansi Kalianji's case* (4); and *Delhi and London Bank* v. *Orchard* (5).

So far, then, as this case is affected by the law of registration, it must be governed by the law as it stood before Act III of 1877 came into force. According to that law, there was not any competition grounded upon registration between documents optionally and documents compulsorily registrable. Hence the registration of the plaintiff's mortgage of the 21st July 1871, and of the certificate of sale to him (both of which were compulsorily registrable), did not confer priority on those documents over the two unregistered mortgages to the defendants, these latter having

(1) 5 B. 442.
(2) 2 Exch. Rep. 22.
(3) 4 H. & N. 559.
(4) 2 B. 148.
(5) 4 I.A. 127.

been respectively for sums under Rs. 100, and, therefore, optionally registrable. The decrees of the District and Subordinate Judges having been rested on the assumption that Act III of 1877, s. 50, is retrospective, must be reversed. The case must be remanded for new trial on the question whether the two mortgages (Exs. 7 and 8), relied upon by the defendants, are *bona fide* instruments, and were executed by the Gaurishankar brothers to Haribhai Kalidas, and more especially whether they were so executed on the 20th July 1871, on which they purport to bear date. The extremely suspicious circumstances connected with those two alleged mortgages we have already noticed. Those circumstances will require the most careful attention of the trying Court, which may receive such further legally admissible evidence (if any) in connection with those mortgages as that Court may deem necessary in order to determine whether or not those two documents are trustworthy.

The costs of the suit and of both appeals should be disposed of on the re-trial in such manner as may be just.

Decree reversed.

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5 B. 660.

[660] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice Kemball.

BABAJI BIN NARAYAN (*Original Plaintiff*), *Appellant v.*
BALAJI GANESH AND ANOTHER (*Original Defendants*), *Respondents.**
[20th July, 1881.]

Hindu law—Inheritance—Daughter's rights—Alienation by daughter.

According to the law of the Presidency of Bombay, the daughter of a Hindu dying without male issue takes absolutely, and may alienate lands by deed, or devise them by will.

Haribhat v. *Damodarbhat* (1) followed.

[R., 9 B. 301 ; 21 B. 739 ; 24 B. 192 (F.B.) = 1 Bom. L.R. 574.]

THIS was a second appeal from the decision of R. F. Mactier, District Judge of Satara, affirming the decree of Meherjibhai Kovarji, Second Class Subordinate Judge of Tasgaon.

The plaintiff Babaji sued Balaji and Hanmanta to recover possession of certain lands. He alleged that the said lands had belonged to one Yesu, who at his death left a widow Uma and a daughter Saku, but no male issue ; that on the death of Uma, he (plaintiff) succeeded to the lands as heir of Yesu ; that subsequently Saku sued him and recovered possession of the lands from him ; that Saku died on the 29th November, 1877, and that, thereupon, he was entitled to the property as heir of her father Yesu, deceased.

Defendant No. 1 (Balaji) denied that the plaintiff was heir to Yesu, and answered, *inter alia*, that he held a moiety of the lands in dispute under a deed of sale executed to him by Saku on the 14th July, 1874.

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* Second Appeal, No. 470 of 1880.

(1) 3 B. 171; and the cases referred to *in notis*.

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Defendant No. 2 (Hanmanta) answered that the lands in his possession were devised to him by Saku under a will dated the 24th November, 1877. Both the defendants contended that Saku was competent to alienate the lands in dispute as she had done.

The Subordinate Judge found that the plaintiff failed to prove his alleged near relationship to Yesu; that the sale, set up by Balaji (defendant No. 1), and the will, relied upon by Hanmanta [661] (defendant No. 2), were proved; and that it was competent to Saku to make the alienations. He, therefore, dismissed the plaintiff's claim. In appeal, the District Judge confirmed the decision of the lower Court, holding that the evidence did not prove the plaintiff to be a near relation of Yesu.

The plaintiff thereupon appealed to the High Court.

G.R. Kirloskar, for the appellant.—It is not shown that there was any legal necessity for the alienation of the property by Saku, and it was not competent to her to *devise* away any portion of it. He referred to *Deo Pershad* v. *Lujoo Roy* (1).

V.N. Pandit, for the respondents, was not called upon.

The following is the judgment of the Court:—

JUDGMENT.

WESTROPP, C.J.—It having been found by the Subordinate Judge that Saku conveyed a portion of the land in dispute to Balaji and devised the residue to Hanmanta, which facts have not been disputed on appeal or second appeal, the plaintiff, even if heir of Yesu, the previous proprietor of the lands, who died without male issue and of whom Saku was daughter, must fail in this suit, inasmuch as the daughter of a Hindu without male issue takes absolutely, and may alienate lands either by deed, or devise them by will, according to the law of this Presidency: *Haribhat* v. *Damodarbhat* (2). Further, the District Judge has found that the plaintiff has failed to prove the fact of his relationship to Yesu, and that finding binds this Court. We affirm the decree of the District Judge with costs.

Decree affirmed.

(1) 20 W.R.C.R. 102.
(2) 3 B. 171 and cases there referred to *in notis*. West and Buhler, 471 (2nd ed.).

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[662] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

TULJARAM MORARJI (*Original Plaintiff*), *Appellant v.* MATHURADAS, BHAGVANDAS, AND PRANJIVANDAS, (*Original Defendants*), *Respondents** AND MATHURADAS, BHAGWANDAS ,AND PRANJIVANDAS, SONS, OF DAYARAM VIZLAL, DECEASED (*Original Defendants*), *Appellants v.* TULJARAM MORARJI (*Original Plaintiff*) *Respondent**

[September, 1881.]

Hindu law—Inheritance—Limited estate in immoveable property inherited by females who have become members of family by marriage—Absolute estate in immoveable property taken by females who have not become members of family by marriage—Nature of estate taken by widow, mother, grandmother, daughter, sister, maternal great-niece.

A maternal great-niece inheriting property is in the same position as regards the nature of the estate taken by her as a daughter or a sister.

The rule which in the Presidency of Bombay restricts the alienation of property by a widow succeeding to her husband or a mother succeeding to her son does not apply to women who have not become members of the family by marriage: *e.g.*, a daughter takes an absolute estate in the property which she inherits from her father, and a sister takes a like estate in property inherited from her brother.

The above rule, which restricts the alienation of property by a widow inheriting from her husband or by a mother inheriting from her son, would seem to be applicable to a grandmother inheriting from her grandson, or to the widow of a *sapinda*, for they, like the widow and mother, enter by marriage into the family whence the property comes which they inherit.

The plaintiff sued to recover the moveable and immoveable property left by his brother's widow, Ladu, who died without issue. The property in question had been given to Ladu and her grandmother Ratan jointly by Ratan's sister, Lakshmi (Ladu's maternal grandaunt), who executed to them a deed of gift dated 17th December, 1843. On her death, Ratan and Ladu took possession and remained in joint possession until the death of Ratan, which occurred in 1867. Ladu was thenceforward until her death on April 19th, 1869, in sole possession.

The plaintiff had obtained a certificate of heirship to Ladu under Bombay Regulation VIII of 1827. The defendants were Ladu's first cousins once removed. They claimed under a deed of gift executed to them dated 27th February, 1869, and duly registered. The Subordinate Judge allowed the plaintiff's claim, holding the deed of gift to be *ultra vires* both as to the moveable and immoveable property. On appeal to the District Court the Judge varied the decree of the lower Court, holding the deed of gift to be *ultra vires* only as to the immoveable property, and he varied the decree by awarding to the plaintiff, as heir of Ladu, the immoveable property only. On appeal to the High Court the only question argued was the nature of the estate taken by Ladu in the immoveable property, her absolute right to the moveable property being admitted.

[663] *Held* that, whether Ladu took by grant or by inheritance from Lakshmi, she took an absolute estate, and being, as she was, without issue, had complete power to execute the deed of gift in favour of the defendants.

[**F.**, 8 Ind. Cas. 214 (215) = 4 S.L.R. 77 ; **R.**, 11 B. 285 (313) ; 11 B. 609 (615) ; 15 B. 206 (209) ; 21 B. 170 (174) ; 24 B. 192 (200) = 1 Bom. L.R. 574 ; 31 B. 453 (455) = 9 Bom. L.R. 834 ; 36 B. 546 (547) = 14 Bom. L.R. 569 (571) = 16 Ind. Cas. 343 ; **D.**, 17 B. 690 (695) (**F.B.**).]

THESE were cross appeals from the decision of H. J. Parsons, Assistant Judge at Surat, varying the decree of Dawlatram Sampatram, Second Class Subordinate Judge of Bulsar.

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* Special Appeal, No. 431 of 1874 ; and Cross Special Appeal, No. 432 of 1874.

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The facts of this case and the arguments appear from the judgment of the Court.

Chandulal Mathuradas appeared for Tuljaram Morarji.

Nagindas Tulsidas appeared for Mathuradas, Bhagvandas, and Pranjivandas.

The following authorities were referred to in argument :—

Mayukha Vyav., ch. vi. sec. viii, pl. 3, and sec. x, pl. 1, 5, 7, 8, 9, 10, 26, 28; *Vinayak Anandrav* v. *Lakshmibai* (1); *Pranjivandas* v. *Dekuvarbai* (2); Norton's Leading Cases, 26; *Doe d. Kullamal* v. *Kuppu Pillai* (3); *Vijarangam* v. *Lakshuman* (4); *Senganalathammal* v. *Valayuda* (5); *Bhugwandeen Doobey* v. *Mina Bai* (6); *Srinath Gangapadhya* v. *Sarbamangala* (7); *Chotay Lall* v. *Chunnoo Lall* (8); Mitaks., ch. ii, sec. xi, pl. 2, 11; *Gangadaraiya* v. *Parameswaramma* (9); *Krishnaji Venkatesh* v. *Pandurang Naik* (10); *Narsappa* v. *Sakharam* (11); *P. Bachiraju* v. *Venkatappadu* (12); Cole, Dig. 417, 479; *Navalram* v. *Nandkishor* (13).

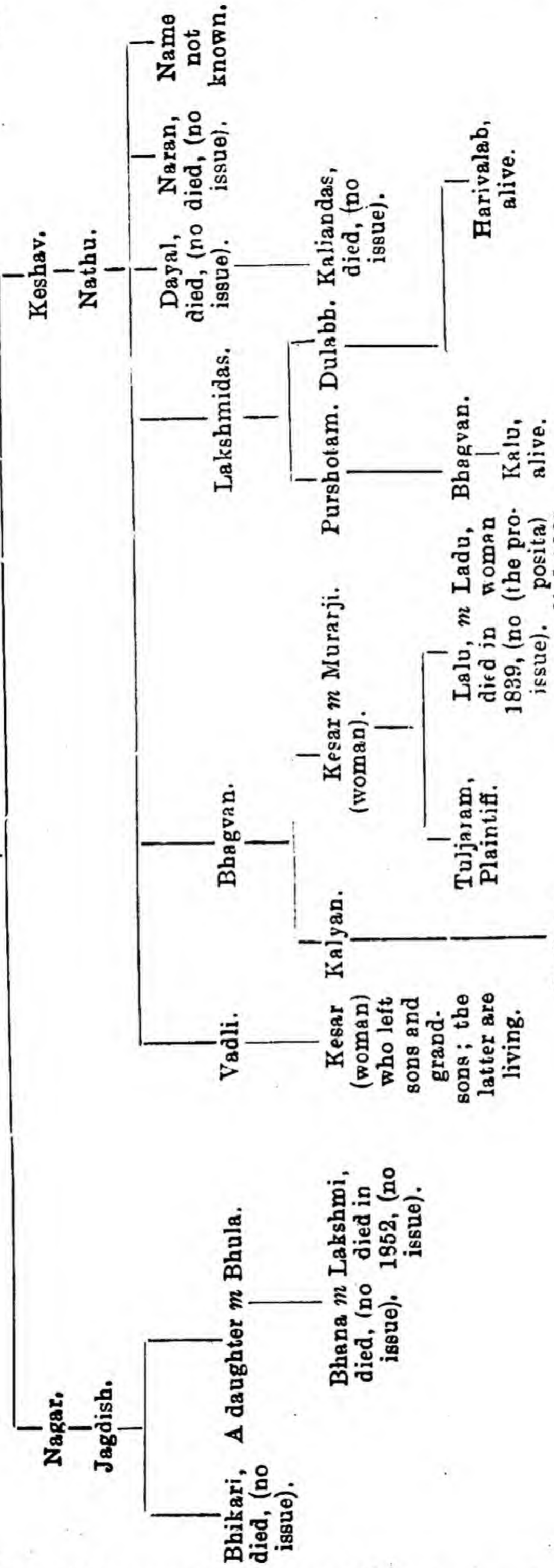
JUDGMENT.

WESTROPP, C. J.—The plaintiff brought the suit, in which these appeals have arisen, to recover certain moveable and immoveable property, which had been in the possession of the plaintiff's childless sister-in-law, Ladu, at the time of her death, and was then taken possession of by the defendants. The most remote male owner, to whom the evidence traced the property, was Bhikari Jagdish. The following pedigree, taken from a pedigree agreed to and signed by the pleaders on both sides in the Court of first instance (which pedigree has been supplemented from the other evidence), will show the relationship between the plaintiff and Bhikari Jagdish :—

(1) 1 B. H. C. R. 117. (2) 1 B. H. C. R. 130. (3) 1 M.H. C. R. 85.
(4) 8 B. H. C R. O.C.J. 244. (5) 3 M. H. C. R. 312.
(6) 11 M. I. A. 487. (7) 2 B. L. R. A. J. 144.
(8) 22 C. W. R. 496 C. R. = 14 B. L. R. 235. (9) 5 M. H. C. R. 111.
(10) Printed Judgments (Bom.) for 1875, p. (52).
(11) 6 B. H. C. R. A.C.J. 215.
(12) 2 M.H.C R. 402. (13) 1 B.H.C.R. A.C.J. 209.

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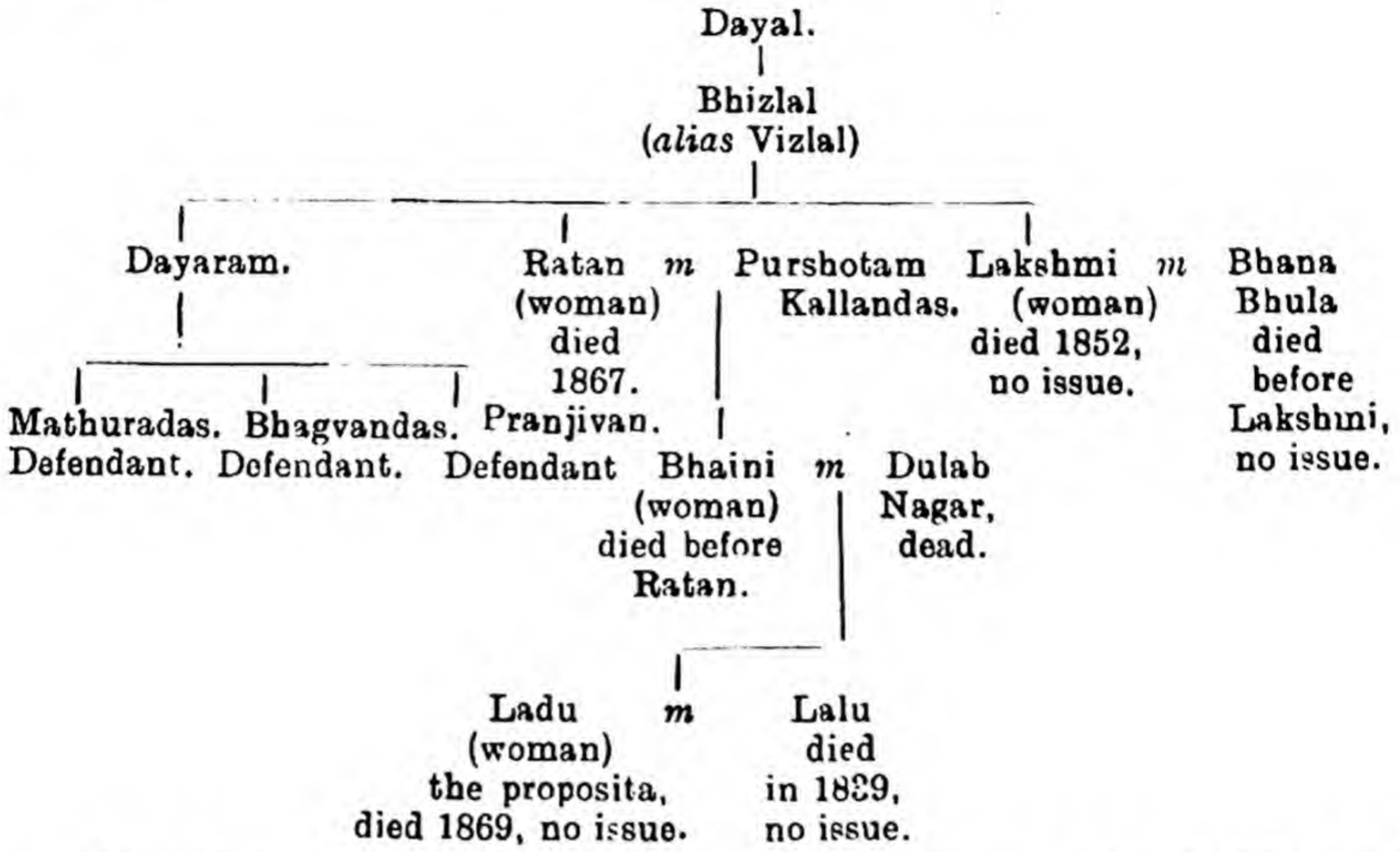
[665] It will be seen that the pedigree traces the relationship of the plaintiff, Tuljaram, through a female (his mother Kesar) to Bhikari, and that Ladu (the proposita) merely came into the family, by her marriage to Lalu, the deceased brother of Tuljaram.

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Ladu's relationship to Lakshmi, her maternal great-aunt, (through whom both parties admit that Ladu obtained the property in dispute), and Ladu's relationship to the defendants are shown in the following table :—



The plaintiff Tuljaram relied on a certificate of heirship to Ladu which certificate he had obtained under Bombay Reg. VIII of 1827 after a contest with the defendants ; and in his plaint he described himself as "the heir of the deceased Ladu, being the full brother of her husband Lalu." He, in that plaint, made no mention of Bhikari Jagdish.

The defendants claimed under a deed of gift to them by Ladu (Ex. 8) dated 27th February 1869. It is duly stamped, attested, and registered, and is found by the Assistant Judge to have been executed by Ladu. The Subordinate Judge held it to be *ultra vires* as regarded both the moveable and immoveable property, and made a decree for the plaintiff as prayed by him. The Assistant Judge, holding that deed to be *ultra vires* so far only as regarded the immoveable property, varied the decree of the Subordinate Judge by awarding to the plaintiff, as heir of **[666]** Ladu, the immoveable property only, and leaving the moveable property in the possession of the defendants.

Both parties appealed to this Court. The plaintiff, in his memorandum of special appeal (No. 431), complained of the ruling of the Assistant Judge that the moveable property passed by Ladu's deed (Ex. 8) to the defendants, which deed the plaintiff contended was void for want of consideration. The defendants in their memorandum of special appeal (No. 432) complained of the ruling of the Assistant Judge that Ladu had not power to alienate the immoveable property, and of his not holding that the defendants were Ladu's heirs.

At the hearing before this Court the learned pleader for the plaintiff, being unable to show authority for the proposition that any consideration was necessary to support Ladu's deed of gift (Ex. 8), and declining to argue that she had not acquired an absolute estate in the moveable property of her maternal great-aunt Lakshmi, the appeal of the plaintiff (No. 431) was virtually abandoned. The contest was upon the defendants' appeal (No. 432) as to the immoveable property. Before entering upon the right of Ladu to dispose of that property, a fuller statement of facts is desirable.

Exhibits 15, 45 and 46 being all upwards of thirty years old and coming from the proper custody, *viz.*, that of the defendants, were admitted in evidence without impeachment. We proceed to mention their contents.

As already stated, the last male owner of the property in dispute (moveable and immoveable) was Bhikari, the son of Jagdish. He being childless, by a deed of gift (Ex. 15) in favour of Bhana Bhula (the husband of Lakshmi), made on the 20th August, 1815, and registered in the Surat Adalat on the 23rd May, 1816, reciting that Bhikari had brought Bhana Bhula from Navsari and had kept him in his (Bihkari's) house and maintained and educated him, and that Bhana had carefully attended and performed services for Bhikari when he was unable to serve himself, proceeded thus : "I, therefore, of my free will and accord and in sound sense give in writing as follows :—As you are my sister's son you are my *dharm-putra* (adopted son) **[667]** My entire inheritance [here followed an enumeration of his property, moveable and immoveable], and any other thing which is in my possession and enjoyment is given to you in gift. I have made you my heir on condition that as long as I and my wife live, the said property shall remain in our possession, and that after our deaths it shall remain in your possession and enjoyment. Nobody (else) has anything to do with it. Should any one set up any claim, the same shall be void," &c. "You are to perform the funeral ceremonies of myself and my wife. You are to be responsible for debts and dues." Beyond the recital in that deed that Bhana (the donee) was the adopted son of Bhikari (the donor), there was not any evidence of his adoption. Nor does Bhana appear to have assumed the name of Bhikari in lieu of that of Bhula, his natural father.

Bhana pre-deceased Bhikari. Nevertheless, on the death of Bhikari, Lakshmi, without opposition from the male or other heirs of Bhikari, took possession of his property, and in all respects acted as absolute owner of it. For instance, by the deed (Ex. 45), dated 30th July 1836, she, for valuable consideration, sold and conveyed to her brother Dayaram valad Vizal bin Dayal (which Dayaram was father of the defendants), the middle *gala* of a house formerly belonging to Bhikari. And by the deed (Ex. 46) of the same date she sold other portions of the same house for valuable consideration to her sister Ratan, grandmother of Ladu.

Finally, Lakshmi executed the deed of gift (Ex. 47), dated the 17th December, 1843, in favour of her sister Ratan and maternal great-niece Ladu, granddaughter of Ratan. Ladu's mother Bhaini (daughter of Ratan) as well as Ladu's husband Lalu were then dead. It proceeded thus :—"To you both I give in writing this deed of gift as follows in my lifetime and of my own free will and pleasure. Of my own womb I have no issue, neither son, nor daughter, and in the present day my age has become ripe, but except you there is not anybody to render me service by assistance, and up to this day you have given me good treatment in the way of service in every manner, and you will continue to render the same so long as I live. For this, my total property, apparel, pots, jewellery, and ornaments and all (including furniture) **[668]** moveables and immoveables, I have given to you as a present. Do you therefore, so long as I live, render me service, and give me good treatment. And, after I am dead, perform my funeral obsequies in the way you think best. And after that, you two should take the enjoyment of all my moveable and immoveable property, and, should one of you die, then let the survivor take the same. Henceforth I have given away my property to you. Should anybody, either on the ground of inheritance or of any other ground, make a claim

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to the same, such claim shall be null and void. Do you therefore, on my death, take into your possession all my moveable and immoveable property, and let the survivor of you take personal enjoyment of the same. You may sell, mortgage or give away the same; for this you have liberty. No one else has any claim. I have executed this of my free will and pleasure in the presence of the undernamed witnesses." The execution of that deed was not disputed. Lakshmi died in 1852. On her death Ratan and Ladu took possession of the property, and remained in joint possession until the death of Ratan, which occurred in 1867. Ladu was thence forward until her death on April 19th, 1869, in sole possession.

On the 27th February, 1869, Ladu duly executed the first abovementioned deed of gift (Ex. 8), (the validity of which is now in contest), in favour of her three first cousins once removed: namely, Mathuradas, Bhagvandas and Pranjivandas (the sons of her great-uncle Dayaram), the defendants in this suit and appellants in Special Appeal No. 432. This deed has been duly registered under Act XX of 1866. If that deed be valid, the certificate of Tuljaram's heirship to Ladu cannot prevail against it. Such a certificate is not conclusive and may be declared null in a plenary suit such as the present suit is: Bombay Reg. VIII of 1827, s. 7, cl. ii.

Bhikari, being without male issue, and not a member of an undivided family, was competent to dispose even of his ancestral property by deed of gift or will: *Bhika* v. *Bhana* (1); *Narottam Jagjiwan* v. *Narsandas* (2); *Baboo Beer Purtab Saheb* v. *Maharajah* [669] *Rajender* (3). There may be some difficulty in determining whether Ex. 15, which Bhikari executed in favour of Bhana, is to be regarded as a deed of gift or as a will. It does not appear that Bhana was ever in possession under it. If Ex. 15 be a will, the devise to Bhana lapsed, inasmuch as he predeceased Bhikari. The date of Bhikari's death has not been fixed with certainty, but he must have died before 1836. It is admitted that Lakshmi, the wife of Bhana, possessed herself of Bhikari's property on his death, and, except so far as she alienated parts of it as above mentioned, continued in uninterrupted possession down to her own death in 1852, and was succeeded by her donees under Ex. 47, Ratan and Ladu, who continued in joint possession from 1852 to 1867, when Ratan died, and Ladu continued thence until her own death in 1869 in sole possession. Whether Ex. 15 be or be not considered as conferring title upon Lakshmi, and whether or not Bhana be deemed to be the adopted son of Bhikari, certain it is that, before the death of Ladu in 1869, there had been a possession by Lakshmi and, after her, by Ladu of, at the very least, 33 years, which possession was adverse to Tuljaram and the heirs of Bhikari. The plaint in the present suit was not filed until 1872. At Bhikari's death several of his *sapindas* were in existence, and the pedigree first above given shows that there still are some, whereas Bhana being a sister's son was only a *bandhu* (4), and neither he nor his widow Lakshmi in right of him could have succeeded in accordance with Hindu law until the *sapindas* were exhausted.

But inasmuch as Tuljaram, the plaintiff, is related to Bhikari only through his (Tuljaram's) mother Kesar, and there are *sapindas* of Bhikari in existence of the unbroken male line, it is as necessary for Tuljaram as for the defendants to treat Lakshmi and Ladu as legitimate owners of

(1) 9 Harr. S. D. A. 446.
(2) 3 B.H.C.R.A.C.J. 8.
(3) 12 M.I.A. 1. (38, 39), *per* Sir James Colvile.
(4) West and Buhler, 2nd ed., p. 205.

the property in dispute, and, as above remarked, Tuljaram in his plaint rests his claim as heir to Ladu on his being brother to Lalu, the husband of Ladu, and says nothing in that plaint of Bhikari. He does not dispute Lakshmi's right to make the deed of gift (No. 47) in favour of **[670]** Ratan and Ladu, and yet he inconsistently denies the power of Ladu to bestow the property on the defendants, her first cousins once removed. The Courts below have pronounced Tuljaram to be the heir of Ladu as brother of Lalu. Whether he is so or not, it is unnecessary for us to decide, inasmuch as we are of opinion that, according to the law and usage of this Presidency, Ladu had power to dispose of the property by deed or will, and has by Ex. 8 effectually disposed of it in favour of her kinsmen, the defendants.

Here, in this Presidency, the widow, who, as such, takes the property of her husband dying without leaving male issue and separated from his kinsmen, is, except for certain limited purposes, restrained from alienating such portion of that property as is immoveable. In it she has only an estate *durante viduitate*, but she is entitled to his moveable estate absolutely: *Pranjivandas* v. *Devkuvarbai* (1); Mayukha, ch. iv, s. 8, pl. 3, 4; see also 8 Bom. H. C. Rep. at p. 156, O. C. J.; 4 Bom. H. C. Rep. at p. 163, O. C. J.; and 6 Bom. H. C. Rep., p. 1; Act XV of 1856, s. 2. A mother, inheriting from her son, is, as to the nature of the estate which she takes in moveable and immoveable property, in the same position as that of a widow inheriting from her husband: *Narsappa* v. *Sakharam* (2). The same rule would seem to be properly applicable to the grandmother inheriting from her grandson, or to the widow of a *sapinda* succeeding, under circumstances similar to those under which Mankuvarbai succeeded in the case of *Lalubhai Bapubhai* v. *Mankuvarabai* (3), for they, like the widow and mother, enter by marriage into the family whence the property comes which they inherit.

But to females, who have not become members of the family by marriage, the restriction as to the alienation of property has not been applied in this Presidency. For instance, a daughter takes an absolute estate in the property which she inherits from her father, and a sister takes a like estate in the property which she inherits from her brother: *Vinayak Anandrav* v. *Lakshmibai* (4) **[671]** *Pranjvandas* v. *Devkuvarbai* (1); *Haribhat* v. *Damodarbhat* (5); *Babaji* v. *Balaji* (6); West and Buhler, 2nd ed., 471.

Referring to *Vinayak Anandrav* v. *Lakshmibai* (4), Mr. Mayne, the learned and able author of a Treatise on Hindu Law (7), says rightly that the force of the decisions given in that case by the Supreme Court of Bombay and Her Majesty's Privy Council consists in the fact that they were given on dumurrer. But he hazards a conjecture that "it is probable that the general allegation of waste was not put in any form which would have supported a decree." We have procured from the Equity Records of the Supreme Court the bill in that suit, and find that, amongst several other specific charges of waste committed by Lakshmibai, is the following in paragraph 13 of the bill:—"The defendant Lakshmibai has

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(1) 1 B.H.C.R. 130.
(2) 6 B.H.C.R.A.C.J 215.
(3) 2 B. 388=7 I. A. 212.
(4) 1 B.H.C.R. 117 (124).
(5) 3 B. 171.
(6) Sec. App. 470 of 1880. Printed Judgments of 1881, p. 157.
(7) 2nd ed., pl. 533.

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sold the said piece of land or ground situate at Warli forming part of the immoveable estate of her deceased husband, and is still attempting to sell part of the immoveable property of the said Bhagwantrav Venkaji, (her late husband) with a view of appropriating the money to her own use, although she did not and does not pretend that there was or there is any necessity for the said sale,and several brokers have during the last year and a half, at her request, gone into the bazaar at Bombay, and on several occasions offered the said last-mentioned property for sale." This paragraph (the truth of which for the purpose of the demurrer was admitted) was alone quite sufficient to support a decree and injunction, if the plaintiffs had any interest in the property, the subject of the suit. The Supreme Court and Privy Council, however, held that the plaintiffs had not any interest, reversionary or otherwise, in the property. It may here be properly mentioned that the decision of the Supreme Court in 1859 in *Pranjivandas* v. *Devkuvarbai* and its decision in 1861 in *Vinayak Anandrav* v. *Lakshmibai* were in accordance with the pre-existing traditions in that Court and in the legal profession in Bombay. With the single exception of Sir Erskine Perry's useful volume of Oriental Decisions there were **[672]** not then any reports of cases in the Supreme Court and the Bar was dependent on tradition for its knowledge of the course pursued in such matters by the Court. The principal depositaries of that tradition were the late Mr. LeMessurier and late Mr. Willam Howard, and the assistance which they generously rendered to members of the Bar on first arriving in Bombay in acquiring a knowledge of the practice of the Court and the legal usages of the country must ever be gratefully remembered. The former had been in Bombay from 1822 to 1854, during the latter 20 years of which time he filled the office of Advocate-General. The career of Mr. William Howard extended from 1836 to 1856, during the greater part of which time he was emphatically the leader of the Bombay Bar. The experience of these two gentlemen extended far beyond that of any of the Judges of the Supreme Court. Those Judges very rarely exceeded their allotted period of ten years' service. The appellants in *Vinayak Anandrav* v. *Lakshmibai* resorted to Her Majesty's Privy Council against the advice given to them by counsel. The decision in that case and that in *Pranjivandas* v. *Devkuvarbai* have been steadily followed by the High Court in numerous unreported cases, and by the legal profession in advising upon titles. Any departure now from those decisions would cause much confusion and injustice throughout this Presidency, and no advantage that we can perceive. We, therefore, must abide by the principles which they clearly indicate.

The Assistant Judge, omitting to notice Ex. 47, seems to have regarded Ladu as having inherited from Lakshmi. If this were so, Ladu would have so inherited as maternal great-niece of Lakshmi. Under such circumstances we think that her position, as to the nature of the estate which she would take, would be the same as that of a daughter or sister. There is not, to our knowledge, any precedent in this Presidency for applying the restriction upon alienation by females to women who have inherited otherwise than by virtue of marriage. We think that the analogy existing between the cases of a daughter, a sister, and a great-niece, necessitates the application to the last-mentioned of the rule applicable to the two former.

Whether, therefore, we regard Ladu as taking by grant (Ex. 47) or by inheritance from Lakshmi, we must hold that Ladu **[673]** took an

absolute estate, and being, as she was, without issue, had complete power to execute the deed of gift (Ex. 8) in favour of the defendants.

We must accordingly reverse the decrees of the Courts below, and make a decree for the defendants, with costs of suit and of both appeals.

Decree reversed.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill and Mr. Justice Kemball.

BHIKAMBHAT (*Original Applicant*), *Appellant v.* JOSEPH FERNANDEZ, DECEASED, BY HIS SONS AND HEIRS ANDREW FERNANDEZ AND OTHERS (*Respondents*).* [29th and 30th August, 1881.]

Decree on bond specially registered—Execution—Registration Act XX of 1866, *ss.* 53 *and* 55—*Summary decision—Civil Procedure Code* (*Act X of* 1877), *ss.* 2.244 (*c*), 591—*Right of appeal—Limitation Act, IX of* 1871, *sch. II, arts.* 166 *and* 167—*Decree or order in regular suit—Act XIV of* 1859, *ss.* 20 *and* 22—*Applications for execution in suits instituted before* 1*st April*, 1873.

An appeal lies from an order in execution of a decree made under s. 53 of Act XX of 1866.

An application for the execution of a decree made under s. 53 of Act XX of 1866 falls within art. 166, and not within art. 167, sch. II of Act IX of 1871. *Jai Shankar* v. *Tetley* (1) dissented from.

A proceeding under s. 53 of Act XX of 1866, though in the nature of a suit, is not a regular suit, and a decree made in such a proceeding is a decision of a Civil Court other than a decree passed in a regular suit.

The ruling of the Privy Council in *Mungal Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (2)—that Act XIV of 1859, and not Act IX of 1871, applied to applications in suits instituted before the 1st April, 1873 - followed.

On the 13th July, 1872, the appellant obtained a decree, under s. 53 of Act XX of 1866, on a bond specially registered under s. 52 of that Act. He applied for the execution of it,—first on the 2nd September, 1872, and, again, on the 18th August, 1875. The Court made an order on the 15th November, 1874, dismissing the proceedings on his second application for execution. The decree not being fully satisfied, he again applied for its execution on the 11th September, 1878.

[674] *Held*—that the application of the 11th September, 1878, was barred both under s. 22 of Act XIV of 1859 and art. 166 of sch. II of Act IX of 1871, no proceeding having been taken to enforce the summary decree within one year next preceding the said application.

[F., 12 C. 511; R., 6 B. 54 (62); 10 C. 196 (P.C.) = 13 C.L.R. 385 = 10 I.A. 113 = 4 Sar. P.C.J. 421.]

THIS was a second appeal from an order made in an execution proceeding by A. L. Spens, District Judge of Kanara, affirming the decision of Munjunathaya Shantapa, Subordinate Judge of Honore.

On the 13th July, 1872, the appellant, Bhikambhat, obtained a decree against the defendant, Joseph Fernandez (deceased), for Rs. 2,064 and costs, under s. 53 of Act XX of 1866, on a bond specially registered under s. 52 of that Act. On the 2nd September, 1872, he applied for the execution of the decree, and recovered Rs. 1,150 by the attachment and sale of certain immoveable property in the possession of Andrew Fernandez, one of the sons and heirs of the deceased defendant. On the 18th

* Second Appeal No. 2 of 1879 from order.

(1) 1 A. 586.

(2) 8 I.A. 123.

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August, 1875, the appellant again applied for execution against Andrew Fernandez for the balance of the money due under the decree, and the Court ordered a notice to be issued to him. But as he could not be found, the Court, at the request of the appellant's pleader, struck off the application from the file on the 15th November, 1875. On the 11th September, 1878, the appellant made the present application for the execution of the decree against Andrew Fernandez and four others.

The Subordinate Judge, on the 16th June, 1879, dismissed the appellant's application, as barred under Act IX of 1871, sch. II, art. 166. On appeal, the District Judge upheld the order of the first Court on the 8th August, 1879.

The appellant thereon appealed to the High Court.

The appeal first came before a Division Bench (Westropp, C.J., and Pinhey, J.) on the 11th July, 1871.

Shamrav Vithal, for the appellant.

Ghanasham Nilkanth, for the respondents, took a preliminary objection that an appeal did not lie in the present case.

The cases, relied upon by the pleaders in support of their respective contention, are mentioned in the order of reference.

[675] The Division Bench referred the case to a Full Bench on the two questions stated in the following order:—

WESTROPP, C.J.—The High Courts of Calcutta and Allahabad being at issue on the question, whether an appeal lies from an order in execution of a decree made under s. 53 of Act XX of 1866, we refer that point to a Full Bench.

We also referred to the same Full Bench the question, whether an application for execution of such a decree falls within art. 166 or art. 167 of sch. II of Act IX of 1871.

On the above points the following cases have been cited :—*In re Rash Beharee Baboo* (1); *Ram Narain Doss Biswas* v. *Sreemunth Poddar* (2); *Hurnath Chatterjee* v. *Futtick Chunder Sumaddar* (3); *Radha Kristo Dutt* v. *Gunga Narain Chatterjee* (4); *Huro Soonduree Debia* v. *Punchoo Ram Mundal* (5); *Girish Chandra Dutt* v. *Buzul-ul-hug* (6); *Gora Chand Misser* v. *Raja Baykanto Narain Singh* (7); *Bhyrub Chunder* v. *Golap Coomary* (8); *Ramanand* v. *The Bank of Bengal*; *Wilayat-un-Nissa* v. *Najib un-Nissa* (9); *In re Ganpat Manikji Patil* (10).

The case was heard by the Full Bench on the 22nd August, 1881.

Shamrav Vithal appeared for the appellant.

Ghanasham Nilkanth, for the respondents.

The following cases were cited in addition to those mentioned in the order of reference :—*Syud Emam Momtazuddeen Mahomed* v. *Raj Coomar Doss* (11); *Jai Shankar* v. *Tetley* (12).

JUDGMENT OF THE FULL BENCH.

The judgment of the Full Bench was delivered on the 29th August, 1881, by

MELVILL, J.—The first question referred to the Full Bench is, whether an appeal lies from an order in execution of a decree made under s. 53 of Act XX of 1866.

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(1) 7 W R C.R. 130.
(2) 9 W.R.C.R. 498.
(3) 18 W.R.C.R. 512.
(4) 23 W.R.C.R. 328.
(5) 34 W R. 225.
(6) 3 B.L.R.A.C.J. 68.
(7) 12 B.L.R. F.B. 261.
(8) 3 C. 517.
(9) 1 A. 377, 583.
(10) 6 B.H.C.R.O.C.J. 64.
(11) 23 W.R.C.R. 187.
(12) 1 A. 586.

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In several cases cited in the order of reference the Calcutta High Court has decided the above question in the negative.

[676] The ground of these decisions appears to be that s. 55 of the Act enacts that no appeal shall lie against any decree or order made under ss. 53, 54 and 55; that by s. 53 a decree made under that section "may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure"; that the effect of the last quoted words is virtually to incorporate into s. 53 the provisions for the enforcement of decrees contained in the Code of Civil Procedure; and that, consequently, an order made under any of those provisions is an order made under s. 53, and, as such, comes within the prohibition against appeal contained in s. 55.

The above construction is, no doubt, logically admissible, but it is not, as it appears to us, a necessary construction. And, restrictive as it is of the ordinary right of appeal, we should not be disposed to adopt it, if we can see our way to any other construction, equally in harmony with the words of the statute, and more consonant to what may reasonably be supposed to have been the intention of the Legislature. It is clearly just that a party who has covenanted to submit to a summary decree should not be allowed to appeal against such a decree. But in the execution of such a decree, both parties are exposed to all the ordinary risks and possible injury arising from an erroneous order; and there would appear to be no just cause why the sufferer should be deprived of any of the ordinary remedies which the Code of Civil Procedure provides for a decree-holder or a judgment-debtor.

A majority of the Judges of the Allahabad Court in *Wilayat-un-Nissa* v. *Najib-un-Nissa* (1) have held that, according to a strict and proper construction of s. 55 of Act XX of 1866, the parties to a decree made under s. 53 are not deprived of such rights of appeal as the Code of Civil Procedure declares to attach to orders in execution passed under the provisions of that Code. In this view we concur; but we should have some difficulty in following the opinion of the learned Judges that the proceedings under s. 53 of Act XX of 1866 are not in the nature of a suit, and yet that an appeal against an order in execution is [677] permissible under the Code of Civil Procedure. Having regard to the terms of s. 591, and of s. 244 (*c*), read in conjunction with the definition of the term "decree" in s. 2 of the Code, it appears to us that an appeal is not allowed in regard to a question arising in execution of a decree, unless such question arises between parties to a *suit*. We accept, however, the decision of the Calcutta Full Bench in *Syud Emam Momtazuddeen Mahomed* v. *Raj Coomar Doss* (2), that proceedings under s. 53 of Act XX of 1866 are in the nature of a suit; and on this ground we hold that an order made in the execution of the decree comes within the definition of a "decree" contained in the Civil Procedure Code, and is, therefore, subject to appeal.

The second question referred to the Full Bench is, whether an application for the execution of a decree made under s. 53 of Act XX of 1866 falls within art. 166 or art. 167 of sch. II of Act IX of 1871.

In *Jai Shankar* v. *Tetley* (3) the Full Bench of the Allahabad Court has held that such an application falls within art. 167, and not art. 166 of the schedule. We should have been glad if we could have adopted this view; but it does not appear to us to be in accordance

(1) 1 A. 583. (2) 23 W. R. 187. (3) 1 A. 586.

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with a proper construction of the provisions of Act IX of 1871. Article 166 provides a period of one year "for the execution of a decision (other than a decree or order passed in a regular suit or an appeal) of a Civil Court or of a Revenue Court." Then follows art. 167, which provides a period of three years "for the execution of a decree or order of any Civil Court not provided for in art. 169." Now, of course, the words "decree or order" in art. 167 are sufficiently wide, if the fullest effect be given to them, to embrace every description of decision, and, therefore, to include the decisions provided for in art. 166. It is manifest, therefore, that the words "decree or order" in art. 167 must be read with some limitation; for, otherwise, they would include the decisions mentioned in art. 166, which article would, consequently, have no operation. On the principle that *generalia specialibus non derogant*, the general words "decree or order" in art. 167 must be read **[678]** as including only such decrees and orders as have not been already specially provided for in art. 166,—that is to say, only such decrees or orders as have been "passed in a regular suit or an appeal." The question, then, as regards a decree made under s. 53 of Act XX of 1866, is whether it is a decree in a regular suit; for, if it be not so, it must be held to fall within art. 166, and not art. 167 of the Limitation Act of 1871. Now, even if the Registration Act were silent on the subject, we should hesitate to hold that an *ex parte* proceeding, consisting of nothing beyond a petition and a decree, could properly be regarded as a regular suit. But, in fact, the Act itself in ss. 52 and 53, speaks of the proceeding as a mode of recovering money "in a summary way," and directs that the petition shall be presented "to any Court which would have had jurisdiction to try a regular suit on the obligation for the amount secured thereby." So that, unless we are to suppose the Legislature to use technical terms in different senses at different times, it is quite clear that a proceeding under s. 53 of Act XX of 1866, though in the nature of a suit, is not a regular suit, and that a decree passed in such a proceeding is a decision of a Civil Court, other than a decree passed in a regular suit, and, as such, comes within the operation of art. 166 of the Limitation Act.

We are confirmed in this view by comparing arts. 166 and 167 with ss. 22 and 20 of the previous Limitation Act No. XIV of 1859. Section 22 provided a period of one year for "any summary decision or award of any of the Civil Courts not established by Royal Charter, or of any Revenue authority"; while s. 20 prescribed a period of three years for "any judgment, decree, or order" of any Court not established by Royal Charter. It seems clear that arts. 166 and 167 of the Act of 1871 were intended to reporduce, without alteration, the above provisions of the Act of 1859, and that, consequently, any "summary decision" (which s. 53 of Act XX of 1866 expressly declares a decree made under that section to be) falls within art. 166 of Act IX of 1871, as it would have fallen within s. 22 of Act XIV of 1859.

Our reply to the second question referred to the Full Bench must, therefore, be that, in our opinion, an application for execution **[679]** of a decree made under s. 53 of Act XX of 1866 falls within art. 166, and not within art. 167 of sch. II of Act IX of 1871.

On the return of the case by the Full Bench, it came again before the Division Bench for final disposal on the 30th August, 1881.

Shamrav Vithal, for the appellant.

Ghanasham Nilkanth, for the respondents.

JUDGMENT OF THE DIVISION BENCH.

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The following is the judgment of the Court :—

WESTROPP, C. J.—The Full Bench has found on the questions referred to it by this Division Court—

1. That an appeal does lie from on order in execution of a decree made under s. 53 of Act XX of 1866.

2. That an application for execution of such a decree falls within art. 166, and not art. 167, of sch. II of Act IX of 1871.

Mr. Shamrav Vithal (for the appellant) now, on the cases coming before this Division Bench for final disposal, has drawn our attention to the case of *Mangal Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (1) where Her Majesty's Privy Council have held that Act XIV of 1859, and not Act IX of 1871, is applicable to applications in suits instituted before the 1st of April 1873, and to the fact that the suit, in which the order is under appeal in the present case, was instituted in 1872. He observes that, under s. 22 of Act XIV of 1859, his client's application for execution, made on the 11th September 1878, is as fully barred as by art. 166 of Act IX of 1871, no proceeding having been taken to enforce the summary decision or order of the 13th July 1872 within one year next preceding the present application for its execution. This Court, concurring in that view, affirms, with costs, the orders of the Court below whereby the application of the plaintiff for execution was dismissed.

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5 B. 680.

[680] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

BALAJI RANCHODDAS AS MANAGER OF THE ESTATE OF MOHANLAL DALSUKHRAM, DECEASED (*Applicant*).* [30th August, 1881.]

Decree—Execution—Power of the District Court to withdraw applications for execution—Mofussil Courts of Small Causes—Jurisdiction—Civil Procedure Code (Act X of 1877), ss. 25 and 647, sch. II.

Sections 25 and 647 of the Civil Procedure Code, Act X of 1877, are both applicable to Courts of Small Causes in the Mofussil, and the former section is extended by the latter to execution proceedings in such Courts.

Under s. 25 of the Civil Procedure Code, Act X of 1877, the District Judge has power to withdraw an application for execution of a decree from a Subordinate Court (such as a Mofussil Court of Small Causes) and to dispose of it himself, or to transfer it to another Subordinate Court competent to deal with it.

The distinction made for the purposes of limitation between suits, appeals, and applications by the Limitation Acts has no bearing upon a question of jurisdiction.

[N.F., 15 C. 177 ; F., 22 B. 778 (782) ; R., 16 C. 457 (463) ; 13 Ind. Cas. 542 (543) ; Cons., 18 B. 61 (64).]

THIS case was referred for the opinion of the High Court by S. H. Phillpotts, District Judge of Ahmedabad, under s. 617 of the Civil Procedure Code, Act X of 1877.

The applicant Balaji Ranchoddas, as manager of the estate of Mohanlal Dalsukhram, deceased, presented an application to the District

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* Civil Reference, No. 23 of 1881.

(1) 8 I. A. 123.

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Judge of Ahmedabad, stating that there were several decrees against Mohanlal Dalsukhram passed by the Subordinate Court and the Small Cause Court of Ahmedabad; that on the applications of the decree-holders for execution the said Courts ordered the amounts of their decrees to be recovered from the estate of Mohanlal, and issued attachment against his property; that the applicant, finding that Mohanlal's property was not sufficient to pay off his debts, took proceedings under ss. 213 and 344 of the Civil Procedure Code (Act X of 1877) to establish the insolvency of his (Mohanlal's) estate and the insufficiency of his property to pay off his debts. The applicant, therefore, prayed that the District Judge, under s. 25 of Act X of 1877, might withdraw the execution proceedings pending in the Small Cause Court and transfer them to the Subordinate Court for disposal, submitting that such a course would be convenient to all the parties concerned. The District Judge, accordingly, called for **[681]** the papers of the execution proceedings pending in the Small Cause Court, but the Judge of the latter Court declined to send them, on the ground that the District Judge had no jurisdiction in the matter. The Judge of the Small Cause Court was of opinion that s. 25 of Act X of 1877 applied only to suits and not to applications for the execution of decrees, and referred to several decisions of the Allahabad and other High Courts regarding the distinction made by the Limitation Acts between suits, appeals, and applications. The District Judge, being of opinion that he had jurisdiction, submitted the case for the decision of the High Court.

There was no appearance of parties in the High Court.

The following is the judgment of the Court:—

JUDGMENT.

WESTROPP, C.J.—Sections 25 and 647 of the Civil Procedure Code (Act X of 1877) are both applicable to Courts of Small Causes in the Mofussil,—see sch. II of Act X of 1877 and the concluding clause in s. 25. Questions arising in the execution of decrees are frequently quite as important as the questions in issue in suits and appeals, and this Court sees no reason for holding that s. 25 is not extended by s. 647 to execution proceedings in Courts of Small Causes. The distinction taken for the purposes of limitation between suits, appeals, and applications by the Limitation Acts relied on by the Judge of Small Cause Court does not appear to this Court to have any bearing upon the present question, which is not one of limitation. Section 647 has been held to extend s. 575 (which on the face of it applies to appeals only) to applications to the High Court in its extraordinary jurisdiction: *Apaji Bhivrav* v. *Shivlal Khubchand*(1).

This Court's reply to the question of the District Judge, whether he has power, under s. 25 of Act X of 1877, to withdraw an application for execution of a decree from a Subordinate Court, and to dispose of that application himself, or to transfer it to another Subordinate Court competent to deal with the same, must be in the affirmative. The very case in which the question has arisen, shows the utility of such a power.

(1) 3 B. 204.

5 B. 682.

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5 B. 682.

[682] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice F. D. Melvill.

GOSAIN RAMBHARTI JAGRUPBHARTI (*Original Defendant*), *Appellant v.* MAHANT SURAJBHARTI HARIBHARTI (*Original Plaintiff*), *Respondent.**

GOSAVIISHVARBHARTI HARIBHARTI (*Original Defendant*), *Appellant v.* MAHANT SURAJBHARTI HARIBHARTI (*Original Plaintiff*), *Respondent.** [17th November, 1880.]

Hindu law—Gosains—Inheritance—Office of Mahant—Marriage—Evidence—Forfeiture—Burden of proof.

Among the Gosains of the Deccan and certain other places marriage does not work a forfeiture of the office of Mahant and the rights and property appendant to it.

Where the plaintiff proved his right of succession to a *math* on the death of its Mahant, the burden of proving that his subsequent marriage worked a forfeiture of his office and his appendant property and rights, lay upon the defendant who impugned the plaintiff's right on account of the marriage.

THESE were appeals from the decision of Rao Babadur Makundrai Manirai, First Class Subordinate Judge of Ahmedabad, in original suit No. 2384 of 1876.

The plaintiff Surajbharti sued for a declaration of his right that he was the *chela* (disciple) and heir of one Haribharti, deceased, and entitled to the whole moveable and immoveable property left by his Guru. Haribharti was the Mahant of a *math* in Ahmedabad, called Dudhadari, and held an inam village attached to the *math*. He died in 1875, when the plaintiff succeeded to the *math* and the inam village as his *chela* (disciple). The plaintiff subsequently married, and was disturbed in the enjoyment of the property by the defendant Rambharti, who claimed the inheritance on the ground that he was declared Mahant by the Panch of his sect, as the plaintiff, by his marriage, had lost his right to the Mahantship. The plaintiff thereon applied for a certificate of his heirship to the District Judge, who refused to grant it, and referred the plaintiff to a regular suit. He, therefore, instituted the present suit for a declaration of his right as Mahant of Dudhadari and entitled to the estate of the deceased Haribharti.

The defendant Rambharti, *inter alia*, alleged that although the plaintiff was the deceased Haribharti's *chela*, he had lost his **[683]** right to the estate in consequence of his marriage; that no married Gosain could be a Mahant, according to the usage and custom of his sect; that he was made Mahant by the panch (headmen) of his sect, and, therefore, entitled to the *math* and property. The defendant Ishvarbharti alleged, among other things, that he was the senior *chela* of the deceased, and entitled to the property in dispute, in preference to the plaintiff or the defendant Ishvarbharti; that the plaintiff had lost his right to the estate by his marriage.

The Subordinate Judge found on the evidence that on the death of Haribharti the plaintiff succeeded to the *math* and the other property; that his subsequent marriage did not deprive him of his right to the pro-

* Appeal No. 11 of 1880.

† Appeal No. 12 of 1880.

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perty as successor of his Guru; that the defendant Ishvarbharti failed to prove himself to be a *chela* (disciple) of Haribharti; that the defendant Rambharti was not appointed Mahant by the panch, and not entitled to succeed to the inheritance. He accordingly made a decree in favour of the plaintiff.

Against that decision the defendants preferred separate appeals to the High Court.

The appeals were heard together. The principal points in argument were, whether the plaintiff had lost his right to the inheritance by reason of his marriage, and whether on the evidence either of the defendants was entitled to it, to the exclusion of the other and the plaintiff.

Farran (with him *Pandurang Balibhadra*) appeared for the defendant Rambharti in Appeal No. 11.

Telang (with him *Shantaram Narayan*) appeared for the defendant Ishvarbharti in Appeal No. 12.

Jardine (with him *Bhaishankar*) appeared for the plaintiff in both the appeals.

The following is the judgment of the Court:—

JUDGMENT.

WESTROPP, C.J.—We agree with the Subordinate Judge in thinking that Ishvarbharti has failed to show that he was a *chela* of Haribharti, the deceased Mathdar or Mahant of Dudhadari. The defendant Rambharti does not deny that the plaintiff was [684] *chela* of Haribharti and as such succeeded Haribharti as Mahant of the *math*, but contends that the marriage of the plaintiff worked a forfeiture of his Mahantship and of the rights and property appendant to that office. In paragraph 6 of Appendix B, the Essay of Mr. Warden on Gosains, annexed to Mr. Steele's work on Caste, p. 434 (2nd ed.), it is, in substance, said that Gosains wandered so far from the road (asceticism, celibacy, chastity) they professed to follow as to form matrimonial connexions, and became in every respect as worldly as their neighbours, but are not acknowledged as Gosains except in the Deccan. The evidence in this case, however, shows that the exception made by the author must be extended to other places than the Deccan also. It has been proved that the Bharti sect of Gosains, in the locality whence this appeal comes, very generally marry; and although it has not been proved that there has been within the memory of the witnesses in this case any instance of a Mahant of the *math* of Dudhadari being married, yet it has been established that the Mahants of several adjacent *maths* are so, and there is one, if not two instances (see Exs. 133 and 113) of a married member of the Bharti sect being a Mahant of a *math*.

The plaintiff having established his succession as Mahant of Dudhadari on the death of Haribharti, we think that the burden of proving that the plaintiff's subsequent marriage worked a forfeiture of his office and its appendant property and rights, lay upon the defendants. This, we think, they have completely failed to do, and we, therefore, affirm, with costs, the decree of the First Class Subordinate Judge.

Decree affirmed.

5 B. 685.

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5 B. 685.

[685] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice West.

NARAYAN GOP HABBU AND ANOTHER (*Original Plaintiffs*), *Appellants v.* PANDURANG GANU AND ANOTHER (*Original Defendants*), *Respondents.** [21st July, 1881.]

Hindu law—Joint Hindu family—Manager—Practice—Parties—Decree against manager binding on members of family, although not parties to suit—Civil Procedure Code, Act VIII of 1859, *s.* 2—Res judicata.

In 1870 A sued B for a piece of land, and obtained a decree against him in the original suit and appeal. Subsequently, in 1875, C and D, the nephews of B, brought a suit against A and B for their shares in the land, alleging that there was collusion between A and B in the previous suit. It was found that C and D and their uncle B had lived together as members of an undivided Hindu family at the time of the former suit and that he (B) was the manager of the family and assisted by his nephews C and D in defending the former suit. C and D made no allegation in their plaint that they were minors at the time of the former suit, nor did they assign any reason for not asking to have been made co-defendant in it. Their allegation of collusion between A and B was not proved.

Held—that the plaintiffs' suit, under those circumstances, was barred by the former suit under s. 2 of Act VIII of 1859

Jogendro Deb Roy Kut v. *Funindro Deb Roy Kut* (1) and *Mayaram Sevaram* v. *Jayvantrao Panāurang* (2) referred to.

[**F.**, 10 B. 21 (24); 15 Bom.L.R. 36 (39)=18 Ind. Cas. 385; **R.**, 33 A. 71 (76)=7 A.L.J. 945=7 Ind. Cas. 902; 6 B. 703 (714); 7 B. 467; 9 B. 198; 141 P.R. 1908=189 P. W.R. 1908; **D.**, 10 A. 411 (413).]

THIS was a second appeal from the decision of A. L. Spens, District Judge of Kanara, affirming the decree of Ramrau Subaji, First Class Subordinate Judge of Karwar.

The plaintiff sued for certain shares in a piece of land under the following circumstances:—In 1870, Pandurang (defendant No. 1) sued Anant (defendant No. 2) for the piece of land in dispute, and obtained a decree against him, both in the original suit and in appeal. The plaintiffs, Narayan and Balkrishna (who were the nephews of Anant, defendant No. 2), brought the present suit in 1875 against Pandurang (defendant No. 1) and their uncle, Anant (defendant No. 2), for their shares in the land in dispute, alleging that defendant No. 1 had obtained the decree in the former suit by collusion with defendant No. 2.

Defendant No. 1 (Pandurang) answered, *inter alia*, that the plaintiffs and defendant No. 2 (Anant), were members of a joint **[686]** Hindu family, of which Anant was the manager, and that the claim was barred by the suit of 1870, under s. 2 of the Civil Procedure Code, Act VIII of 1859.

Both the lower Courts dismissed the suit, finding that the plaintiffs and their uncle, defendant No. 2 (Anant), were members of an undivided Hindu family, and lived together in one house, both at the time of the former and the present suits; that defendant No. 2 (Anant) managed the family affairs and paid Government assessment on their lands; that the plaintiffs assisted him (Anant) in his defence in the former suit; that they, therefore, were bound by the decree in that suit; that they failed to prove

* Second Appeal, No. 425 of 1880.

(1) 14 M. I. A. 367=11 B. L. R. 244=17 W. R. 104. See note (1) 5 B. 687.
(2) See note 2, 5 B. p. 687.

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collusion between their uncle and defendant No. 1, Pandurang; and that their claim was barred under s. 2 of Act VIII of 1859.

The plaintiffs appealed to the High Court.

Pandurang Balibhadra for the appellants.—The plaintiffs were no parties to the former suit, and could not, therefore, be bound by it.

Shamrav Vithal, for respondent No. 1, relied upon *Mayaram Sevaram* v. *Jayvantrao Pandurang* (1).

WEST, J., referred to *Jogendro Deb Roy* v. *Funindro Deb Roy* (2).

JUDGMENT.

The following is the judgment of the Court:—

WESTROPP, C. J.—It has been found by the District Judge on clear and satisfactory evidence that, at the time of the former suit brought by the first defendant Pandurang against the second defendant Anant, the latter was manager of the undivided family of which the plaintiffs and he are members, and that they all three resided together, and the plaintiffs assisted the second defendant in that suit. The plaintiffs do not allege that they were then minors, or give any other reason for not asking to have been made co-defendants in that suit. The second defendant is still manager of the family, and the allegation of the plaintiffs, that he colluded with the first defendant in the former suit, has altogether failed in proof. Under these circumstances, we act **[687]** consistently with the view of the Privy Council, expressed in *Jogendro Deb Roy Kut* v. *Funindro Roy Kut* (3) and with *Mayaram Sevaram* v. *Jayvantrao Pandurang* (4) in affirming the decrees of the Courts below with costs.

Decrees affirmed.

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(1) 5 B. 687.

(2) 14 M.I.A., 367=11 B.L.R., 244=17 W.R. 104. See note (1) 5 B. 687.

(3) Note (1).—The passage in the judgment of the Privy Council in *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut* referred to above and which bears upon the reported case, is as follows:—"Their Lordships think that this case cannot in any degree be likened to those which sometimes occur in India, wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit, or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit." 14 M.I.A. 376=11 B.L.R. 244=17 W.R. C. R. 104. **[R., 5 B. 685.]**

(4) Note (2).—In *Mayaram Sevaram* v. *Jayvant Pandurang* (Special Appeal No. 435 of 1873) above referred to, the plaintiff Mayaram sued to recover possession of a piece of land, alleging that he had purchased it at a Court sale in execution of a decree against one Govind and his son Mahadev. The defendant Jayvant answered, *inter alia*, that the land in dispute had been mortgaged to him in 1863 by Govind with the consent of his son Mahadev; that he sued Govind for foreclosure of the mortgage and obtained a decree, under which he was put in possession of the land by the Court; that Mayaram brought the suit against him (defendant) in collusion with Govind and Mahadev. It was found that the mortgage on which the defendant Jayvant had obtained a decree in the foreclosure suit was written by Mahadev for his father Govind, and that the father and son were united in interest.

Both the lower Courts dismissed plaintiff's suit, holding that Govind and Mahadev were undivided in interest, and that the land had ceased to be their property at the time when the plaintiff purchased it at the Court sale.

The plaintiff specially appealed to the High Court.

Bhairavnath Mangesh for the appellant.

Pandurang Balibhadra for the respondent.

It was contended in special appeal that the plaintiff was entitled, at least, to the share of Mahadev, who was no party to the foreclosure suit brought by Jayvant. The following is the judgment of the Court:—

WEST, J.—The son, Mahadev, was effectively represented in the suit, brought by Jayvantrao by his father Govind for whom he had written the mortgage on

5 B. 688.

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[688] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice West.

LUVAR CHUNILAL ICHHARAM (*Original Plaintiff*), *Appellant v.* LUVAR TRIBHOVAN LALDAS (*Original Defendant*), *Respondent.** [21st July, 1881.]

Limitation Act IX of 1871, *s.* 20 *a, sch. II, art.* 59—*Acknowledgment—Prescribed period.*

The expression "prescribed period" in s. 20*a* of the Limitation Act IX of 1871 means the period prescribed by that Act.

Where a suit was brought on the 11th September, 1877 for money paid by the plaintiff on the 16th November, 1868, to the use of the defendant, and the plaintiff based his claim upon two acknowledgments of the defendant in writing, of which the first was dated the 3rd November 1872.

Held—that to bring the case within s. 20 (*a*) of the Limitation Act IX of 1871, the first acknowledgment should have been made before the expiration of the period prescribed by art. 59 of sch. II of that Act, *viz.*, three years from the period when the money was paid.

[R., 12 C.L.R. 277.]

THIS was a second appeal from the decision of S. H. Phillpotts, District Judge of Ahmedabad, reversing the decree of Mukundrai Manirai, First Class Subordinate Judge at the same place.

The plaintiff, Chunilal, brought this suit for the recovery of Rs. 503-10-11, being money, with interest, paid by him on the 16th November, 1868, for the use of the defendant, Tribhovan. The plaintiff grounded his claim upon two acknowledgments, dated respectively the 3rd November, 1872, and 11th November, 1874, and signed by an agent of the defendant at his request. The plaint was filed on the 22nd September, 1877.

The defendant pleaded that the suit was barred by limitation.

The Subordinate Judge allowed the plaintiff's claim. His decree, however, was reversed by the District Judge in appeal, on the ground that Act IX of 1871 barred the claim.

The plaintiff appealed to the High Court.

Gokuldas Kahandas appeared for the appellant.

Nagindas Tulsidas appeared for the respondent.

JUDGMENT.

WESTROPP, C.J.—The argument for the appellant is that, under the Limitation Act XIV of 1859, this suit being one in respect of money paid by the plaintiff for the use of the defendant, the plaintiff had six years within which he might have **[689]** brought his suit (*Umedchand* v. *Sha Bulakidas*) (1), and that the first acknowledgment given in this case by the defendant's agent being on the 3rd November 1872 was made within that time; that the second acknowledgment was made on the 11th November 1874, *i.e.*, within three years from the first

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which Jayvant proceeded. The foreclosure was binding, therefore, on him as well as on Govind, and the property had ceased to be his at the time when his interest was sold in execution to Mayaram. We confirm the decree of the District Court with costs (27th February 1874.) [R., 5 B. 605; 7 B. 467; 3. B. 198; D., 10 B. 21.]

* Second Appeal, No. 437 of 1880.

(1) 5 B. H. C. R. O. C. J p. 16.

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acknowledgment, and that the suit was commenced on the 22nd September 1877, *i.e.*, within three years from the second acknowledgment. But the first acknowledgment, to bring this case within s. 20*a* of the Limitation Act IX of 1871, should have been an acknowledgment made "before the expiration of the prescribed period": which prescribed period seems to us to be the period prescribed by Act IX of 1871 (art. 59 of sch. II), *viz.*, three years from the period when the money was paid. That the prescribed period means the period prescribed by Act IX of 1871 is, we think, clearly inferrible, from Part III of that Act *passim*, in which s. 20*a* is included. The hardship (if any) of this construction of s. 20*a* was mitigated by the postponement of the operation of the Act (s. 1) to the 1st April 1873, *i. e.*, for a period exceeding two years from the day (24th March 1871) on which the assent of the Governor-General was given to the Act.

For these reasons we must, on the point of limitation, affirm the decree of the District Judge with costs. We should observe that the learned pleader for the appellant has not cited any authority for the proposition that the term "prescribed period" could be construed as meaning a period prescribed by any enactment other than Act IX of 1871.

Decree affirmed.

6 B. 1=6 Ind. Jur. 194.

ORIGINAL CIVIL.

Before Mr. Justice West.

THE AGRA BANK, LIMITED (*Plaintiffs*) *v.* ABDUL RAHIMAN ISAC (*Defendant*).* [2nd August, 1881.]

Bill of exchange—Suit on bill by indorsee for value against acceptor—Sale by indorsee of goods against which bill drawn—Acceptor entitled to credit for amount of proceeds of sale.

J consigned goods to defendant, and, for the price, drew on the defendant two bills of exchange, each for the sum of Rs. 1,406-4-0, payable thirty days after sight, which were duly accepted by defendant. J indorsed the bills for value to the plaintiffs, who, in default of payment by defendant, sold the goods, and credited him with the amount realized. After giving him credit for this amount, there remained due by the defendant to the plaintiffs, in respect of the said bills, a sum of Rs. 1,017. The plaintiffs abandoned Rs. 17 of this amount, and sued the defendant for Rs. 1,000 in the Small Cause Court at Bombay. In that suit the defendant pleaded that the goods, in respect of which the bills were drawn, were damaged, and that he had, therefore, refused to accept them, as he was entitled to do. The Judge thereupon dismissed the suit on the authority of *Shortt* v. *Abdul Rahiman* (1), holding that the plaintiffs could not, under the circumstances, give the defendant credit for the goods, and that the claim was not, therefore, within the jurisdiction of the Small Cause Court. The plaintiffs then brought the present suit in the High Court upon the bills of exchange, alleging that they held the proceeds of the goods for the consignor. The defendant contended that in no case could the plaintiffs recover from him more than the amount of the bills less the proceeds of the goods.

Held that the defendant was entitled to credit for the net proceeds of the sale of the goods. The plaintiffs had by the sale already realized part of the amount [2] due to them; and to allow them now to recover from the defendant the whole amount due on the bills would be to permit them to realize this part of their claim a second time: in that case they would be bound to hand over the amount, so realized, to the drawers. But the drawers when they negotiated the bills with the plaintiffs got all they were entitled to, and would have to account, in equity, to the defendant for anything further obtained by them.

Held, therefore, that the defendant was exonerated to the amount of the proceeds of the goods, but was liable for the remainder of the sum claimed by the plaintiffs.

THE plaintiffs, as indorsees and holders for value, sued to recover Rs. 2,812-8-0 due on two bills of exchange, for Rs. 1,406-4-0 each, drawn by J. D. Jackson & Co., of Liverpool, on the defendant. The first was dated the 21st October, 1880, and was accepted by the defendant on the 9th November, 1880. The second was dated the 18th November, 1880, and was accepted on the 8th December, 1880. Both bills were made payable thirty days after sight, and they became due on the 12th December, 1880, and 10th January, 1881, respectively.

In his written statement the defendant admitted his acceptance of the first bill, but stated that he had no recollection of having accepted the

* Suit No. 364 of 1881.

(1) 6 B.H.C.R. O.C.J. 53.

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other and he further pleaded that, "if the plaintiffs were at all entitled to recover, they were only entitled to recover from him such amount as might, upon taking accounts, be truly and justly found due to them after deducting the proceeds of sale of the goods which they held in their hands as collateral security for the moneys advanced by them to the drawers, J.D. Jackson & Co." He also contended "that the plaintiffs were bound to retain the said specific goods in their possession, and that the sale thereof was an improper one, and prejudicial to the interests of the defendant."

On behalf of the plaintiffs it was stated that they had sold the goods against which bills had been drawn, and that, after giving the defendant credit for the amount realized, there remained due to them only a sum of Rs. 1,017, *viz.*, Rs. 546 on the first bill and Rs. 471 on the second. Abandoning Rs. 17 of this amount they had sued the defendant for Rs. 1,000 in Small Cause Court at Bombay. In that suit, however, the defendant pleaded that he had not accepted the goods in respect of which the bills were drawn, and that the said goods were damaged, and he was entitled to reject them. **[3]** The Court, on the authority of *Shortt* v. *Abdul Rahiman* (1), dismissed the suit, holding that, under these circumstances, the plaintiffs could not give the defendant credit for the goods, and that the claim was not, therefore, within its jurisdiction.

The plaintiffs thereupon brought this suit upon the bills of exchange, alleging that they held the proceeds of the goods for the consignor.

Inverarity, for the plaintiffs.—The question is,—whether, under the circumstances, there has been a payment *pro tanto* for the defendant for which he now can claim credit. Payment by the drawer of a bill does not exonerate the acceptor as between him and the indorsee: *Thornton* v. *Maynard* (2); Chitty on Bills of Exchange (11th ed.), 274. Counsel referred also to *Warwick* v. *Nairn*(3).

B. Tyabji, for the defendant.—When the defendant accepted the bills he did so on the faith of receiving goods equal to sample. But the goods were damaged. This fact is clear from the account sales. The consideration, therefore, for the bills failed, and the drawers could not sue. The bills were really accommodation bills. In such case payment by the drawer exonerates the acceptor: Bullen and Leake's Pleadings (3rd ed.), 537; *Cook* v. *Lister* (4). Notice of the bill being an accommodation bill makes payment by drawer good in exoneration of acceptor: *Thornton* v. *Maynard* (2). Here the bill was taken with full knowledge of all the facts. The plaintiff denies that he was bound to take delivery of the goods. He did so in the Small Cause Court; and, as there was then no admitted set-off, the plaintiff's suit failed. The goods have been sold, not by defendant's authority, but by that of the drawer, and the plaintiffs have been paid to the amount of the proceeds of sale. They can, in any case, recover only the amount of the bills, less the proceeds of sale.

JUDGMENT.

WEST, J.—The defendant in his written statement admits his acceptance of one of the bills, but denies his acceptance of the second. This point, however, he has now abandoned.

[4] A defence has been advanced, in argument, of non-acceptance of the goods on account of their damaged condition: this, however, was not

(1) 6 B.H. C.R. O.C.J. 53. (2) L.R. 10 C.P. 695 (699). (3) 10 Ex. 762.
(4) 13 C.B N.S. 543.

suggested in the written statement, and it is inconsistent with the defendant's conduct.

The defendant is liable for the amount sought, except in so far as he may be entitled to credit for the net sums realized by the sale of the goods. As to this, the cases cited show that the bank recovering the whole amount of the bills would be a trustee for the drawers to the extent of the sum realized by the sale. On the other hand, the drawers of the bills, who were also consignors of the goods, could not, if the whole amount were thus recovered from the defendant by the Bank, retain any further sum handed over to them as *cestuis que trustent*. They realized forthwith when they negotiated their bills, and would have to account to the defendant for anything additional recovered from him and handed over to them by the Bank. The Bank does not pretend to have any right, on its own account, to a double realization; and, in so far as it has already once realized by the sale of the goods, must hold the defendant exonerated, unless it would be bound to hand over the proceeds to the consignors. This, however, it could not have to do; the consignors getting cash for their bills got all they were entitled to, and would have to account, in equity, to the defendant for anything further obtained by their action against him.

The amount to be awarded is the sum of Rs. 1,017-5-11, which is the total amount of the two bills less the sum realized by the sale of the goods. On this amount I allow interest at $7\frac{1}{2}$ per cent. from 20th June, 1881, to judgment; also costs of the suit and 6 per cent. on the aggregate till satisfaction.

Judgment for the plaintiffs.

Attorneys for the plaintiffs.—Messrs. *Smith* and *Frere*.
Attorneys for the defendant.—Messrs. *Balkrishna* and *Bhugwandas*.

6 B. 5.

[5] ORIGINAL CIVIL.

Before Mr. Justice West.

HAJI ABDUL ALLA RAKHI (*Plaintiff*) *v.* HAJI ABDUL BACHA AND OTHERS (*Defendants*).* [8th October, 1881.]

Charter-party—Agreement for a charter-party—Threatened breach of charter-party— Interim *injunction.*

Where a charter-party has been actually completed, the Court will, by injunction, prevent an employment of the ship inconsistent with the terms of the charter-party; but where there is only an agreement for a charter-party, no such injunction will be granted.

SUIT on a charter-party. The plaint stated that the plaintiff had chartered the defendants' steamer *Empress* to sail from Bombay to Jedda upon the terms contained in a charter-party duly executed, and dated 15th August, 1881: that subsequently the plaintiff heard that the defendants were offering the said steamer to other persons on charter; that the plaintiff was ready and willing to carry out his part of the agreement, but that the defendants refused to perform their part thereof; and the plaintiff alleged "that, unless restrained by the order and injunction of this Honourable Court, the defendants will charter the said steamer to other

* Suit No. 440 of 1881.

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6 B. 5.

persons (if, indeed, they have not already done so), and will employ the said steamer *Empress* contrary to the terms of their agreement with the plaintiff."

The prayer of the plaint asked for an injunction in the following terms :—

"That the defendants, their agents, and servants be restrained from committing any breach of agreement to charter the said steamer *Empress* as aforesaid, and may be restrained from employing the said steamer contrary to the terms of the said agreement, and from allowing the said steamer to leave the harbour of Bombay in any voyage for any persons, other than the plaintiff, to whom the defendants may have already chartered the said steamer *Empress*."

The plaintiff also claimed Rs. 60,000 as damages for breach of agreement.

[6] On the day before the October vacation commenced,

Inverarity presented the plaint, and moved for an *interim* injunction.—The rule against granting injunction to enforce an affirmative agreement does not apply in the case of a charter-party : Kerr on Injunction, p. 423; *De Mattos* v. *Gibson* (1). The Court can restrain the defendants employing the ship contrary to their agreement with the plaintiff : *Sevin* v. *Deslandes* (2). The defendants wish to break their agreement with the plaintiff, because they have got a better offer for the ship. Counsel also cited *Herior* v. *Nicholas* (3) ; *Messageries Imperiales* v. *Bains* (4) ; *Hart* v. *Herwig* (5).

Lang, appeared for the defendants.

Inverarity.—This is an application for an *interim* injunction, and the defendants cannot be heard.

Lang.—The defendants' solicitors have only just now heard of the plaintiff's intention to apply for an *interim* injunction ; and, if the injunction is granted, they will suffer a serious loss, as the ship has been chartered, and is now about to sail with pilgrims to Jedda. The defendants have a good defence to the suit. I ask to be heard on their behalf.

WEST, J.—I think, under the circumstances, the defendants' case should be heard.

Lang.—There has been a preliminary agreement, but the charter-party has not been signed. In such a case as the present an injunction cannot issue : Specific Relief Act (I of 1877), ss. 24 and 56.

JUDGMENT.

WEST, J. [after noticing the delay which had taken place in applying for the injunction, said].—As to the merits, the case of *De Mattos* v. *Gibson* (1) and the other cases that have followed it in England, go to establish that a complete charter-party will be enforced by means of an injunction against an inconsistent employment of the ship. Mr. Inverarity says that the agreement to make a charter-party is equivalent to a charter party. It cannot be quite equivalent, for in that case the charter-party would be superfluous ; and no case has been cited in which it has been held **[7]** equivalent, nor any even in which specific performance of the preliminary agreement has been granted.

It may upon the cases perhaps be thought to be settled that a charter-party of a ship is a contract for breach of which compensation in

(1) 4 D. & J. 276 (298). (2) 30 L.J. Ch. 457. (3) 12 W.R. 844.
(4) 11 W.R. 322. (5) L.R. 8 Ch. 860.

money does not afford adequate relief; but the decisions rest on special considerations, and the supposed principle may not admit of the extension I am asked to give to it. *Prima facie*, one would say that any purely mercantile contract was one admitting of compensation in money; and that being, as I believe, the generally recognized and central principle, I do not feel warranted, without express authority, in carrying what must be regarded as an exception to it further than the actual decisions have gone. I am the more disposed to refuse the application here, because it might have been made three days ago, and is now made quite at the eleventh hour.

I must reject the application for an *interim* injunction, but I grant a *rule nisi* for injunction as prayed.

Attorneys for the plaintiff.—Messrs. *Tyabji and Dayabhai.*
Attorneys for the defendants.—Messrs. *Prescot and Winter.*

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6 B. 7.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice Pinhey.

FAKIRAPA (*Plaintiff*) *v.* PANDURANGAPA (*Defendant*).*

[13th September, 1881.]

Decree—Limitation—Suit on decree the execution of which is barred by limitation—Limitation Act XV of 1877, *sch.* II, *art.* 122—*Civil Procedure Code (Act X of* 1877), *s.* 244—*Suit in High Court on judgment of Small Cause Court—Practice—Averments in plaint—Evidence necessary in such suits.*

A suit will not lie upon a decree the execution of which is barred by the provisions of the Limitation Act.

A suit may be brought in the High Court of Bombay upon a judgment obtained in the Court of Small Causes of Bombay. The execution of the decrees in such suits is rigorously confined to immoveable estate.

The ground of the interference of the High Court in such cases is that, practically, the judgment-creditor could not recover his debt except by process against the immoveable estate of the debtor.

[8] In such cases the plaint must contain an averment, and the plaintiff must establish to the satisfaction of the High Court that there is not any sufficient moveable property of the defendant against which the decree of the Court of Small Causes can be fully executed, and that he has immoveable property situated within the original jurisdiction of the High Court against which execution can be had.

Moonshi Golam Arab v. *Curreem Bux Shaikji* (1) referred to.

[F., 3 B. 1; R., 7 B. 467 (470); 25 M. 300 (333).]

UNDER s. 617 of Act X of 1877, this case was referred for the decision of the High Court by Rao Bahadur Babaji Lakshman, First Class Subordinate Judge of Hubli, with powers of the Judge of a Small Cause Court.

The suit was brought by the plaintiff on an *ex-parte* money-decree obtained by him against the defendant in the Subordinate Court of Dharwar on the 14th June, 1878. The Subordinate Judge was of opinion that the suit was not maintainable.

There was no appearance of parties in the High Court.

The following is the judgment of the Court:—

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* Small Cause Court Reference No. 7 of 1881.

(1) 5 C. 294.

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JUDGMENT.

WESTROPP, C. J.—The question put by the Subordinate Judge of Hubli is "whether a suit will lie upon a decree?" The question actually arising upon the facts furnished by him is "whether a suit upon a decree of his own Court for money (Rs. 18-15-0), the execution of which decree is barred by the Limitation Act XV of 1877, can be lawfully entertained by him?" To this question our answer must be in the negative, and for reasons which would dictate a similar answer to the larger question put by him. See s. 244 (more especially cl. *c*) of Act X of 1877 (which section was substituted for the nearly similar enactment in s. 11 of Act XXIII of 1861, which replaced s. 283 of Act VIII of 1859), prohibiting a separate suit in matters relating to the execution of a decree; *Kisan* v. *Anandram* (1); *Sanjivayah* v. *Nanjayah* (2); *Ranganasary* v. *Shappani* (3); *Sayad Nasrudin* v. *Venkatesh* (4); *Mirza Mahomed* v. *The Widow of Balmukand* (5). The case of *Attermoney* v. *Hurry Doss* (6) appears to have been heard *ex parte*, and s. 244 of Act X of 1877 does not seem to have been brought to the **[9]** notice of the Court. No doubt art. 122, sch. II of Act XV of 1877, which prescribes twelve years as the period within which an action may be brought upon a judgment obtained in British India, is later legislation than Act X of 1877, which was sanctioned by the Governor General on the 30th March, 1877,—Act XV of 1877 not having been sanctioned until the 19th July, 1877. These enactments were, in fact, under the consideration of the Legislature much about the same time, and it is not probable that it was intended that there should be any inconsistency between them. Laying aside any possible argument as to a renewal of the force of Act X of 1877, s. 244, by the amendment made in that section by s. 31 of Act XII of 1879, there seems to be room for the operation of art. 122 of sch. II of Act XV of 1877, without holding that article to be inconsistent with s. 244 of Act X of 1877: for instance, where a suit upon a decree would give a higher or better remedy than the decree-holder could otherwise obtain, or where such a suit would give him the only practicable remedy. See the observations of Couch, C.J., in *Mancharam* v. *Bakshi Saheb* (7).

This seems to be a suitable opportunity of noticing *Moonshi Golam Arab* v. *Curreem Bux Shaikji* (8), where it was held by the High Court of Calcutta, contrary to its previous practice, that an action would not lie in that Court upon a judgment of the Calcutta Court of Small Causes. It is not stated in the report of that case whether the plaint contained an allegation that the defendant had not any moveable property sufficient to satisfy the decree. A Bombay case (*Manekji Mehervanji* v. *Mahamad Abdulla*)—unreported — was there relied upon in which it was decided on the 8th of June, 1858, by the late Supreme Court on demurrer that an action would not lie in that Court upon a judgment of the Bombay Court of Small Causes. We have examined the record in that case, and also the notes of it in the book of Sir M. Sausse, C.J. Although counsel in support of the plaint in his argument drew the attention of the Court to the impossibility of obtaining, in the Small Cause Court, execution against immoveable property, yet the plaint itself did not contain an averment that there was not any sufficient moveable **[10]** property of the defendant to satisfy the judgment. Our friend

(1) 10 B.H.C.R. 433. (2) 4 M.H.C.R. 453. (3) 5 M.H.C.R. 375.
(4) 5 B. 382. (5) 3 I.A. 241. (6) 7 C. 74.
(7) B.H.C.R. A.C.J. 231 (235). (8) 5 C. 294.

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Mr. Justice White, late an eminent member of the Bombay Bar, and who argued in support of the demurrer in the Bombay case seems in the Calcutta case to have been under the impression that, ever since the decision in *Manekji Mehervanji* v. *Mahamad Abdulla*, suits upon decrees of the Bombay Court of Small Causes have not been entertained here. We find, however, that from 1862 to the end of 1880 there have been sixty such suits at the Original Jurisdiction Side of the High Court, in forty-eight of which there have been decrees for the plaintiffs. The others, with one exception (*Hemraj* v. *Virji*), were dismissed for non-appearance of parties, the suits having probably been compromised. In the first of the forty-eight suits the decree for the plaintiff was made by Couch, J., in 1862. The plaint must contain an averment, and the plaintiff must establish to the satisfaction of the High Court that there is not any sufficient moveable property of the defendant against which the decree of the Court of Small Causes can be fully executed, and that he has immoveable property situated within the Original Jurisdiction of the High Court against which execution can be had. In *Hemraj* v. *Virji*—above mentioned—the Judge, who heard the case at the Original Jurisdiction Side of this Court, dismissed a suit upon a judgment of the Bombay Court of Small Causes, being of opinion that s. 223 of Act X of 1877, when taken in conjunction with s. 8 of the same Act, was consistent with such a suit. But, on appeal, that decree was reversed by the appellate Court, and a decree was made on the 28th September, 1878, for the plaintiff for the amount of the judgment and costs. The appellate Court was of opinion that s. 223 had not the effect attributed to it; that s. 223 (see s. 8) does not apply to the Court of Small Causes at Bombay, and that the practice of the High Court of Bombay to entertain such suits was too long settled to be disturbed except by legislation or by Her Majesty's Privy Council, although it might have been better if such a practice had never been initiated. It may be mentioned here that, with a few unimportant exceptions, the Code of Civil Procedure has not hitherto, I believe, been applied to the Bombay Court of Small Causes. The difficulties referred to by **[11]** Garth, C.J., in *Moonshi Golam Arab* v. *Curreem Bux Shaikji* (1), have been surmounted by rigorously confining the execution of the High Court decrees in such suits to immoveable estate. If in any instance (and at present we are not aware that there has been one) execution of the High Court decree in such cases has issued against the person or freshly discovered moveable property of the judgment-debtor, it must have been inadvertently so issued, and, if brought to the notice of the Court, would have been quashed. The ground of the interference of the High Court is that, practically, the judgment-creditor could not recover his debt except by process against the immoveable estate of the debtor.

(1) 5 C. 294 (298).

6 B. 11.

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Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

DAMODAR DEVCHAND (*Original Plaintiff*), *Appellant v.* NARO MAHADEV KELKAR AND OTHERS (*Original Defendants*), *Respondents.**

[13th September, 1881.]

Mortgage—Rights and Liabilities of prior and subsequent mortgagees—Redemption—Suit by second mortgagee—Form of decree.

S mortgaged a house and site to R on the 4th January, 1870; and on the 21st February, 1870, he (S) mortgaged the same property to D. On the 3rd January, 1874, R brought a suit against S on the mortgage, and obtained a decree which directed the satisfaction of the mortgage debt by the sale of the mortgaged property. R did not make D a party to that suit. The property was sold by the Court and purchased by N in his own name, but as trustee for R. At the Court sale, D. the puisne mortgagee, gave notice of his claim to R and N. D sued N. R, and S for the amount due on his mortgage. In his evidence R admitted that he, subsequently to the sale to N, pulled down the house and sold portion of the materials. The lower Courts dismissed the suit, holding that N (defendant No. 1), the purchaser at the auction sale, was not liable for the plaintiff's claim. On appeal to the High Court.

Held, that D being puisne mortgagee, and, as such, representing the equity of redemption to the extent of his mortgage, should have had an opportunity of redeeming the mortgaged premises from R's mortgage, and should have been made a party to R's suit. He could not be deprived of his right by proceedings to which he was not a party, and was, therefore, entitled to a decree framed on the basis of such right of redemption.

[**F.**, 10 B. 224; **R.**, 9 A. 125=6 A.W.N. 318; 13 A. 432 (**F.B.**); 20 B. 390; 28 B. 153; 1 O.C. 105.]

[12] THIS was a second appeal from the decision of J. W. Walker, Assistant Judge at Ratnagiri, affirming the decree of Mukundrao Bhaskar, Second Class Subordinate Judge of Dapoli.

The plaintiff Damodar sued Naro, Ragho, and a third person for the amount due on his mortgage, dated the 21st February, 1870. The suit was filed in the Subordinate Court of Dapoli.

The facts of the case are fully stated in the judgment of the High Court.

Both the lower Courts dismissed the suit, holding that Naro, the purchaser at the auction sale (defendant No. 1), was not liable for the plaintiff's claim. The following are the Assistant Judge's reasons:—

"It is not contended for the plaintiff that his mortgage had priority over that of Ragho (defendant No. 3). But it is urged that at the time of the sale in execution of the decree obtained by defendant No. 3, plaintiff gave notice of his claim, and that, therefore, Naro (defendant No. 1) purchased the house subject to that claim. But it is now well settled that the first mortgagee is entitled to sell the property mortgaged to him as it existed at the time of the mortgage, and free from any subsequent incumbrances. To hold otherwise would make it impossible for the first mortgagee to realize anything when he brought the property to sale. The decree is confirmed with costs." (3rd September, 1880).

The plaintiff appealed to the High Court.

* Second Appeal No. 508 of 1880.

The Hon. Rao Sahib *V. N. Mandlik*, for the appellant.—Naro's purchase was subject to the plaintiff's mortgage, of which he had ample notice.

There was no appearance for the respondents.

JUDGMENT.

WESTROPP, C. J.—Sonu mortgaged a house and site to Ragho on the 4th January, 1870, for Rs. 50. Sonu further mortgaged the same house and site and a cattle-shed and a cart and harness to Damodar for Rs. 80 on the 21st of February 1870. Both of those mortgages were unregistered. On the 3rd January, 1874, Ragho instituted a suit on his mortgage against Sonu and on the 17th November, 1874, obtained *ex parte* a decree for sale of the house and site in default of payment of Rs. 60 (the amount due **[13]** on Ragho's mortgage) and costs. He did not make Damodar, the puisne mortgagee, a party to that suit. Damodar had, on the 2nd of January, 1874, instituted a suit on his mortgage against Sonu and another person, but omitted to make Ragho a party to that suit. Damodar obtained a decree in his suit on the 5th February, 1875. The house and site were sold, as appears by the certificates, dated the 10th of May, 1875, under Ragho's decree to the defendant Naro, who, however, admits in his deposition (Ex. 50) that he purchased as a trustee for Ragho. Naro further says that he resold the house to Gan Nak, whom Ragho, however, in his deposition (Ex. 51) admits to have purchased as a trustee for Ragho himself. This complication was probably resorted to for the purpose of throwing difficulties in the way of Damodar. It should be mentioned that Damodar at the auction sale to Naro gave notice to Naro and Ragho of his (Damodar's) mortgage. The omission of Ragho to make Damodar a party to Ragho's suit prevents the decree and sale in that suit and the subsequent sale from binding Damodar, who, though a mortgagee puisne to Ragho, did, as such mortgagee, represent the equity of redemption to the extent of his (Damodar's) mortgage. As such puisne mortgagee Damodar was entitled to be made a party to Ragho's suit, and to have an opportunity of redeeming the mortgaged premises from Ragho's mortgage, and could not be deprived of that right by proceedings to which he was not a party.

Ragho in his deposition admits that he, subsequently to the sale to Naro, pulled down the house and sold the greater part of the materials. Under these circumstances the decrees of the Courts below cannot be supported, and must be reversed; and there must be a decree as follows, *viz.*, that an account be taken of the amount realized by the sale of the materials of the house sold by Ragho, or on his behalf; and, if the amount so realized exceed Rs. 60 and the costs of Ragho's suit against Sonu, let the amount of such excess be paid by Ragho into the Subordinate Judge's Court to the credit of this suit. If the amount realized by sale of the said materials be less than the said sum of Rs. 60 and costs awarded to Ragho by his decree against Sonu, it is hereby declared that the plaintiff Damodar is entitled to redeem the unsold materials of the said house and the site thereof by **[14]** paying to Ragho the amount of such deficit within three calendar months from the date on which the Subordinate Judge shall notify to Damodar or his pleader the amount of such deficit; and if Damodar make default in payment of such deficit (if any) within the time aforesaid, let him be for ever barred and foreclosed from redeeming the said unsold materials of the said house and the said site. In the event of it appearing, on taking the said account of

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the sold materials, that the amount realized by the sale thereof exceeds the said sum of Rs. 60 and costs awarded to Ragho by his decree, let the excess (ordered hereinbefore in that event to be paid into Court by Ragho) or so much thereof as may be necessary, be paid over to the plaintiff Damodar in or towards satisfaction of the sum of Rs. 133-8-3 and costs found due to him under his mortgage; and in the event of such last-mentioned payment being insufficient to meet the said sum of Rs. 133-8-3 and costs, or in the event of the amount realized by the sale of the said materials equalling the amount found due to Ragho under his decree for Rs. 60 and costs, let the said unsold materials of the said house and (if necessary) the said site be sold, and let the proceeds, or so much thereof as may be sufficient, be paid to the said Damodar in discharge of so much of the said sum of Rs. 133-8-3 and costs as may remain due to him, and let the balance, if any, be made over to the said defendant Ragho. The parties respectively should bear their own costs of the suit and both appeals.

Decree reversed.

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6 B. 14.

APPELLATE CRIMINAL.

Before Mr. Justice M. Melvill and Mr. Justise Pinhey.

IMPERATRIX *v.* SHIVRAM GUNDO.* [20th September, 1881.]

Mukhtyar—Criminal Procedure Code, Act X of 1872, *s.* 278—*Appeal.*

An appellant in a criminal case has a right to appear and be heard by a mukhtyar.

[F., Rat. Unr. Cr. Cas. 314 (315); **Appl.,** 16 B. 283 (F.B.); **R.,** 18 A. 23 (24); **D.,** 25 C. 432 (434); 12 Cr.L.J. 118=9 Ind. Cas. 711=4 S.L.R. 195.**]**

THIS was an application for a revision of an order passed by M. B. Baker, Joint Session Judge of Poona, at Sholapur.

The accused was originally tried by Khan Bahadur Darasha Dosabhai, Magistrate (First Class) at Sholapur of the offence of **[15]** retaining stolen property, and sentenced to suffer rigorous imprisonment for eighteen months. The accused preferred an appeal to the Joint Session Judge, and engaged one Narayan Vishnu, a mukhtyar, to conduct the appeal on his behalf. Mr. Baker refused to hear him. He said: "Narayan Vishnu, a mukhtyar, wished to appear on behalf of the appellant, but the Court declined to grant him permission to do so under s. 186 of the Code of Criminal Procedure. He contended that he had a right to appear in an appeal; but with this contention I cannot agree, for the appellant is as much 'a person accused of an offence' when the case is before a Court of appeal as when it is before a Court of original jurisdiction. I do not consider that the Legislature can have intended to give unqualified practitioners privileges in an appellate Court which are denied to them in a Court of original jurisdiction. To admit mukhtyars is to injure qualified pleaders; and this particular mukhtyar has already been warned that he would not be permitted to appear in this Court." Mr. Baker then went into the merits of the case, and confirmed the conviction and sentence.

The accused thereupon applied to the High Court.

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* Criminal Application for Revision No. 203 of 1881.

There was no appearance in the High Court either on behalf of the accused or the Crown.

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JUDGMENT.

APPELLATE CRIMINAL

Per Curiam.—The appellant in a criminal case has a right to appear and be heard by a mukhtyar (see *Reg.* v. *Bechar Pitambar*; Criminal Rulings of 22nd February, 1870; *Imp.* v. *Samaldas Becharlal* (1), 13th January, 1881; *In re Subba Aitala* (2)). It is impossible to say what effect the arguments of the mukhtyar might or might not have produced on the Session Judge in the case. The order of the Session Judge confirming the conviction and sentence on Shivram must be reversed, and he must be ordered to retry the appeal of Shivram, after giving notice to the mukhtyar, and hearing him if he appears.

6 B. 14.

Order accordingly.

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6 B. 16.

[16] APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

VISHVANATH MAHESHVAR (*Applicant*) *v.* VIRCHAND PANACHAND AND OTHERS (*Opponents*).* [3rd October, 1881.]

Civil Procedure Code (*Act X of* 1877), s. 295—*Decree—Sale—Assets—Distribution.*

Moneys paid into Court by sale or otherwise in execution of a decree are assets from the moment of their payment into Court, and are available, under s. 295 of the Code of Civil Procedure (Act X of 1877), for rateable distribution only amongst decree-holders who have applied for execution prior to that time.

[R., 12 B. 400 (407); 16 B. 91 (101); 28 B. 264; 12 C. 252; D., 18 C. 242.]

THIS was an application, in the Court's extraordinary jurisdiction, for reversal of an order of Rao Saheb K. Atmaram, Subordinate Judge of Vagra.

On the 16th of June, 1879, the applicant Vishvanath obtained a decree against Madhavsang and Vajubhai.

On the 12th September, 1879, he applied for its execution.

On the 12th July, 1880, the judgment-debtor's *gamtya* lands were sold for Rs. 99-8-0 in execution of the applicant's decree, and with the permission of the Court the applicant himself became the purchaser, and paid in Rs. 99-8-0 into Court.

On the 6th of August, 1880, Virchand, another decree-holder, applied for execution of his decree.

On the 1st of September, 1880, the judgment-debtor's *bhagdari* lands were sold for Rs. 1,752, which was paid into Court the same day.

On the 28th September, 1880, three other decree-holders applied for execution of their decrees against the same judgment-debtor.

On the 4th of October, 1880, two other decree-holders applied for execution.

On the 5th of November, 1880, the sales of the *gamtya* and *bhagdari* lands were confirmed by the Court.

The Subordinate Judge, professing to act under s. 295 of the Code of Civil Procedure (X of 1877), allowed all those decree-holders who

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* Extraordinary Civil Application No. 20 of 1881.

(1) Unreported.

(2) 1 M. 304.

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6 B. 16.

made their application for execution within sixty [17] days of the dates of the respective sales to take the proceeds realized with the applicant,—sixty days being the period allowed for the confirmation of a sale.

The applicant applied to the High Court.

Shantaram Narayan and *Shivram V. Bhandarkar*, for the applicant.—The Subordinate Judge has construed s. 295 of the Code wrongly. Assets are realized as soon as the purchase-money is paid in. Before the date of the sale of *gamtya* lands and the payment into Court of the proceeds of that sale none of the other decree-holders had made their application, and, therefore, none were entitled to share with the applicant in the amount realized. Nor are they entitled to share in the proceeds of the *bhagdari* lands except Virchand, who alone applied prior to the realization of those proceeds.

Nanabhai Haridas, Government Pleader, for the opponents.—The sales did not become absolute till they were confirmed. Probably only one-fourth of the purchase-money was paid on the day of the sale and the rest on the day it was confirmed. Assets are not said to be realized by sale till the sale has been confirmed, and become absolute. Till then the price is merely a deposit in the hands of the holders, and is liable to be returned to the bidders.

JUDGMENT.

KEMBALL, J.—In execution of a decree obtained by the present applicant, certain *gamtya* and *bhagdari* lands were at his instance attached and caused to be sold by public auction. Subsequently to these sales, several other persons having decrees for money against the same judgment-debtor, applied for the execution of their decrees. These applications bore different dates. All of them were made subsequently to the payment of the purchase-money in the case of the *gamtya* sale, and all but one subsequently to a similar payment in respect of the *bhagdari* land. Most of the applications, however, were made prior to the confirmation of the sales, and in those instances the Subordinate Judge held that the respective applicants were entitled to share rateably with the applicant at whose instance the properties were attached and sold, on the ground, presumably, though he does not say so, that the purchase-moneys were not "assets" within the meaning of s. 295, Act X of 1877, until the confirmation [18] of the sales: at least that is the ground on which three of the judgment-creditors, who claim a rateable division, base their argument in showing cause against the rule. It is contended that the purchase-money held by the Court cannot be regarded as "assets" realized until such time as the sale becomes absolute, because, until the happening of that event, such money is liable under certain contingencies to be refunded to the purchaser. But there is nothing in the aforesaid section to show that such was the intention of the Legislature, and we see no reason for placing so forced a construction on the word "assets." Under the old law (s. 270 of Act VIII of 1859) the attaching creditor was entitled to be first paid out of the proceeds of property attached and sold, the surplus only being liable to distribution rateably among subsequent attaching creditors; whereas by the new law it is immaterial at whose instance an attachment is placed, or, indeed, how assets are realized,—whether by sale or otherwise. So long as assets are in the hands of, and held by, the Court, every creditor who has, prior to such realization, applied for execution of his money decree is entitled to a rateable division; and the circumstance that such money may, under some possible contingency,

have to be refunded to the person paying them in, cannot be held to affect their character, while within the control of the Court, as assets realized in execution of a decree. With these remarks I concur in the order which my brother Pinhey has written, and which he has read to me disposing of the particular case before us.

PINHEY, J.—In this case the assets were realized as soon as the purchase-money for the properties sold was paid into Court by the auction-purchaser. The fact that it was possible that, under certain circumstances, the sale might be set aside by the Court, and the purchase-money returned to the purchaser, does not make the payment of the money into Court less a realization of the assets, within the meaning of s. 295 of the Code of Civil Procedure.

The *gamtya* property of the judgment-debtors was sold on the 22nd July, 1880, for Rs. 99-8-0, and their *bhagdari* property was sold on the 1st September, 1880, for Rs. 1,752. The purchase-moneys of both the said properties were paid into Court by the **[19]** purchasers on the dates of the respective sales. The sales were held in execution of the decree obtained by the applicant to this Court, Vishvanath Maheshwar.

None of the other decree-holders, mentioned in the Subordinate Court's judgment, applied to the Court for execution prior to the realization of the proceeds of the sale of the *gamtya* property on the 22nd July, 1880, and, therefore, none of them are entitled to share in the proceeds of that sale, and, therefore, the whole sum of Rs. 99-8-0 realized by the sale of the *gamtya* property must be paid to the applicant, Vishvanath Maheshwar, after deducting the costs of the realization.

The only decree-holder, other than the applicant, who applied to the Subordinate Court for execution prior to the realization of the proceeds of the sale of the *bhagdari* property on the 1st September, 1880, was Virchand Panachand, who applied for execution on 6th August, 1880. He is entitled, under s. 295 of the Code of Civil Procedure, to share rateably with the applicant in the Rs. 1,752 realized by the sale of the *bhagdari* property after deducting the costs of the realization.

The Subordinate Court's order must be amended accordingly. The applicant Vishvanath Maheshwar to receive his costs from the opponents, who will bear their own costs in both Courts.

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6 B. 19.

APPELLATE CRIMINAL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

IMPERATRIX *v.* VITHAL BHAICHAND.* [17th November, 1881.]

Gambling—Coin—Bombay Act III of 1866, *s.* 11.

A coin is not an instrument of gaming within the meaning of s. 11 of Bombay Act III of 1866. An instrument of gaming means an implement devised or intended for that purpose.

THIS was an application for the revision of the order of J. M. Campbell, Magistrate of Kheda, confirming the sentence passed on the applicant by Vishnu Ramchandra, Magistrate (Second Class) at Kheda.

[20] The accused was convicted of having gambled with coins at a fair within two miles of the Mehmadabad railway station. The game

* Application for Revision, No. 227 of 1881.

1881 played was not one of mere skill; but no cards, dice, counters or other
NOV. 17. instruments of gaming were used in playing the game. The Subordinate
— as well as the District Magistrate considered that, as the game played
APPEL- was not one of mere skill, the act of the accused was criminal under
LATE s. 11 of Bombay Act III of 1866, and sentenced the accused to a fine of ten
CRIMINAL. rupees. The accused consequently applied to the High Court.
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6 B. 19. *Gokaldas Kahandas Parekh*, for the applicant.
Nanabhai Haridas, Government Pleader, for the Crown.

JUDGMENT.

Per Curiam.—The Court is of opinion that a coin is not an instrument of gaming within the meaning of s 11 of Bombay Act III of 1866. An instrument of gaming means an implement devised or intended for that purpose: *Watson* v. *Martin* (1); see also the case of *Rama Zilu*, Criminal Rulings, dated 19th June, 1873. The Court, therefore, reverses the conviction and sentence, and directs that the fine be restored.

Conviction reversed.

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6 B. 20.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

PUNJA KUVARJI (*Original Plaintiff*), *Appellant v.* BAI KUVAR AND OTHERS (*Original Defendants*), *Respondents.**

[30th August, 1881.]

Limitation—Prescription—Act XV of 1877, ss. 23 and 26—Continuing nuisance—Easement.

From time immemorial, and certainly for more than twenty years prior to the date of the obstruction by the defendants, the plaintiff enjoyed the right of having an egress for his rain water through a drain in the defendants' land. The plaintiff, more than two years after the date of the obstruction, sued the defendants for the removal of the obstruction.

Held that though, under the circumstances, the plaintiff had failed to prove a title acquired under s. 26 of Act XV of 1877, yet the plaintiff, having a title, evidenced by immemorial user, did not require the aid of that Act; and inasmuch as the obstruction complained of, constituted a continuing nuisance, as to [21] which the cause of action was renewed *de die in diem*, the plaintiff's claim was not barred by any provision of the Act, but, on the contrary, was saved by the express provision of s. 23.

[F., 1 C.W.N. 96; R., 16 B. 592; 8 C. 956=10 C.L.R. 577; 28 M. 72=15 M.L.J. 32; 2 Ind. Cas. 410.]

THIS was a second appeal against the decision of S. H. Phillpotts, Judge of Ahmedabad, reversing the decree of the Subordinate Judge of Kaira.

The plaintiffs and the defendants were owners of two contiguous buildings. The plaintiffs on the 31st of June, 1879, sued the defendants to cause them to remove obstructions placed by them on the 23rd of June, 1876, in the way of the plaintiffs' rain-water flowing through the defendants' drain. The plaintiff alleged that the water had had egress through

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* Second Appeal No. 236 of 1881.

(1) 34 L.J. M.C. 50=11 Jur. N. S. 321.

the defendants' drain from time immemorial. The defendants (*inter alia*) contended that the plaintiff not having enjoyed his easement within two years of the date of suit, his claim was barred by s. 26 of the Limitation Act XV of 1877. The Subordinate Judge of Kaira held that the plaintiff had by long user acquired a prescriptive right the enforcement of which was not barred by the section quoted or any other of the Limitation Act. The District Judge differed from this view. He said : " It is admitted by the defendants, both in their pleadings and in one of their depositions, that the plaintiff's rain water has always flowed over the land he seeks to get a servitude over now ; it is quite sufficient to prove any length of prescription when the opposite party himself admits that the user has always existed.

There, therefore, is the first fact that from time immemorial up to a date which was either 1870 or 1876 the plaintiff's rain water had an egress through the drain in question on to the defendants' land. How the water was drained off from there, was the defendants' business.

" The next fact to be determined is, when did this user cease ? I hold that the date specified by the plaintiff is the true one. This is the 23rd of June, 1876, or the commencement of the rains of that year * * * * Hence it is clear, first, that the plaintiff had by long usage acquired a title to the easement he now claims ; and, secondly, that he was not interfered with till 23rd June, 1876. This suit, however, was not brought till the 31st January, 1879,—*i.e.*, more than two years after the plaintiff admits he was obstructed in the use of his right.

[22] " Section 26 of Act XV of 1877 applies to this case, and the illustrations thereon show that the delay is fatal to the plaintiff's case. The Subordinate Judge holds this is not a suit in the way of easement, because the plaintiff had not brought his suit in that way, but on a right which has always existed and which the defendants admit ; but the Subordinate Judge has misunderstood the meaning of the word easement, and confounded it with that of prescription. Easement is a right to enjoy certain privileges over another's property ; it matters not how this easement is derived,—it maybe from contract,—it may be, as appears in this case, from long user * * *. Therefore, the suit is for an easement,—*i.e.*, for the right of the rain water of his house to pass through another property,—and, as such, he must bring his suit within the period prescribed by law.

" It appears that the plaintiff has enjoyed it for a period of more than twenty years, but he admits he has not exercised his right since 1876. This suit must, therefore, be dismissed."

The District Judge accordingly reversed the decree of the Subordinate Judge, and rejected the plaintiff's claim. The plaintiff thereupon appealed to the High Court.

Gokaldas Kahandas Parekh, for the appellant.—The plaintiff's prescriptive right is not denied by the defendants, and has been found proved by the Judge, who has erred in applying to this case the law of limitation as to easements. The obstruction complained of is a continuing nuisance ; and the existence of the dominant right being established, its enforcement can be applied for at any time. *Rajrup Koer* v. *Abdul Hossein* (1) is a case on all fours with this. More than twenty years before the

(1) 6 C. 394.

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suit in that case the plaintiff's ancestors had constructed and used a water-course on the defendant's land, and obstructions were made by the defendant within two years of the suit. The Privy Council held that Act IX of 1871 was a remedial Act, and neither prohibitory nor exhaustive, and its provisions did not exclude or interfere with the acquirements of rights otherwise than under them. And with regard to s. 27 of that Act, which corresponds with s. 26 of Act XV of 1877, their Lordships held that that section by [23] allowing a user of twenty years, if exercised within two years of suit, under the conditions prescribed, to give, without more, a title, did not prevent proof of an easement founded on another title, independently of the Act. In *Achul Mahta* v. *Rajun Mahta* (1) the above decision was followed by the High Court at Calcutta in a case to which, like the present, Act XV of 1877 was applicable.

Nagindas Tulsidas, contra.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—Having regard to the decision of the Judicial Committee in *Rajrup Koer* v. *Abdul Hossein* (2), we think that the plaintiff is entitled to succeed. He has failed to prove a title acquired under s. 26 of Act XV of 1877; but the District Judge has found that "from time immemorial up to a date which was either 1926 (1870) or 1932 (1876) the plaintiff's rain water had an egress through the drain in question on to the defendants' land." Immemorial user must be referred to a legal origin,—that is, either to a lost grant, or to an agreement between the predecessors in title of the parties. Under this view the plaintiff, having a title evidenced by immemorial user, does not require the aid of Act XV of 1877; and inasmuch as the obstruction complained of, as observed by the Judicial Committee in the case referred to, constituted a continuing nuisance, as to which the cause of action was renewed *de die in diem*, the plaintiff's claim was not barred by any provision of the Limitation Act, but, on the contrary, was saved by the express provisions of s. 23 of the Act. The decree of the District Judge must, therefore, be reversed, and that of the Subordinate Judge restored. Costs on the defendants throughout.

Decree reversed.

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6 B. 24.

[24] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

LAKSHMISHANKAR AND OTHERS (*Original Plaintiffs*), *Appellants* *v.* BAIJNATH AND OTHERS (*Original Defendants*), *Respondents.**

[21st September, 1881.]

Hindu will—Bequest for the performance of ceremonies and giving feasts to Brahmans—Bequest of undivided share of joint property.

A bequest by a Hindu for the performance of ceremonies and giving feasts to Brahmans is valid.

A Hindu has no power to bequeath his undivided share of joint family property.

[F., 12 C.W.N. 1083; Appr., 18 B. 136; R., 5 Bom. L.R. 1010.]

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* Second Appeal No. 131 of 1881.

(1) 6 C. 812.

(2) 6 C. 394.

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APPELLATE CIVIL.

6 B. 24.

THIS was a special appeal against the decision of S. H. Phillpotts, Judge of Ahmedabad, confirming the decree of Rao Saheb Chunilal Maneklal, Subordinate Judge of Borsad.

One Umayashankar by a will dated the 14th of November, 1874, devised all his property to the plaintiffs as trustees, directing them to reduce it to money, and expend it in the performance of his funeral ceremonies and in feeding Brahmans according to the custom of his caste. The material part of the will was as follows:—"Whatever property might remain at the time of my death, it is my wish to expend it in the performance of ceremonies and giving feasts to Brahmans, according to the custom of my caste, as far as it may be possible. I, therefore, entrust the business to the two persons mentioned below [the plaintiffs] who are my relatives. They should reduce the property in their possession after my death and apply it towards the purposes above described. In that nobody should interfere, because nobody has a right to interfere, because my cousins have no share in this property, and I am at enmity with them, and, therefore, I do not like to give them any portion of it. I give full authority to the two persons to sell the property and to apply the proceeds of the sale in performance of obsequies at such places as they might think proper." Relying upon this will the plaintiffs sued the defendants to recover possession of a portion of a field, some trees, and a building-site. The defendants contended that the will was invalid; that the field was their joint family property which the testator could not will away.

[25] The Subordinate Judge held the will to be invalid. He argued that the testator in making the will was not actuated by religious motives, but wished to disinherit the defendants from feelings of enmity. He found that the defendants for a whole year after the testator's death had performed his funeral ceremonies. He referred to the cases of *Morice* v. *Bishop of Durham* (1); *Williams* v. *Kershaw* (2); *Ellis* v. *Selby* (3); *The Advocate General* v. *Damodar Madhavjee* (4); *Pranjivan Tulsidas* v. *Devkuvarbai* (5); *Baker* v. *Sutton* (6).

The District Judge agreed with the Subordinate Judge, and confirmed his decree.

The plaintiffs appealed to the High Court.

Nanabhai Haridas, Government Pleader, for the appellants.—The bequest is specific, and neither vague, indefinite, nor uncertain. It is for the performance of the testator's funeral ceremonies and to the extent of the property in giving feasts to Brahmans according to the custom of his caste: Perry's Oriental Cases, 526. In *Dwarkanath Bysack* v. *Burroda Persaud Bysack* (7) Mr. Justice Pontifex upheld a bequest directing a trustee to feed "the really poor and needy at Gopinathji," and his decision was confirmed, in appeal, by Garth, C. J., and Markby, J. In that case the learned Judges considered the English cases referred to by the Subordinate Judge and a good many others.

Manekshah Jehangirshah.—The Subordinate Judge has held that a part, at least, of the property is joint. The District Judge has not touched that point at all. If the property is joint, the testator could not will away his undivided share. This appears on the face of the plaint. This point must be inquired into, even if the will be held to be otherwise valid.

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(1) 9 Ves. 399. (2) 5 Cl. & F. 111. (3) 1 M. & Cr. 286 (298, 299).
(4) Perry's Oriental Ca. 526 (I.D., O.S., Vol. IV, p. 481), See also 1 B.H.C.R. 76.
(5) 1 B.H.C.R. 130. (6) 1 Keen. 224. (7) 4 C. 443.

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JUDGMENT.

MELVILL, J.—We see no reason for holding that a bequest "for the performance of ceremonies and giving feasts to Brahmans" is invalid. Such a bequest was upheld by the Calcutta High Court in *Dwarkanath Bysack* v. *Burroda Persaud Bysack* (1). The Bombay cases, on which the Courts below rely, merely establish [26] the proposition that a devise to "*dharma*" is void, because the word "*dharma*," without any qualifying expression, is too vague an indication of the testator's intention to constitute a valid gift to charity. A specific bequest, for the purpose of a particular charity, stands on a different footing.

It may be, however, that the will (Ex. No. 3) is invalid, wholly or in part, on another ground, *viz.*, that the testator had no power to bequeath his undivided share of joint family property: *Gangubai* v. *Ramanna* (2) and *Vrandavandas* v. *Yamunabai* (3). There has been no finding, by the Courts below, on the question, whether the property in suit, or any part of it, was joint family property at the date when the will (Ex. No. 3) was executed. If it were so, the will, so far as it affects to deal with the testator's interest in such undivided property, would be invalid. The decrees of both the Courts below must be reversed, and the case remanded for a new decision with reference to the issue above suggested. Costs to follow final decision.

Decrees reversed.

6 B. 26.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

KHUSALBHAI AND OTHERS (*Plaintiffs*), *Applicants v.* KABHAI AND OTHERS (*Defendants*), *Opponents.** [12th September, 1881.]

The Civil Procedure Code (Act X of 1877), s. 386—*Act XII of* 1879, *ss* 60 *and* 108—*Limitation Act XV of* 1877, *sch. II, art.* 171-*B—Deceased defendant—Application to make legal representative defendant—Construction of Limitation Acts.*

Subsequently to the institution of the plaintiff's suit, one of the defendants died, and his son, as his legal representative, was made a defendant in his stead. The new defendant (*inter alia*) objected that his father had been dead more than six months before the application of the plaintiffs to make him a defendant, and that, therefore, the suit should abate, as provided by the last clause of s. 368 of the Civil Procedure Code Act X of 1877 (introduced by the amending Act XII of 1879), art. 171-B of the Limitation Act XV of 1877, which prescribes a period of sixty days within which an application should be made to have the representative of a deceased defendant made a defendant to a suit.

[27] When the amending Act XII of 1879 was passed,—that is, on the 29th of July, 1879,—the original defendant had been dead more than six months; but the plaintiff made an application to have the representative of the deceased defendant made a defendant before the publication of the Act in the local gazette.

Held that the provisions of art. 171-B of the Limitation Act should not be given retrospective effect, and that the plaintiffs' application was not time-barred. The general rule as laid down in *Reg.* v. *Dorabji* (4)—that "an Act of Limitation, being a law of procedure, governs all proceedings, to which its terms are applicable, from the moment of its enactment, except so far as its operation is expressly excluded or postponed"—admits of the qualification that, when the retrospective application of a statute of limitation would destroy vested rights, or inflict

* Extraordinary Application, No. 26 of 1881.

(1) 4 C. 443.
(2) 3 B.H.C.R.A.C.J. 66.
(3) 12 B.H.C.R. 229.
(4) 11 B.H.C.R. 117.

such hardship or injustice as could not have been within the contemplation of the Legislature, then the statute is not, any more than any other law, to be construed retrospectively.

[R., 17 C.L.J. 316 (351) = 17 C.W.N. 889 (916) = 19 Ind. Cas. 793; 11 Ind. Cas. 912 = 7 N.L.R. 125 ; 14 Ind Cas. 184 = 11 M.L.T. 276 = (1912) M.W.N. 652 ; (1913) M. W.N. 303 ; 90 P.R. 1904 = 88 P.L.R 1904 ; 153 P.L.R. 1901 ; D., 34 M. 292 = 5 Ind. Cas. 420 = 20 M.L.J. 347 = 7 M.L.T. 115.]

THIS was an application, in the Court's extraordinary jurisdiction, for the reversal of an order of S. Tagore, Judge of Surat, confirming an order of Khan Saheb E. M. Modi, Subordinate Judge of Jambusar.

The plaintiffs sued the defendants to recover possession of a piece of land alleged to have been sold to them under a deed of sale dated 9th April, 1875, or the price paid for it with interest. The defendants answered that they had completed the sale by making over to the plaintiffs possession of the property ; that they lost that possession afterwards in consequence of the obstruction caused by one Bai Amrut and others, and that, therefore, they, the defendants, were no longer responsible.

One of the defendants subsequently died, and his legal representative was made a defendant in his stead. The new defendant (*inter alia*) objected that his father had been dead more than six months before the application of the plaintiffs to make him a defendant, and that, therefore, the plaintiffs' claim must necessarily abate under the last clause of s. 368 of Act X of 1877 introduced by Act XII of 1879, and art. 178-B of Act XV of 1877, which prescribes a period of sixty days within which to apply to have the representative of a deceased defendant made a defendant.

Another of the defendants also died, and his son was made legal representative on the record. The latter also made the same defence under the same circumstances.

[28] The Subordinate Judge and, on appeal, the District Judge, following the principle laid down in *Reg.* v. *Dorabji*(1), held the claim barred, and directed the suit to abate. The plaintiffs applied to the High Court.

Gokuldas Kahandas Parekh, for the applicants.—When this suit was filed, neither the Code of Civil Procedure (Act X of 1877) nor the Limitation Act XV of 1877 had been amended. The amending Act XII of 1879 received the assent of the Governor-General on the 29th July, 1879, when both the defendants had been dead six months. Section 60 of the amending Act introduced into s. 368 the words " when the plaintiff fails to make such application within the period prescribed therefor, the suit shall abate " ;—s. 180 added to sch. II of the Limitation Act XV of 1877, art. 177-B.—" Under s. 368 of the same Code [the Code of Civil Procedure] where the representative of a deceased defendant was made a defendant sixty days from the date of the defendant's death." The effect of these amendments is to require a plaintiff to apply, within sixty days of the defendant's death, to have his legal representative made a defendant. At the date of the passing of Act XII of 1879 the defendants had been dead six months, and it was physically impossible for the plaintiffs to have carried out the Legislature's direction. The Legislature could not have intended to deprive the plaintiffs of their right to revive their suit without any notice whatever, for the amending Act came into force the same day that it was passed. The application in this case was made as soon as possible. It was made before the publication of the

(1) 11 B.H.C.R. 117.

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amending Act in the local gazette. It would be a hardship to give retrospective operation to the Act: 24 and 25 Vict., c. 67, s. 20; Maxwell on Statutes, 198; *The Queen* v. *Leeds and Bradford Railway Company* (1).

Shivshankar Govindram, contra.—The words of the amending Act are imperative and must be given effect to, whatever may be the hardship. As ruled in *Reg.* v. *Dorabji*, a law of procedure governs all proceedings to which it applies from the moment of its enactment, except so far as its operation is expressly postponed, which it is not in this case.

JUDGMENT.

[29] MELVILL, J.—The decision of this Court in the matter of *Reg.* v. *Dorabji* (2), on which the Courts below rely, is, no doubt, in point. That case may have been rightly decided; for the Court was there dealing with a statutory provision which was beneficial to the liberty of the subject, and, therefore, perhaps, there was no reason, (but the contrary) for presuming that the Legislature did not intend that the words of the statute should receive the widest possible application. But we think that it is somewhat too broadly stated in that case that "an Act of Limitation, being a law of procedure, governs all proceedings, to which its terms are applicable, from the moment of its enactment, except so far as its operation is expressly excluded or postponed." This general rule must admit of the qualification that, when the retrospective application of a statute of limitation would destroy vested rights, or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, then the statute is not, any more than any other law, to be construed retrospectively. Thus in *The London and Delhi Bank* v. *Orchard* (3), the Privy Council, in discussing the literal construction which had been put on ss. 20 and 21 of Act XIV of 1859, observe: "Such a construction would cause great inconvenience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a right which he had under the law as it existed in the regulation provinces at the time of the passing of the Act, and in the Punjab at the time of the introduction of it. Their Lordships are of opinion that such a construction would be contrary to the intention of the Legislature." Similarly, in the present case, we think that art. 171-B, sch. II, of Act XV of 1877, ought not, if possible, to be retrospectively construed. When that article was introduced into the statute of limitation by Act XII of 1879, the deceased defendant had been dead for six months, and it was, therefore, impossible for the plaintiffs to comply with the requirements of the article, namely, that an application to have the representative of a deceased defendant made a defendant should be presented within sixty days from the date of the defendant's death. Consequently, to put a retrospective construction upon the article would be to deprive the plaintiffs absolutely of the **[30]** right which they previously had, and which all plaintiffs subsequently had, to revive their suit; and this would be an injustice which cannot be presumed to have been within the intention of the Legislature.

Another consideration, tending to the same conclusion, is that there was no postponement of the operation of Act XII of 1879, but the Act came into force at the moment at which it received the assent of the Governor General. The plaintiffs, therefore, and others similarly situated,

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(1) 21 L.J.M.C. (N.S.) 193. (2) 11 B.H.C.R. 117. (3) 4 I.A. 127.

had no such notice as might have enabled them to anticipate the divestiture of their right of revival. This is a consideration which has weighed much with Courts in England and in this country when dealing with similar questions (see *Wright* v. *Hale* (1); *Towler* v. *Chatterton* (2); *Ramchandra* v. *Soma* (3); *Abdul Karim* v. *Manji Hansraj* (4); *In the matter of the petition of Ratansi Kalianji and others* (5). In the *Queen* v. *The Leeds and Bradford Railway Company* (6) it was held that the 11 and 12 Vict., c. 43, s. 11, which limits the time for taking summary proceedings before Justices to six months from the time when the matter complained of arose, was fatal to proceedings begun after the passing of the Act, in respect of a matter which had arisen more than six months before the Act was passed. But this was not on the ground that a statute of limitation is necessarily retrospective, but because there was an interval of six weeks between the passing of the Act and its coming into operation; and the concession of this interval was thought to show that the hardship in question had been in the contemplation of the Legislature, and had been thus provided for. If it had been otherwise, the decision would probably have been different. Lord Campbell said: "If the Act had come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention, on the part of the Legislature, not to give it a retrospective operation; but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the Legislature has provided that as the period of time within which proceedings **[31]** respecting antecedent damages or injuries might be taken before the proper tribunal." The observations of Wightman, J., were to the same effect.

The orders of the Courts below must be reversed, and the plaintiffs' application of the 12th August, 1879, to enter the names of the legal representatives of the deceased defendants, must be complied with, and the plaintiffs must have the costs of the appeal and of this application.

Order reversed.

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6 B. 31.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

MANOHAR (*Applicant*) *.v* GEBIAPA, (*Opponent*).* [5th October, 1881.]

Dekkhan Agriculturists' Relief Act XVII of 1879, *ss.* 47 *and* 48—*Application for execution—Conciliator—Limitation Act XV of* 1877, *s.* 14, *para* 3, *art.* 179, *sch.* 2—*Court.*

A conciliator appointed under the Dekkhan Agriculturists' Relief Act XVII of 1879 is not a Court. The presentation, therefore, to a conciliator of an application for execution of a decree within the period of limitation does not save the limitation, if the application to the proper Court be time-barred: Act XV of 1877, s. 14, para. 3; sch. 2, art. 179; Act XVII of 1879, ss. 47 and 48.

The presentation, to any civil Court, of an application for execution of a decree passed before 1st November, 1879, (the date on which the Dekkhan Agriculturists' Relief Act came into force,) to which any agriculturist residing within any local

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* Extraordinary Application, No. 22 of 1881.

(1) 6 H. & N. 227. (2) 6 Bing. 258. (3) 1 B. 305, *note*.
(4) 1 B. 295 (302). (5) 2 B. 148. (6) 21 L.J. (M. C.) 193.

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area for which a conciliator has been appointed is a party, is no legal presentation at all, if the application be not accompanied by the conciliator's certificate.

[R., 20 B, 76.]

THIS was an application, in the High Court's extraordinary jurisdiction, for the reversal of an order of W. H. Newnham, Judge of Poona, reversing an order of the Subordinate Judge of Barsi.

Gebiapa held a decree against Manohar. The last application made to enforce it was on the 7th of July, 1877. Within three years of this date, Gebiapa applied to the Subordinate Judge of Barsi to have the decree fully executed. The Subordinate Judge ruled that the application was one to which the Dekkhan Agriculturists' Relief Act XVII of 1879 applied, and that it must, therefore, be accompanied by a conciliator's certificate. Gebiapa was accordingly directed to procure it. Gebiapa applied to a [32] conciliator on the 5th of July, 1880,—that is, also within three years of the last application,—but the conciliator having failed to reconcile the parties, he on the 17th of July, 1880, issued the necessary certificate. Gebiapa thereupon applied to the Subordinate Judge on the 23rd of July, 1880,—that is, after the expiration of three years,—and renewed his application.

On these facts the Subordinate Judge considered the application time-barred; but the District Judge thought otherwise, and ordered the execution to proceed against Manohar.

Manohar applied to the High Court.

Manekshah Jehangirshah, for the applicant.

Ghanasham Nilkant, for the opponent.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—The District Judge has held that the application made to the conciliator to effect an amicable settlement, was a step taken to keep alive the applicant's decree, and that, consequently, a fresh period of limitation commences from the date of that application. The District Judge has, however, lost sight of the circumstances that, in order to give a fresh starting point, the application to take some step in aid of execution must be made "to the proper Court" (art. 179, sch. II, Act XV of 1877). It is impossible to hold that a conciliator appointed under the Dekkhan Agriculturists' Relief Act is a Court. He has no power to decide anything, but can only endeavour to effect a settlement; and, if he fails, must refer the parties to the Civil Court.

The applicant alleges that this application was presented to the Subordinate Judge within three years, and that he was referred by the Subordinate Judge to the conciliator; and he wishes that the date on which he first went to the Subordinate Judge, and not the date on which he subsequently applied with a certificate, should be taken as the date of the presentation of his application. But this is impossible. He was bound by law to obtain a certificate from the conciliator before he went to the Subordinate Judge, and the Subordinate Judge could not entertain any application without such a certificate. The application, therefore, which [33] was made on the 5th July, being unaccompanied by a certificate, cannot be considered to have been legally presented at all.

We think that it is to be regretted that in s. 48 of the Dekkhan Agriculturists' Relief Act the words "or application for execution of a decree" were not inserted after the word "suit," as they have been in

s. 47. It is hard enough that a party who has obtained a decree in a Civil Court should be unable to execute it, until pressure has been put upon him by a conciliator to induce him to forego a portion of his debt. But it is a still greater hardship if the intervention of the conciliator is to have the effect of causing the execution of the decree to become barred by lapse of time. Yet this must be the result, as the law stands, in many instances. We believe that the conciliators are in many places quite unable to keep pace with the work imposed upon them, and that thousands of applications are lying undisposed of in their hands. In the case of contemplated suits, this is not of so much consequence, as s. 48 of the Act provides for the deduction, from the period of limitation, of the time occupied in proceedings before the conciliator. But, there being no similar provision in the case of decree-holders, and para. 3 of s. 14 of the Limitation Act XV of 1877 being of no use to the decree-holder, inasmuch as a conciliator is not a Court, limitation is running against the decree holder during the whole period for which the proceeding is pending before the conciliator, and this must in many cases be fatal to the enforcement of his rights. An Act for amending the Dekkhan Agriculturists' Relief Act is before the Legislature, and we trust that the point to which we now call attention will receive the consideration which its great importance deserves.

The order of the District Judge must be reversed, and that of the Subordinate Judge restored. The parties to bear their own costs of appeal and of this application.

Order reversed.

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6 B. 34.

[34] APPELLATE CRIMINAL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

IMPERATRIX *v.* PANDHARINATH.* [5th October, 1881.]

Evidence—Confession—Admission—Self-exculpatory statement to police officer in police custody—Indian Evidence Act I of 1872, *ss.* 25 *and* 26—*Re-trial.*

A statement made to a police officer by an accused person while in the custody of the police, although intended to be made in self-exculpation and not as a confession, may be nevertheless an admission of a criminating circumstance, and, if so, under ss. 25 and 26 of the Indian Evidence Act I of 1872, it cannot be proved against the accused.

After excluding evidence improperly admitted and put before the jury, the High Court found that the remaining evidence was not of such a character that a conviction might reasonably be based upon it. It accordingly reversed the conviction and sentence of the accused, declining to order his re-trial.

[**F.**, 19 B. 363 (368) ; 4 Cr. L.J. 177=16 P.R. 1906=111 P.L.R. 1906=P.W.R. 1906, p. 3 ; 11 Cr. L.J. 153=4 Ind. Cas. 1028=5 L.B.R. 131 ; Rat. Unr. Cr. Cas. 488 (489) ; **R.**, 14 B. 260 (263) (**F.B.**) ; 19 B. 749 (755) ; 37 C. 467 (523)=14 C.W.N. 1114 (1197)=11 Cr. L.J. 453=7 Ind. Cas. 359=20 M.L.J. 498 ; 2 C.W.N. 702 (707) ; 12 Cr. L.J. 60=8 Ind. Cas. 1181=6 N.L.R. 180 ; 14 Cr. L.J. 252=19 Ind. Cas. 508=6 S.L.R. 143 ; **D.**, 5 Bom. L.R. 312 (313).]

THE accused was tried by W. H. Newnham, Judge of Poona, and a jury under ss. 467 and 471 of the Indian Penal Code, with having dishonestly used as genuine a forged cheque for Rs. 500, knowing or having reason to believe it to have been forged. The jury returned a verdict of

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* Criminal Appeal, No. 125 of 1881.

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guilty; and the Judge, concurring with it, convicted the accused, and sentenced him to undergo rigorous imprisonment for five years.

A theft was committed in the house of one Mr. Riddell on the 16th of August, 1878, at Lanavil. Among other things, a blank cheque-book of the National Bank of India, bearing Nos. 243701 to 243725, was stolen; and on the 16th of June, 1881, one of these cheques bearing No. 243702, with Mr. Riddell's name forged drawn for Rs. 500 in favour of Hari Narayan, was presented for payment at the National Bank of India by Ramchandra Mulchand; but as the manager felt some doubts about its being genuine, and as he had been communicated with by Mr. Riddell at the time the theft occurred, he addressed a letter to Mr. Riddell; and ultimately the cheque, which was dated 1st of April, 1881, was made over to the police.

The evidence adduced by the prosecution tended to show that Sonya Bapa, uncle of the accused, called one Dagdu to his house where he as well as the accused resided; that Dagdu went to the house; that the accused in his uncle's presence gave Dagdu **[35]** the forged cheque with instructions to cash it; that Dagdu wished the accused to accompany him, but that the accused excused himself on the plea that warrants of the Court of Small Causes were out against him; that Dagdu the next morning got the cheque receipted by the accused, and took it to one Govardhan, who agreed to discount it at 4 annas per cent; that the accused wanted an immediate advance of Rs. 60, which Dagdu accordingly procured, and paid to the accused in presence of Chhotiram and Shaligram. Besides other evidence, the prosecution put in an application alleged to have been written by the accused and addressed to Mr. Wendon, an officer of the G. I. P. Railway Company, whose employee the accused himself was, with the object of proving that the writing of it and the cheque was by the same hand. The prosecution, moreover, to prove the possession of the cheque by the accused, called a policeman, who deposed that while the accused was in *faraskhana* in police custody, he put the cheque into the hands of the accused, and asked him whence he got it, and that the accused replied that he had got it from one Kisan.

The accused himself denied all knowledge of the cheque.

In delivering his charge to the jury the Judge directed their attention to three points—First, was the cheque forged? Second, did the accused endeavour to cash it? And, third, did he do so knowingly? He recapitulated the evidence, and in doing so drew attention to the statement of the policeman that the accused told him he had got the cheque from Kisan, and asked the jury to compare the handwriting of the cheque with that of the petition alleged to have been presented by the accused to Mr. Wendon.

Thereupon the jury bringing in a verdict of guilty, the Judge convicted and sentenced the accused.

The accused appealed to the High Court.

Kashinath Trimbak Telang, counsel (with him *Ganesh Ramchandra Kirloskar*, pleader), for the appellant.—The conviction being in this case by a Judge and jury, the appeal lies on a point of law only, and the one which the appellant raises is that there is no evidence to justify the conviction. The Judge was in error in allowing the statement of the accused—that he had got the **[36]** cheque from Kisan—to be proved by the evidence of a policeman. Such a statement amounts to a confession, and s. 25 of the Indian Evidence Act I of 1872, forbids its being proved. And it was, besides, made while the accused was in police custody. It cannot, therefore, be

proved : s. 26. The application to Mr. Wendon was not admitted by the accused to have been in his handwriting, and no evidence had been adduced to prove it. It was, therefore, inadmissible. The accused was on a trial for uttering a forged document, and not for forgery. The comparison of handwriting was not permissible, and quite beside the right issue in the case. Eliminating these two pieces of evidence there remains the evidence of Dagdu—whose object is to shift the crime on to some one else—and Chotiram and Shaligram, whom the Judge properly describes as "possible partisans." The conviction should be reversed, and if necessary a new trial ordered : *Reg* v. *Amrita* (1).

Nanabhai Haridas, Government Pleader, for the Crown.—This is not a case of "no evidence." There is some evidence which the Judge and jury have believed. The statement of the accused—that he got the cheque from Kisan—was intended only to excuse himself. It was not intended as an admission or confession. If the remaining evidence be deemed insufficient, a retrial should be ordered.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—The witness No. 14, a police officer says : "The accused was sent for, and shown this cheque, and he said that one Kisan had given it to him. This was at the *faraskhana*. He was in custody. Accused said this after his arrest." This statement of the prisoner, that Kisan had given him the cheque, was used by the prosecution as an admission by the prisoner that he had had possession of the cheque, and it was put to the jury as amounting to such an admission. It is contended that ss. 25 and 26 of the Indian Evidence Act (I of 1872) prohibit such a use of such a statement when made to a police officer, or by a person in custody of a police officer; and we have come to the conclusion that this contention is well founded. It is true that **[37]** the statement in question was probably not intended as a confession of guilt, but was rather made by the prisoner in self-exculpation ; but it is nevertheless an admission of a criminating circumstance on which the prosecution mainly relates, and formed, indeed, the most important part of the evidence against the accused. We think that such an admission comes properly within the rule of exclusion which the Legislature has laid down in regard to confessions made by a person in custody of the police.

There is another piece of evidence in the case, *viz.*, an application alleged to have been made by the prisoner to Mr. Wendon, which ought not to have been allowed to go to the jury. It was not admitted or proved that this application had been written by the accused, and it was not, therefore, admissible, under s. 73 of the Evidence Act, for the purpose of comparison of hand-writing. It is true that the Sessions Judge told the jury not to attach much importance to this piece of evidence ; but it is easy to imagine that, if they looked at the application, and came to the conclusion that it was in the same handwriting as the cheque, it may have had a very considerable effect in inducing in their minds a belief of the guilt of the accused.

Being of opinion that evidence has been improperly submitted to the consideration of the jury, it is necessary for us to set aside the conviction and sentence. We have next to consider whether we ought to order a new

(1) 10 B.H.C.R. 497.

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trial. We do not think that we should do so, unless the remaining evidence (after rejecting that improperly admitted), is of such a character that a conviction might reasonably be based upon it. We have come to the conclusion that it is not of such a character. It consists of a statement of Dagdu (No. 6), who cashed the cheque, that he received it from the prisoner, and the statements of two other witnesses (Nos. 8 and 9) who are apparently friends of Dagdu, that they saw Dagdu pay Rs. 60 to the prisoner. As Dagdu was the person who cashed the cheque, he is, of course, bound to clear himself by fixing the blame on some other person; and considering this circumstance, and the generally unsatisfactory character of the evidence of the three witnesses referred to, we [38] cannot say that it is such evidence as would justify us in ordering a new trial.

We accordingly reverse the conviction and sentence, and order that the prisoner be discharged.

Conviction reversed.

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6 B. 38=6 Ind. Jur. 196.

ORIGINAL CIVIL.

Before Mr. Justice Bayley.

SIR MANGALDAS NATHUBHOY (*Plaintiff*) *v.* KRISHNABAI AND BHAGVANDAS PRANJIVANDAS (*Defendants*).* [29th August, 1881.]

Hindu law—Will—Person competent to take under a will.

The doctrine laid down by the Privy Council in the *Tagore Case* (1)—that only a person, either in fact or in contemplation of law in existence at the death of a testator, can take under his will—is a general principle of Hindu law applicable as well to Hindus governed by the law of the Mitakshara as to those governed by the Dayabhaga.

INTERPLEADER suit. In this case the plaintiff and the first defendant Krishnabai were the children of Nathubhoy Ramdas, deceased. The second defendant, Bhagvandas Pranjivandas, was the eldest son of Krishnabai, the first defendant.

Nathubhoy Ramdas died in September, 1843, and by his will, dated the 26th August, 1843, he gave a legacy of Rs. 3,000 to his daughter, Krishnabai (the first defendant) in the following terms:—"I do further write that my daughter, Krishnabai, is very young; but after she is grown up you will give her in marriage to a good husband, looking her father and mother-in-law possessing one dwelling-house. The marriage to be performed, according to our rule, with proper presents given on the marriage and after the marriage is performed, Rs. 3,000 is to be given her from my property by my son Mangaldas. She is to place it at interest in some proper place, and the interest thereof she is to enjoy. If she get any children, then that her money go to her children, and should she not give birth to any children then after her death that money may go to my son Mangaldas"

Krishnabai married in February, 1848, and there was issue of [39] this marriage—four sons and one daughter—all of whom were living

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* Suit No. 230 of 1881.

(1) 9 B.L.R. 377=I.A. Sup. Vol. 47.

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6 B. 38 = 6 Ind. Jur. 196.

at the date of the present suit. Shortly after Krishnabai's marriage, Sir Mangaldas Nathubhoy, in accordance with the above provision of the will, gave her the Rs. 3,000. From that time until shortly before the present suit he held it in deposit for her, and paid her interest upon it at the rate of 6 per cent. *per annum*.

Early in the year 1881, Sir Mangaldas gave notice to Krishnabai that he would not continue to pay interest at so high a rate. She then demanded that the principal sum should be paid over to her. The second defendant through his solicitor served notice on Sir Mangaldas not to pay over the money, alleging that, under the will of Nathubhoy Ramdas, Krishnabai was only entitled to a life-interest in the sum of Rs. 3,000, and claiming for himself and the other children of Krishnabai a beneficial interest in the said money in remainder after her death. Thereupon Sir Mangaldas paid the Rs. 3,000 into Court, and filed this suit, praying that the defendants might be ordered to interplead concerning their claims to the said sum of Rs. 3,000.

At the first hearing on the 8th August, 1881, the Court dismissed the plaintiff from the suit, and awarded him his costs under s. 473 of the Civil Procedure Code (Act X of 1877).

Written statements were filed by the defendants. Krishnabai claimed that the money should be at once paid over to her, and she denied that the second defendant had any interest in it whatever. The second defendant, on the other hand, alleged that, under the will of Nathubhoy Ramdas, Krishnabai had only a life interest in the money, and that he and her other children were entitled in remainder, and he prayed that the money should be invested in proper security under the direction of the Court.

Lang (*Jardine* with him).—No question arises in this case: the second defendant was not in existence at the time of the testator's death, and has, therefore, no claim. The point has been expressly decided by the Privy Council in the *Tagore Case* (1).

Kirkpatrick (*Telang* with him) for the second defendant.—We admit that our claim must fail unless this case can be distinguished from the *Tagore Case*, or reasons be given for holding that the *Tagore Case* does not apply. There has been no decision, **[40]** under the Mitakshara, that a gift by will can only take effect if the donee be in existence at the date of the testator's death. In this Presidency such gifts are frequently made to unmarried persons for life, and after their death, to their children. The Dayabhaga lays it down (chap. I, s. 21) that a gift can only be made to a "donee who is a sentient person;" and as the Privy Council in the *Tagore Case* held that gifts *inter vivos* and gifts by will were analogous, there was no escape from the conclusion that a gift by will could only be to "a sentient person." But there is no such text in the Mitakshara, which is the law applicable here. The Dayabhaga and Mitakshara differ in the most vital points, and they do so from the conscious application of completely different principles" (Mayne on Hindu Law, para 35). Unless there is something in this will contrary to the letter or spirit of the Mitakshara, its provisions should not be declared void. There is clearly nothing in it contrary to the letter of the Mitakshara; and we submit that its provisions are not contrary to, but strictly in accordance with the spirit of that law. That law favours the rights of children. It gives them rights by birth which the Dayabhaga denies them (see Mitakshara, chap. I, s. 1, pl. 23; Dayabhaga chap. I, pl. 13

(1) 9 B.L.R. 377 = I.A. Sup. Vol. 47.

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et seq. ; Mayne's Hindu Law, para 35). The decision in *Sreemutty Soorjeemony* v. *Denobundoo Mullick* (2) declares that there is nothing in an executory devise contrary to Hindu law. It is true that in the *Tagore Case* the application of that proposition was limited, but that was when an attempt was made to apply it to a case under the Dayabhaga.

According to the doctrine laid down in the *Tagore Case* (p. 397), if the testator in the present case had left the Rs. 3,000 to Krishnabai for life, and after her death to her adopted child, the bequest would be good. Apparently it would be so, even although the adopted child were not born till after the testator's death. Whatever the doctrines of the law of Bengal may be, it is anomalous under the Mitakshara to place an adopted child in a better position than a natural one. Hitherto the decisions of the Courts have been directed towards securing for an adopted child rights equal, not superior, to those of a natural child.

JUDGMENT.

[41] BAYLEY, J.—In this case the second defendant, Bhagvandas Pranjivandas, is the eldest son of the first defendant, Krishnabai, and he claims to be entitled in remainder, subject to his mother's life interest, to a sum of Rs. 3,000 bequeathed by the will of his grandfather (the father of Krishnabai) in the following words:—[His Lordship read the clause of the will above set forth.] This will was made in the year 1843, and the testator died in the same year. Krishnabai was married in 1848; and if it be the case, as stated in the plaint, that Bhagvandas is now only 23 years of age, it would appear that he was not born until the year 1857 or 1858. We have, therefore, a person claiming to take under a will who was not in existence at the death of the testator, and the question is whether the claim can be maintained. I consider that the point is settled by the authority of the *Tagore Case* (1) which was decided by the Privy Council in 1872. Their Lordships in that case decided that it was a general principle of Hindu law that only a person, either in fact or in contemplation of law in existence at the death of the testator, can take under his will. Their decision was based, not on the Dayabhaga, but upon the Hindu law of gifts *inter vivos*, which they considered to be the law applicable to cases of gifts by will. By that decision I am bound, and I must, therefore, hold that the claim of Bhagvandas to be declared beneficially interested in the sum of Rs. 3,000 after the death of Krishnabai is unsustainable. It is not necessary for me to decide whether Krishnabai takes more than a life-interest in this money, and I give no opinion upon the point.

Attorneys for first defendant.—Messrs. *Craigie Lynch and Owen.*
Attorneys for second defendant.—Messrs. *Hore Conroy and Brown.*

(1) 9 M.I.A. 123.
(2) 9 B.L.R. 377 = I.A. Sup. Vol. 47.

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[42] ORIGINAL CIVIL.

Before Mr. Justice West.

FATMABIBI (*Plaintiff*) *v.* THE ADVOCATE GENERAL OF BOMBAY AND SHAIK HUSSAN ROGAY (*Defendants*).*

[4th, 29th and 30th April, 1881.]

Mahomedan law—Wakf—Power of revocation—Reservation of rents and profits to donor for life—Ultimate dedication of property to charity with intervening private interest—Rule against perpetuities how far applicable in a colony subject to English law—Charities, what are—Trust for maintenance of idol, for benefit of poor, for building tanks—Dedication by minor—Subsequent ratification—Estoppel.

A *wakf*, must be certain as to the property appropriated, unconditional and not subject to an option. It must have a final object which cannot fail, and this object must be expressly set forth.

When a *wakf* is created, the reservation, in the deed of settlement, of the annual profits of the property to the donor for life does not invalidate the deed. If, however, there is a provision for the sale of the *corpus* of the property and an appropriation of the proceeds to the donor, the settlement is invalid.

If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a *wakf* is not rendered invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take, may constitute a perpetuity in the sense of the English law; but, according to the Mahomedan law, that does not vitiate the settlement, provided the ultimate charitable object be clearly designated.

The rule against perpetuities extends to a colony in which English law is enforced only so far as it is adapted to the circumstances of the community. The case of "charities useful and beneficial" to the community is an exception to this rule. It is for the Courts to pronounce whether any particular object of bounty falls within this class. In order to decide this question they must, in general, apply the standard of customary law and common opinion amongst the community to which the parties interested belong. Objects which the English law would possibly regard as superstitious uses are allowable and commendable according to Mahomedan law. A trust for the benefit of the poor, for aiding pilgrimages and marriages, and for the support of wells and temples is a charity amongst Mahomedans. The law and opinion of Mahomedans regard such a trust as a charity; and, granting there is a charity, the objection to a perpetuity fails according to the principles of the English law.

Where the proposed object of the endowment is one which is directly contrary to the public law of the State, the above rule does not apply.

By an indenture of voluntary settlement, dated 16th March, 1866, F, a Mahomedan girl of the age of fourteen, conveyed certain immoveable property in the island of Bombay to trustees upon trust.—(1) During her lifetime to pay the rents and profits to her for her sole and separate use without power of anticipation. (2) After **[43]** her death to pay the rents and profits to her children and descendants as she might by deed or will appoint. In default of appointment the trustees were to pay life allowances to such descendants at their discretion. The rents and profits only were to be thus distributed among such descendants for ever, the *corpus* of the property being kept intact. (3) In case there should be no such descendants, or in the event of failure of such descendants, the rents and profits were to be expended on charitable purposes, such as expenses of poor pilgrims going to Mecca, building mosques, funeral and marriage expenses of poor people, sinking wells or tanks, or in such other manner as the trustees should think fit. Shortly after the execution of the settlement the trustees took possession of the property, and for fifteen years continued to pay the rents and profits to the settlor. The settlor was married in 1866 to H, and there was issue of the marriage only one son, who died in 1832 an infant under the age of five years. H died in 1872, and the settlor remained a widow. In 1881 she became desirous of revoking the above settlement, and under s. 527 of the Civil Procedure Code (Act X of 1877) she stated a case for the opinion of the Court, contending that she could

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lawfully revoke the trusts declared by the said indenture; that, if she could not revoke, then that the trust therein declared in favour of charity was void for remoteness; and generally that she was, under the circumstances, entitled to have the property reconveyed to her by the surviving trustee.

Held that the settlement was irrevocable. The dedication having been once made could not be recalled. The interposed private interests, which might or might not endure, did not avoid the ultimate charitable trust. According to Mahomedan law the latter gave effect to the former. Should the intermediate purposes of the dedication fail, the final trust for charity did not fail with them. It was but accelerated, being itself regarded as the principal object in virtue of which effect was given to the intervening disposition. Charitable grants being thus tenderly regarded, it would be inconsistent that a power of revocation should be recognized in the grantor.

Held, also, that although the dedication by a girl of fourteen was not to be upheld without inquiry, yet the transaction never having been questioned by her husband during his life, and she having for fifteen years confirmed her own act by a continued acceptance of the profits of the estate from the trustees, could not with reason contend that the dedication was invalid on account either of its ceremonial defects or of a want of an accompanying volition.

[**F.**, 11 B. 492; **R.**, 31 A. 136=6 A.L.J. 115=1 Ind. Cas. 763; 11 B. 441; 13 B. 264; 33 B. 122=10 Bom. L.R. 417; 18 C. 399; 20 C. 116; 22 C. 619 (**P.C.**)=22 I.A. 76=6 Sar. P.C.J. 572; 15 M. 424; 18 M. 201; 5 Bom L.R. 1010; 8 Bom.L.R. 245; 8 O.C. 379; **D.**, 13 M. 66.]

CASE stated under s. 527 of the Civil Procedure Code (Act X of 1877).

1. The plaintiff, Fatmabibi, is a Mahomedan lady of the age of about twenty-nine years. She belongs and always has belonged to the Sunni division or sect of the Mahomedan community.

2. Prior to the 16th of November, 1866, the said Fatmabibi (hereinafter referred to as the plaintiff) was the owner of the several immoveable properties in the island of Bombay particularly described in the schedule to the indenture or deed of settlement in the next succeeding paragraph hereof referred to. The[44]said properties are now of the aggregate value of Rs. 3,00,000 or thereabouts. The plaintiff on the said 16th of November had agreed to marry one Haji Mahomed Ebrahim bin Haji Abdul Cadur Jetaykar.

3. By an indenture bearing date the said 16th November, 1866, and made between the plaintiff of the one part and Mahomed Ali bin Mahomed Ameen Rogay, the defendant Shaik Hussan, Ameenabibi and Khudizabibi, therein called the trustees, of the other part, the plaintiff—after a recital that she was possessed of the hereditaments and premises in the schedule to the said indenture described, and that she was desirous of settling the same upon the trusts hereinafter declared—granted and conveyed the same to the said trustees to hold the said premises, subject to the payment of the rents and taxes payable in respect of the same, upon the following trusts, viz.—

1. Upon trust, during the life-time of the plaintiff, to pay the rents and profits of the said premises to the plaintiff for her sole and separate use, without power of anticipation.

2. Upon trust, after the death of the plaintiff, to pay the *rents and profits* of the said premises to such one or more exclusively of the others or other of the children or grandchildren or other the descendants of the plaintiff at such age or time, of respective ages or times if more than one, in such shares and with such future and executory or other trusts for the benefit of the said children or grandchildren or other descendants, or some or one of them, with such provisions for their maintenance and education either at the discretion of the trustees or trustee for the time being of the said indenture or of any other person or persons, and upon such conditions, with such restrictions and in such manner *as the plaintiff should by deed or will appoint*, and, in default of any such direction or appointment and so far as no such direction or appointment should extend, upon

trust to pay the said rents and profits to and amongst the children or grandchildren and other descendants of the plaintiff for and during the term of their natural lives or the life of any of them, in such shares and proportions and in such manner for their maintenance or education or otherwise as the said trustees or trustee for the time being should think fit. Provided always, and it was by the said indenture agreed and declared that its object was to make such a settlement of the said premises that the *rents and profits* thereof should alone be divisible amongst the children, grandchildren and other *descendants of the plaintiff for ever*.

3. In the event of there being no children, grandchildren or other descendants of the plaintiff, or, there being such, in the event of such child or other descendants dying without leaving any child or children, upon trust to stand possessed of the said premises and of the rents and profits thereof in trust for the said Mahomed **[45]** Ali bin Mahomed Ameen Rogay and his heirs to be devoted by him and them to charitable uses, according to the law of Mahomedans, either in paying the expenses of poor and indigent pilgrims going to Mecca, establishing charitable institutions, in donations to and building mosques, in payment of the funeral expenses or marriage expenses of poor people, in sinking wells or constructing tanks, or in such other manner as the said Mahomed Ali bin Mahomed Ameen Rogay, his heirs, executors or assigns should think fit.

4. The indenture contained a covenant on the part of the said Mahomed Ameen Rogay with the plaintiff that the said Mahomed Ali bin Mahomed Ameen Rogay, his heirs, executors, administrators or assigns would devote the said premises to such charitable uses accordingly; and it also contained various provisos, declarations, and agreements which it is unnecessary to refer to in detail, but reference is to be made to the said indenture as though it had been set out in full in this case.

5. There was no consideration for the execution, by plaintiff, of the said indenture, and the trust thereby created were entirely voluntary. The said indenture was duly registered.

6. The plaintiff was married on the 19th of November, 1866, to the said Haji Mahomed Ebrahim bin Haji Abdul Cadur Jetaykar, and had issue of the said marriage one son who died on the 30th of September, 1872, an infant under the age of five years.

7. Soon after the execution of the said indenture, the trustees took possession of the said trust premises; and the trustees or trustee of the said indenture, for the time being, have ever since collected the rents and profits thereof, and paid the same over to the plaintiff.

8. On or about the 31st of March, 1869, the said Mahomed Ali bin Mahomed Ameen Rogay and the said Khudizabibi retired from the said trust; and by indenture of that date the said Haji Mahomed Ebrahim bin Haji Abdul Cadur Jetaykar and one Ganesh Sadashiv Desai were duly appointed trustees in their place.

9. The said Haji Mahomed Ebrahim bin Haji Abdul Cadur died on the 16th of March, 1872. The plaintiff was not since re-married, and is childless—never having had a child, save her said son who died in his infancy.

[46] 10. The said Ganesh Sadashiv Desai died on the 27th of March, 1872 and the said Ameenabibi died on the 18th of March, 1872. The defendant, Shaik Hussan Rogay, is the sole surviving trustee of the said trust premises.

11. The plaintiff is desirous of revoking the settlement contained in the said indenture of the 16th of November, 1866, and of dealing with the properties comprised therein as her own.

12. The plaintiff contends that she can lawfully revoke the trusts declared by the said indenture: if she cannot revoke the same that the trust therein declared in favour of charity is void for remoteness; and generally she contends that she is, under the circumstances stated in this case, entitled to have the premises, in the schedule to the said

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indenture described, re-conveyed to her by the defendant, Shaik Hussan Rogay.

13. The Advocate General of Bombay joins in stating the present case as representing the said charity if validly created.

14. The questions for the opinion of this Honourable Court are—

(1) Whether the plaintiff is at liberty to revoke the trusts declared by the said indenture of the 16th November, 1866?

(2) Whether the trusts thereby declared are legal and valid trusts, or whether any and which of such trusts are or is legal and valid?

(3) Whether the trusts thereby declared or any and which of such trusts are or is void?

(4) Whether the plaintiff is entitled to have the said premises re-conveyed to her by the defendant, Shaik Hussan Rogay?

15. In the event of this Honourable Court deciding that the said trusts are revocable or void, or that the plaintiff is entitled to have the said premises re-conveyed to her, the defendant, Shaik Hussan Rogay, is to re-convey the said premises to the plaintiff, or according to her directions, and at the cost of the plaintiff.

Farran, for the plaintiff.

Marriott (Advocate-General), for the first defendant.

B. Tyabji, for the second defendant.

[47] *Farran*, for the plaintiff.—It is agreed that if the Court pronounces the deed of the 16th November, 1866, void, the trustee under the settlement shall re-convey the property. The form of the deed is not exclusively either English or Mahomedan. I contend that, under both Mahomedan and English law, the deed is invalid. The restraint on anticipation is English, and would not be valid according to Mahomedan law. The power of appointment is essentially according to English form, and is contrary to the Mahomedan law of *wakf*. The creation of a *wakf* excludes the further exercise of a volition by the donor. The trust must be constituted definitely as to its objects at once. The provision as to perpetuity would be invalid by English law. The ultimate trust for charity would also be invalid according to English law; it is founded on Mahomedan law.

The *cypres* doctrine does not apply to cases of trust-deeds. Under English law the trusts in favour of the children would be void (Watson's Compendium of Equity, Vol. II, p. 748; *In re Sayer's Trusts* (1); *Company of Pewterers* v. *The Governors of Christs Hospital* (2), and the succeeding trusts would fail: *Fowler* v. *Fowler* (3); *Tagore* v. *Tagore* (4).

Then, is this trust revocable according to Mahomedan law? As to the nature of *wakf*,—Baillie on Mahomedan Law, pp. 549, 550. The settlor (Fatmabibi) was only fourteen years of age at the date of the deed. Perpetuity is essential to a *wakf*. Limitation, therefore, to a particular time is unlawful. There must be an unfailing object. Here it is Mahomed Ali Rogay and his heirs only who are to distribute the funds to the poor; Baillie on Mahomedan Law, p. 567; Hedaya II, 334.

The trust is not one that the law will recognize; *Abdul Ganne Kasam* v. *Hussen Miya* (5); *Bibee Kuneez Fatima* v. *Bibee Saheba Jan* (6), *Jeewun Doss Sahoo* v. *Shah Kuber-ood-deen* (7); The *Tagore Case* (4) shows that the Courts will not allow a perpetuity to be created in favour of an individual.

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(1) L.R. 6 Eq. 319. (2) 1 Vern. 161. (3) 33 Bea. 616.
(4) 9 B.L.R. 377 = I.A. Sup. Vol. p. 47. (5) 10 B.H.C.R. 7.
(6) 8 W.R. 313. (7) 2 M.I.A. 390.

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[48] WEST, J., referred to *Yeap Cheah Neo* v. *Ong Cheng Neo* (1).

B. Tyabji, for the second defendant.—It is argued that the family gift fails by reason of the doctrine against perpetuities, and, therefore, the ultimate limitations also fail. Here there has been an actual delivery of the property, and it has been managed according to the deed since 1866; Baillie on Mahomedan Law, p 567. When property has once been made *wakf*, it cannot be recovered; Baillie, p. 425; Hedaya II, 337-338; *Delroos Banoo Begam* v. *Nawab Syud Ashgur* (2). In *The Advocate-General* v. *Fatima* (3) it was held that the founder of a *wakf* must follow the provisions of his own trust-deed.

Marriott, Advocate-General, did not address the Court.

JUDGMENT.

WEST, J.—This, which is the first case stated in this Court under s. 527 of the Code of Civil Procedure, has arisen on a trust-deed executed by the plaintiff, Fatmabibi, on 16th November, 1866, which she now desires to revoke.

The plaintiff is a Sunni Mahomedan, and at the time mentioned she possessed property valued at about three lakhs of rupees. She was very young, being now only twenty-nine or thirty years of age, and was engaged to be married. These circumstances, however, have not been seriously relied on as affecting the validity of the deed of trust. The husband, who is now dead, did not question it during his life, and the plaintiff herself allowed the trustees to take possession of the property embraced in the settlement, and has ever since received the profits of the property from them. This was in accordance with one of the provisions of the trust which she now relies on as a ground for its invalidity.

The trust-deed is of 16th November, 1866. Its principal provisions, as to the disposal of the property made over to the trustees, are these:—

"(1) The trustees are to pay to the plaintiff, during her life, the profits arising from the property, without anticipation.

"(2) Afterwards they are to pay the profits to the plaintiff's children and descendants as she may by deed or will appoint. In default of appointment the trustees are to pay life allowances at **[49]** their discretion. The profits alone are to be thus distributed, the *corpus* of the property being kept intact.

"(3) Should there be no descendants, or a failure of descendants of the plaintiff, the profits are to be expended on charitable purposes, such as pilgrimages, temples, marriages, and wells."

The transaction was quite gratuitous; and it is not asserted that the trustees, of whom only one—Shaik Husan—now survives, have at the plaintiff's request incurred expense or responsibility.

The questions, then, are—

(1) Whether the trusts were or were not validly created by the indenture of 16th November, 1866?

(2) Whether any power of revocation remains to the plaintiff?

Mr. Farran dwelt on the fact that the indenture follows, in part at least, English precedents. A provision against alienation or anticipation, he contended, would have no place in a deed of *wakf* under the Mahomedan law. The power of appointment reserved to the plaintiff was, he urged, inconsistent with *wakf*, which entirely excludes the further exercise of a volition on the part of the donor. Such a power, constituting a kind

(1) L.R. 6 P.C. 381. (2) 15 B.L.R. 167 (190). (3) 9 B.H.C. R. 19.

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of condition or suspensive clause, prevented an effective disposal in *wakf* by which the trust must, it was argued, be definitely settled forthwith as to all its objects. In spite, therefore, of the ultimate destination of the property to charitable objects, which might by itself be effectual under the Mahomedan law, the deed could not, as a whole, be given effect to according to that law.

Under the English law, again, it was urged that the attempt to create a perpetuity of interest in the rents and profits of the trust property was essentially invalid; nor could the defect be supplied by resort to any connective or complementary arrangement,—the *cypres* doctrine being inapplicable to settlements. The trusts in favour of the remoter issue must fail, and with them must fail the subsequent trusts in favour of the specified charities.

If the English law is to be applied to the case, there can be no doubt that the attempted creation of a perpetuity in favour of the family must fail. So, too, apparently, must the charity if regarded as resting on a trust of lands not taking effect forthwith **[50]** in possession (1); so that the question—of whether the settlement in favour of the charity could take effect by way of quasi-remainder or executory interest by means of the trust after an intermediate estate involving a perpetuity disapproved by the law (2)—could hardly arise. Possibly the trust might be given effect to by construing it as creating an equitable estate tail which could be dealt with by successive holders, and so saved from a withdrawal *extra commercium*, which would vitiate the whole of the proposed settlement. Or, again, alternative contingencies being provided for, each supported by the legal estate conveyed to the trustees, the equitable interest on the one or the other event must become vested in possession immediately on the plaintiff's death, which is not too remote a period for the constitution of an equitable interest. But these questions, too, would be speculative in the presence of the statutory provisions as to grants in mortmain.

As to the ultimate trust for constructing wells and aiding marriages and pilgrimages, the case of *Yeap Cheah Neo* v. *Ong Cheng Neo* (3) shows that the rule against perpetuities extends to a colony where the English law is enforced only so far as that law is adapted to the circumstances of the community, because it is regarded as having its foundation in principles of general application. But it is subject to exception in the case of "charities" liberally construed as objects "useful and beneficial" to the community. But useful and beneficial in what sense? The Courts have to pronounce whether any particular object of a bounty falls within the definition; but they must, in general, apply the standard of customary law and common opinion amongst the community to which the parties interested belong. Objects which the English law would possibly regard as superstitious uses are allowable and commendable according to the Hindu law [*Khusalchand* v. *Mahadevgiri* (4)], and not less so according to the Mahomedan law. A trust for maintenance of an idol, it has been held, is one for a public charitable purpose amongst Hindus [*Manohar Ganesh* v. *Keshavram* (5)] claiming protection under s. 539 of the Code of Civil Procedure; and, unless an arbitrary **[51]** criterion is to be employed, it seems impossible to say that a trust for the benefit of

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(1) See Stat. 9 Geo. II, c. 36, s. 1.
(2) See Fearne. Cont. Rem. 468, 470, 403 ss. *Tagore Case*, I.A. Sup. Vol., 71 (72).
(3) L. R. 6 P.C. 381.
(4) 12 B.H.C.R. 214.
(5) Printed Judgments (Bombay) for 1878, 252.

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the poor, for aiding pilgrimages and marriages (1) and for the support of wells and temples is not amongst Mahomedans, a charity within the definition even according to the principles of the English law. These contain within themselves the requisite correction for the varying circumstances of a community having customs and a religion different from those of the English nation in England; and allowance, as the case I have referred to shows, is to be made even for Englishmen and, *a fortiori*, for Asiatics in circumstances in which particular English laws from their specially local or historical character become obviously inapplicable. An exception, no doubt, arises in a case in which the proposed object of the endowment is one which is directly contrary to the public law of the State, even in a wide sense (2); but the general principle of the public law of British India is that of supporting the private customary law of each of the principal classes, except where it has been distinctly superseded by a statutory rule (3). The law and the opinion of the Mahomedans undoubtedly regard a trust, such as the one in question, as a charity; and, granting there is a charity, the objection to a perpetuity fails according to the principles of the English law.

According to the Mahomedan law there can be no doubt that the proposed application of the fund is a highly commendable charity. Mr. Badrudin contended that, so far from the interposed private interests, which might or might not endure, avoiding the ultimate charitable trust, the latter gave effect to the former. And this appears to be the true construction of the Mahomedan law (4). A *wakf* must be certain as to the property appropriated unconditional, and not subject to an option. It must, too, have a final object which cannot fail; and this object, it seems, must, according to the better opinion, be expressly set forth (5). In the deed now in question it is set forth; and the reserve to the plaintiff, [52] for her life, of the annual profits does not invalidate it (6), as such a consequence arises only when there is a provision for the sale of the *corpus* of the property and an appropriation of the proceeds to the donatrix (7). In the case of *Delroos Banoo Begum* v. *Nawab Syud Ashgur* (8) a dedication of property in *wakf* was declared invalid on the ground that the donatrix—an illiterate woman, though a wealthy one—had not really known what she was doing in endowing the imambara. The imambara was within her own house; she had appointed herself joint mutawali, and her co-mutawali had died. The property had never been treated as dedicated to a public religious establishment within the meaning of Act XX of 1863. Everything went to show that there had not been a true dedication; but the learned Judge, who pronounced the decision of the Court, said that if the instrument of *wakf* had been "really and knowingly executed" by the lady defendant "it would have bound Delroos Banoo Begum without the power of revocation." In the present case the direct ownership of the property was completely parted with. There was, it is said, a want of discretion on the part of the plaintiff; and certainly a dedication made by a girl of fourteen is not to be upheld without inquiry; but here the

(1) Comp. the definition of "charitable purpose" in Stat. 43 Eliz., cap 4.
(2) *Thrupp* v. *Collet*, 26 Beav. 125; *Rex* v. *Lady Portington*, 1 Salk. 162; Lewin on Trusts, ch. VI.
(3) Charter of Supreme Court of Bombay, ss. 29, 41; 2 M.I.A. 423.
(4) *Phate Saheb Bibi* v. *Damodar Premji*, 3 B. 84.
(5) Baillie's M. L. 567; 10 B.H.C.R. 7.
(6) *Doe d. Jaun Beebee* v. *Abdollah Barber*, 1 Fult. 345; 2 Hamilton's Hedaya 351; *Muzhurool Huq* v. *Puhraj Ditarey*, 13 W.R. 236; Baillie's M.L. 585.
(7) Baillie's M.L. 556.
(8) 15 B.L.R. 167 (190).

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transaction was never questioned by the plaintiff's husband during his life, and the plaintiff herself has for fifteen years confirmed her own early act by a continued acceptance of the profits of the estate from the trustees. She cannot now say with any reason that the dedication was invalid on account either of its ceremonial defects, or of a want of an effectual accompanying volition.

The case of *Abdul Ganne Kasam* v. *Hussen Miya* (1) is an authority for the proposition that, under the Mahomedan law, an attempt, by using the word *wakf*, to create a perpetuity for the benefit of a family will be ineffectual. In the case of *Bibee Kuneez Fatima* v. *Bibee Saheba Jan* (2) there referred to, certain charitable objects are mentioned as the motive cause of the **[53]** grant, but not as a purpose of the grant, the fulfilment of which is annexed to it as a condition or a trust. There was no dedication, even ultimately, "solely to the worship of God or to any religious or charitable purposes." In *Abdul Ganne Kasam* v. *Hussen Miya* there was no pretence of any such purpose. In neither, therefore, was there any creation of *wakf* in the proper sense with the peculiar attributes of that class of property, whereas in *Dayal Chand Mulick* v. *Sayad Keramut Ali* (3) there was a clear intention to dedicate to religious purposes. Though the *wakf* was mixed up with provisions of a different character, effect was given to the dedication; and in *Muzhurool Huq* v. *Puhraj Ditarey* (4) Kemp, J., says: "We are of opinion that the mere charge, upon the profits of the estate, of certain items, which must in the course of time necessarily cease, being confined to one family and for particular purposes, and which after they lapse will leave the whole profits intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law." If the condition of an ultimate dedication to a pious and unfailing purpose (5) be satisfied, a *wakf* is not made invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take, may constitute a perpetuity in the sense of the English law; but, according to the Mahomedan law, that does not vitiate the settlement, provided the ultimate charitable object be clearly designated (6).

That a true *wakf* is irrevocable, is stated in some of the cases I have referred to, and it follows from the definition of the term. The consequences of the dedication are that, even while the direct ownership is retained, the beneficial interest passes wholly from the appropriator (7). In the present case the direct ownership has been conveyed to the trustees. If the surviving trustee fails in his duty—which, in full accordance with the Mahomedan law (8), is largely discretional—the plaintiff or her representatives can **[54]** enforce the fulfilment of the trust; but the dedication once made cannot be recalled (9). Should the intermediate purposes of the dedication fail, the rule of Mahomedan law appears to be that the final trust for charity does not fail with them. It is but accelerated (10), being itself regarded as the principal object in virtue of which effect is given to the accompanying and intervening dispositions. Charitable grants being thus

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(1) 10 B.H.C.R. 7. (2) 8 W.R. 313. (3) 16 W. R. 116.
(4) 13 W.R. 235. (5) Baillie's, M.L. 557. (6) Baillie's M.L. 570, ss. 586.
(7) Bailie's M.L. 551.; *Abul Hasan* v. *Haji Mahomed*, 5 Sel. Rep. S.D.A. Rep. 87 = 7 I.D. (O.S.) 413.
(8) Baillie's M.L. 588, Comp. *Pocock* v. *Attorney-General*, L.R. 3 Ch. Div. 342.
(9) Baillie's M.L. 545, 558, 588.
(10) Baillie's M.L. 553, 558; *In re Williams*, L.R. 5 Ch. Div. 735; *In re Birkett*, L.R. 9 Ch. Div. 576.

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tenderly regarded, it would be inconsistent that a power of revocation should be recognized in the grantor. It is not recognized; and on the several questions submitted to the Court I must find against the plaintiff.

The costs of the defendant to be paid by the plaintiff by means of deductions from sums coming due to her under the indenture.

Defendant's costs as between attorney and client not thus satisfied to be defrayed out of the trust fund.

Attorneys for the plaintiff and second defendant: Messrs. *Craigie, Lynch and Owen.*

Attorneys for the Advocate-General: Messrs. *Hearn, Cleveland and Little.*

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6 B. 54.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

MANJUNATH BADRABHAT (*Original Defendant*), *Appellant v.* VENKATESH GOVIND SHANBHOG (*Original Plaintiff*), *Respondent.**

[26th September, 1881.]

Decree—Execution—Limitation—Act XIV of 1859—*Act IX of* 1871—*Applications in suits instituted before the* 1*st April*, 1873—*Act VIII of* 1859, *s.* 2—*Act X of* 1877, *s.* 13—Res judicata—*Meaning of "suit."*

The decision, by a competent Court, that an application for the execution of a decree is barred by limitation, has the effect of *res judicata*; and although such decision may be erroneous, yet so long as it remains unreversed in appeal it is valid and binding, and the question cannot be re-opened. A decision, that an application for execution is not time-barred, has a similar effect.

[55] On the 15th April, 1868, the plaintiff applied for the execution of a decree held by him against the defendant, and certain houses were thereupon attached. In April, 1869, the attachment was raised on the intervention of a third person. The plaintiff then brought a suit to establish his right to attach the houses, and obtained a decree on the 28th February, 1871. An appeal was made, and the suit was finally decided in the plaintiff's favour in April, 1873. After the plaintiff had obtained his original decree, and while the appeal was pending, he applied for the sale of the houses in execution on the 30th November, 1871, and subsequently made three other applications within three years of each other, the last of which was dated the 30th October, 1876. The Court rejected this last application on the 28th November, 1876, on the ground that the execution of the decree was barred, as more than three years had elapsed between the first and second applications (*i.e.*, the applications of the 15th April, 1868, and 30th November, 1871). The plaintiff appealed against the order; but his appeal was rejected, because he had failed to produce with it a copy of the order appealed against. The plaintiff took no further steps in that proceeding, but made a fresh application for execution on the 10th August, 1878. The Subordinate Judge rejected it, on the ground that the execution was barred, the matter being *res judicata*. In appeal, the District Judge reversed that order, and allowed execution. On appeal to the High Court.

Held, on the authority of *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdry* (1) that the rule of *res judicata* applied, and that the application of the 30th November, 1871, was time-barred, and, *a fortiori*, every subsequent application was barred.

Semble.—A proceeding in execution is a proceeding which terminates in a decree as defined by s. 244 of the Civil Procedure Code (Act X of 1877), and is, therefore, a suit within the meaning of the Code.

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* Second Appeal No. 10 of 1880 from order.

(1) 8 I. A. 123.

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[F., 6 B. 586 ; R., 14 B. 206 ; 19 B. 675 ; 26 B. 109=3 Bom. L.R. 565 ; 18 M. 482 ; 22 M. 256 ; 17 C.P.L.R. 178 ; 14 C.W.N. 114=3 Ind. Cas. 47; 47 P.R. 1906=86 P.L.R. 1907.]

THIS was a second appeal from the order of J. W. Walker, Acting Judge of Kanara, in a miscellaneous appeal, reversing the decree of the Second Class Subordinate Judge of Kumta.

The facts of the case are briefly stated in the head-note above, and will be found fully set forth in the judgment of the High Court.

On the 10th August, 1878, the plaintiff, Venkatesh, applied to the Subordinate Court of Kumta, for the execution of a decree held by him against the defendant, Manjunath. The Court rejected the application as barred by limitation. In appeal, the District Judge reversed that order, and allowed execution. The following are his reasons :—

The points for decision are: (1) whether the execution of the decree is time-barred ; and (2), if not, whether the present application **[56]** is barred by the former decision that the execution is time-barred. My finding on these points is in the negative.

"As to the first question, if the application of November, 1871, was time-barred, then the present application would be barred through the break in the chain of applications (see *Gopal* v. *Ganeshdas*, 8 Bom H.C. Rep., A.C.J. 97 ; and *Ameerun Bibee* v. *Shib Pershad Thakor*, 8 Calc. W. R. Civ. Rul., 199). The point, therefore, for determination is whether the application of November, 1871, was within time or not. At that time the Limitation Act (IX of 1871) was in force and there is a Full Bench Ruling of the Allahabad High Court (I.L.R., 1 All. 355) that, under circumstances above stated, the application was not barred under sch. II, art. 167. According to that decision the application of November, 1871, should be taken as a continuation of the application of April, 1868, after the interruption caused by the claim of a third person had ceased by a decree in plaintiff's favour, and the three-years' rule, accordingly, does not apply.

"On the next point, the decision of the Privy Council in *The Delhi and London Bank* v. *Orchard*, reported in I. L. R., 3 Calc. 47, seems to apply. It was there held that an order rejecting an application to execute a decree on the ground of its being time-barred was not an adjudication within the rule of *res judicata*. That decision refers to the old Limitation Act (XIV of 1859), s. 20 ; but the ruling appears to me to be equally applicable to the Acts of 1871 and 1877 and the new Civil Procedure Code. It is urged that in the Privy Council case there was an *ex parte* decision on the point of limitation ; while, here, the respondent appeared and was heard. I do not see, however, that this can affect the question at all. In the above case the Privy Council found that if a Court rejected an application for the execution of a decree on the ground of its being time-barred, and a subsequent application were made within three years, the Court could, on the latter application, order execution if, in point of fact, the execution was not time-barred, notwithstanding the previous order rejecting the former application. The present case is precisely similar.

"It may seem that such a decision is anomalous, and opens up **[57]** a prospect of increasing work for the Courts. But, in practice, probably little inconvenience will be felt.

"With respect to the *res judicata* objection, it is clear that the case does not fall under the law as now contained in s. 13 of the Civil Procedure Code. The rule there refers only to a *former suit*, and not to a second

application in the same suit. Next, under s. 230 of the Code, there is no restriction imposed as to applications for execution,—the restriction contained in the Code, as first passed, about due diligence being now removed. It seems clear, therefore, that there is nothing to prevent the application to the Court from which the appeal is brought, or the present appeal. It may be pointed out that as, under the amended Code, a miscellaneous appeal is no longer allowed in such a case as the present, practically the anomaly, noticed above, will cease. * * *

"I reverse the decision of the lower Court, and order that execution issue on the application."—(12th June, 1880).

The defendant appealed to the High Court.

Shamrav Vithal, for the appellant.

Ghanasham Nilkanth, for the respondent.

JUDGMENT.

The following is the judgment of the Court, delivered by

MELVILL, J.—In this case we have to consider the effect of the recent judgment of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (1).

This judgment lays down two propositions, which will revolutionise the practice of the Indian Courts in two important particulars.

The first proposition is that, as regards suits instituted before the 1st April, 1873, all applications in them are excluded from the operation of Act IX of 1871, and are governed by Act XIV of 1859.

This decision must, of course, be accepted with the respect due to the tribunal from which it emanates, and must be acted upon in future, though directly opposed to the practice of the past.

[58] The second proposition is that, although a decree may be barred at the date of some order made for its execution, yet such order, though erroneously made, is nevertheless valid, unless reversed upon appeal.

This proposition must materially affect the practice of our Courts in dealing with a second application for execution made within three years from a previous time-barred application which has been erroneously admitted and acted upon. The practice in such cases has been to reject the second application on the ground that the previous application, from which the three years are dated, was itself time-barred.

In this practice the High Court of Bombay considered (see *Gopal* v. *Ganeshdas* (2)) that it was following the decision in the Calcutta Full Bench case, *Bisseshur Mullick* v. *Maharajah Mahatab Chunder Bahadoor* (3). The Calcutta High Court has always taken the same view of the intention and scope of that decision. In the Privy Council case, which we are now considering, the High Court had based their judgment upon the Full Bench case, the effect of which they stated to be that "a decree having been once dead, no proceeding by means of an application out of time could revive it." But, in delivering the judgment of the Judicial Committee, Sir Barnes Peacock limits the scope of the Full Bench decision, to which, it is to be remarked, he was himself a party. He points out that in the Full Bench case there had been no proceedings after the decree was barred beyond an application and the service of a notice on the judgment-debtor; and that no order had been made. The proceedings under thatexecution were in fact, for some reason or other, struck off. But Sir Barnes Peacock then goes

(1) 8 I.A. 123. (2) 8 B.H.C.R.A.C.J. 97. (3) 10 W.R.F.B. 8.

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on to say that when, upon a time-barred application, a Court makes an order for execution, that order amounts to an adjudication by a competent Court that the application is not time-barred; and, although such adjudication may be erroneous, it is nevertheless *res judicata*, and, unless the judgment-debtor appeals and obtains a reversal of the order, the order remains valid and binding, and it is not competent to any Court to re-open the question in a subsequent proceeding.

[59] This judgment goes no further than to ascribe the effect of *res judicata* to a decision, whether express or implied, that an application is *not* time-barred. But it seems to be a necessary conclusion that the same effect must be given to a decision that an application *is* time-barred. If a decision be valid and binding, although it may be erroneous, when it is given in favour of one party, it cannot be less so when it is in favour of the other party. In the present case the learned Judge (who had not, of course, had the advantage of seeing the Privy Council case with which we have been dealing) has, indeed, held otherwise, and has supported his opinion by a reference to the decision of the Judicial Committee in *The Delhi and London Bank* v. *Orchard* (1). That decision was also delivered by Sir Barnes Peacock, and was cited in the argument in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry*. It would, therefore, be very surprising if we were to find any irreconcileable inconsistency in the two judgments. A careful consideration of the judgment in *The Delhi and London Bank* v. *Orchard* will show that there is not, in fact, any such inconsistency. It is quite true that at the close of that judgment their Lordships make the following observation :—

"It was contended that the rule *res judicata* applied, and that the application made on the 4th of May, 1871, was barred by the order of the Deputy Commissioner of the 10th day of December, 1869, from which no appeal was preferred. But their Lordships are of opinion that the order of the 10th day of December, 1869, was not an adjudication within the rule of *res judicata*, or within s. 2 of Act VIII of 1859."

No reasons are given for the above observation; but it is clear that it applies only to a particular order, and cannot be construed into a general rule, unless the particular order referred to is found to be one of a general class. Now the order referred to is set out in the judgment of the Privy Council, and is as follows :—

"The decree is of a prior date to the introduction of Act XIV of 1859. It should be executed according to the Civil law of the Punjab; and as, according to the said law, the period of one year was fixed for its execution, and, in case that period expires, the rule is that the decree should be executed by obtaining the [60] sanction of the Commissioner; and as, on the report sent for obtaining sanction, the Commissioner did not pass any order either giving sanction, or any other order; and as it is not within the power of this Court to execute such a decree, it is ordered that the petition be sent to the record-room."

It appears to us that the above order was not in the nature of an adjudication at all, and that the description of it in the head-note to the report in the Indian appeals, and still more the description in the head-note to the Calcutta Report, is incorrect, and gives an erroneous idea of the meaning of the Judicial Committee's observation. The Deputy Commissioner did not, in fact, decide that the application was time-barred, nor did he decide anything. He simply said that, as he could not execute the decree

(1) 3 C. 47 = 4 I.A. 127.

without the Commissioner's sanction, and as the Commissioner had not given the sanction which had been applied for, nor made any other order, it was not within his power to execute the decree, and, therefore, the application must go to the record-room. The Judicial Committee might well say that this was not an adjudication within the rule of *res judicata*, or within s. 2 of Act VIII of 1859. We do not think that the question, whether a decision that an application is time-barred is *res judicata*, is in any way concluded by the observation of the Privy Council in *The Delhi and London Bank* v. *Orchard*, but we think that it *is* concluded by necessary inference from the judgment of the same tribunal in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry*.

It cannot, we think, be said that the rule of law which we have deduced from the recent Privy Council judgment is inequitable, or opposed to public policy. On the contrary, it appears to us that it would (as the learned District Judge in the present case admits) be anomalous, and, we may add, inconvenient and unjust, if a judgment-creditor, whose decree had been declared by a subordinate, but competent, Court to be time-barred, and who had acquiesced in such decision, or had failed to get it reversed in appeal, were to be allowed to go again to the subordinate Court with another application for execution, and ask that Court to determine that the previous decision, though perhaps confirmed by the High Court or the Privy Council, was erroneous and of [61] no effect. A judgment-debtor, who has once obtained a decision from a competent Court, declaring the judgment against him to be dead, is surely entitled to expect that, so long as that decision remains unreversed, he will not be further harassed by applications for execution.

We have been referred to a decision of the Full Bench of the Allahabad Court in *Rup Kuari* v. *Ram Kirpal Shukul* (1), in which that Court held that the law of *res judicata* does not apply in proceedings in execution of a decree; two of the learned Judges basing their decision on the ground that a proceeding in execution is not a "suit" within the meaning of s. 13 of Act X of 1877, and a third learned Judge considering the question concluded by the judgment of the Privy Council in *The Delhi and London Bank* v. *Orchard*. That decision of the Allahabad Court is, no doubt, opposed to the view which we have expressed. But the case was decided before the judgment of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdry* was given, and it may be that it will have to be reconsidered by the light of that judgment. It is true that the Privy Council had not to consider the effect of s. 13 of Act X of 1877; but they were bound to consider s. 2 of Act VIII of 1859, the provisions of which are as closely limited to *suits* as are those of the later Code of Civil Procedure. The Privy Council must, therefore, have held either that the word "suit" has a more extensive application than is given to it by the Allahabad Court, or else, (and the observation already quoted from *The Delhi and London Bank* v. *Orchard*, renders this the more probable hypothesis), that the rule of *res judicata* extends much further than the limited terms of the Civil Procedure Code. But, independently of this, and even if we felt ourselves to be bound down within the four corners of Act X of 1877, we are not sure that we should feel constrained to put upon the word "suit" in s. 13 the narrow construction adopted by the Allahabad High Court. Section 2 of the Act, as amended by Act XII of 1879, declares that an order under s. 244

(1) 3 A. 141.

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is a decree; and the term "decree" is defined to mean "the formal adjudication upon *any right claimed* or defence set up in a Civil Court, when [62] such adjudication, so far as regards the Court expressing it, decides *the suit* or appeal." From this it might very fairly be argued that every proceeding which terminates in a decree (and a proceeding in execution in such a proceeding) is a suit within the meaning and intention of the Code. In the case of *Bhikambhat* v. *Joseph Fernandez* (1) we have pointed out that there may be a distinction between the term "suit" as used in the Procedure Code and the term "regular suit" as used in the Limitation and other Acts; and we referred to the decision of the Calcutta High Court in *Syud Emam Momtazuddeen Mahomed* v. *Raj Coomar Doss* (2), in which it will be observed that the Full Bench of that Court in dealing with the question of *res judicata* refused to adopt the narrow construction which one learned Judge wished to attach to the word "suit" in s. 2 of Act VIII of 1859.

It only remains for us to apply the law, as we have gathered it from the judgment of the highest tribunal, to the circumstances of the present case. Those circumstances are stated by the learned District Judge to be admittedly as follows--The plaintiff made his first application in execution of his decree on the 15th April, 1868. Some houses were attached thereon; but a third person intervened, and the attachment was raised in April, 1869. The plaintiff then brought a suit to establish his right to attach the houses, and obtained a decree on the 28th February, 1871. An appeal was made, and the suit was finally decided in plaintiff's favour in April, 1873. After plaintiff had obtained his original decree, and while the appeal was pending, he applied for the sale of the property in execution on the 30th November, 1871. He also made three other applications after that date within three years of each other, the last being on the 30th October, 1876. This last application was rejected by the Subordinate Judge on the 28th November, 1876, on the ground that the execution of the decree was barred, as more than three years had elapsed between the first and second applications,—that is between the applications of April, 1868, and November, 1871. The plaintiff thereupon made a miscellaneous appeal to the District Court, which was rejected, because plaintiff had failed to produce with his memorandum of appeal a copy of the order appealed against. The plaintiff took [63] no further steps in that proceeding, but he made a fresh application for execution on the 10th August, 1878. The Subordinate Judge rejected this application, on the ground that the execution was barred, the matter being *res judicata*. In appeal the District Judge laid down, as the point for determination, whether the application of 30th November, 1871, was time-barred or not, and he reversed the order of the Subordinate Judge, holding that the matter was not *res judicata*; that the order of the Subordinate Judge, dated the 28th November, 1876, by which he held the application of the 30th November, 1871, to be time-barred, was erroneous; and that, there having been a continuous chain of applications since the 30th November, 1871, the last application of the 10th August, 1878, was in time. The matter now comes before us in second appeal.

If it were possible for us to consider the issue laid down by the learned District Judge, we should probably come to the same conclusion at which he has arrived. Indeed, it was admitted by the pleader for the appellant that, if we apply (as we are now bound to do), the provisions

(1) 5 B. 673.

(2) 23 W. R. 187.

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of Act XIV of 1859, and not those of Act IX of 1871, we should be obliged to hold that the Subordinate Judge's order of the 28th November, 1876, was erroneous. It may be, too, that, as the learned District Judge says, the order was equally erroneous under the provisions of Act IX of 1871. But, although that order may have been erroneous, yet, not having been reversed in appeal, it is nevertheless valid and binding, and the question cannot be re-opened. We are bound, by the rule of *res judicata*, to hold that the application of the 30th November, 1871, was time-barred and, *a fortiori*, every subsequent application was barred.

It was argued that an order for execution was issued in December, 1871, upon the application of the 30th November, 1871; that, according to the view taken by the Privy Council, this order was equivalent to a decision that the application was within time; and that the question being thus already *res judicata*, the decision of the Subordinate Judge on the 28th November, 1876, was without jurisdiction, and is, therefore, of no effect. But this agument is really nothing more than a repetition of the statement that the Subordinate Judge's order of the 28th November, 1876, **[64]** was erroneous. The Subordinate Judge had jurisdiction to decide whether the matter before him was *res judicata* or not; and if he decided this question wrongly, or, if the question not having been raised, he did not decide it at all, his decision is not the less binding, and cannot now be set aside.

We have come to this conclusion reluctantly, for the plaintiff seems to have been diligent in his endeavours to obtain the fruit of his decree. He appealed against the fatal order of the 28th November, 1876, and the ground on which his appeal was rejected was a very technical one. He might (unless there was some strong reason to the contrary) have been allowed time to produce the copy of the order appealed against.

The order of the District Judge is reversed, and that of the Subordinate Judge restored. The respondent must bear the costs in the two lower Courts. The parties will bear their own costs of this second appeal.

Decree reversed.

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6 B. 64.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

APAJI BHIVRAV RAYRIKUR (*Original Plaintiff No.* 3), *Appellant v.* KAVJI AND ANOTHER (*Original Defendants*), *Respondents.** [6th September, 1881.]

Mortgage of property already sold in execution—Subsequent mortgagee with notice of previous sale—Assignment—Rejection of application under ss. 269 *of Act VIII of* 1859—*Suit within one year.*

On the 17th October, 1866, K (defendant No. 1), one of the three sons of Bahirji, mortgaged certain immoveable property to one Narhar with possession. On the 19th December, 1866, Atmaram (plaintiff No. 1) obtained a money decree against K and the estate of his deceased father. In execution of that decree the property was sold by the Court and purchased by Atmaram himself, who obtained a certificate of sale dated the 30th January, 1868. He subsequently sold and conveyed the property to Damodar and Apaji (plaintiffs Nos. 2 and 3). On

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* Second Appeal No. 26 of 1881.

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applying to the Court for possession, the plaintiffs were resisted by Narhar. The Court rejected the plaintiffs' application on the 11th July, 1868. On the 31st May, 1871, K and his two brothers mortgaged the property to M (defendant No. 2), who took the mortgage with full notice of the Court sale to the plaintiff Atmaram. K and his [65] brothers paid off the mortgage of Narhar out of the money borrowed by them from M (defendant No. 2) on the mortgage of the property. Narhar returned his mortgage-deed to K and his brothers, who made it to over to M. In 1878 the plaintiffs brought a suit against K and M for possession of the property. The Subordinate Judge held the plaintiffs entitled to recover it, on payment of the amount due to M on his mortgage, being of opinion that M was in the same position as Narhar. In appeal, the District Judge dismissed the plaintiffs' suit, on the ground that it was not brought within one year from the date when the application for possession was rejected. On appeal to the High Court,

Held that the mortgage by K and his brothers to M, dated the 31st May, 1871, was a mortgage of property which did not then belong to them,—their estate and interest in it having passed to the plaintiff Atmaram at the Court sale.

Held, also, that the order of the 11th July, 1868, rejecting the plaintiffs' application for possession under s. 269 of the Civil Procedure Code (Act VIII of 1859) did not affect the right to bring a redemption suit against Narhar.

Held, further, that there was nothing to show any assignment, by Narhar, of his mortgage, or any intention on his part to assign it to M, or to keep it on foot for M's benefit.

The High Court, accordingly, reversed the decrees of the Courts below, and made a decree in favour of the plaintiffs.

[F., 4 Ind. Cas. 478=3 S.L.R. 133.]

THIS was a second appeal from the decision of W. H. Newnham, District Judge of Poona, reversing the decree of D. J. Karmarkar, Joint Subordinate Judge at the same place.

On the 17th October, 1866, Kavji, one of the three sons of one Bahirji, mortgaged certain immoveable property to Narhar with possession. On the 19th December, 1866, Atmaram (plaintiff No. 1) obtained a decree against Kavji and the estate of his deceased father Bahirji, and in execution of that decree the property was sold by the Court and purchased by Atmaram himself, who obtained a certificate of sale dated 30th January 1868. He subsequently sold and conveyed the property to Damodar and Apaji (plaintiffs Nos. 2 and 3). On applying to the Court for possession, the plaintiffs were resisted by Narhar, and the application was rejected. On the 31st May, 1871, Kavji and his brothers, Jabaji and Genu, mortgaged the property to one Manikji with notice of the previous execution sale to the plaintiff Atmaram. Out of the money advanced by Manikji, Kavji and his brothers paid off the mortgage of Narhar, who returned his mortgage-deed to them, by whom it was thereupon handed over to Manikji. In 1878, Atmaram and his vendees (Damodar and Apaji) sued Kavji and Manikji for possession of the property.

[66] *Shamrav Vithal*, appeared for the appellant (plaintiff No. 3).

G. R. Kirloskar, appeared for the respondents.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—The mortgage (Ex. 19) of the 31st May, 1871, by Kavji, Jabaji, and Genu, the three sons of Bahirji, to Manikji was a mortgage of property which did not then belong to those mortgagors. Their estate and interest in that property had, under the judicial sale [evidenced by the certificate of sale (Ex. 13), dated the 30th January, 1868], passed to the plaintiff Atmaram, who subsequently sold and conveyed it

to the plaintiffs, Damodar and Apaji. Manikji, as appears from the evidence of witness Bhikaji Gopal (the writer of Ex. 19), had full notice of the sale to Atmaram; nevertheless with that knowledge he ignored Atmaram's claim, and dealt with the ex-owners of the property, who could not convey to him any title.

It is said that Narhar, the alleged mortgagee of the 17th October, 1866, having defeated, under s. 269 of Act VIII of 1859, an attempt of Atmaram to obtain possession of the property, and Atmaram not having brought an action of ejectment within a year after his failure to obtain such possession, Manikji may have assumed that Atmaram had lost all title to the property. But there was nothing to prevent Atmaram from bringing a suit against Narhar for redemption. The order under s. 246 could not and did not affect that right; and if Manikji supposed otherwise, he must take the consequence of his mistake in law: *ignorantia legis neminem excusat.*

Again, on behalf of Manikji, it has been contended that he must be regarded as occupying the same position, at least, as Narhar, and that the plaintiffs cannot recover the property without paying, as redemption to Manikji, the amount which is said to have been paid to Narhar. This might be so if Manikji could in anywise be regarded as assignee of Narhar's mortgage. Manikji's own deed of mortgage, however, negatives any such assignment to Manikji. The mortgage to Manikji, which was executed by the three sons of the deceased Bahirji, shows that they borrowed Rs. 325 from Manikji, and that they (not Manikji) paid off Narhar by giving to him Rs. 300 out of the money which they so borrowed, **[67]** and that Narhar then returned his mortgage to the three sons of Bahirji, who then made the same over to Manikji. Narhar did not execute or in anywise assign his mortgage to Manikji, but he (Narhar) attested the mortgage to Manikji. Although that mortgage to Manikji, as already said, recites the making over, by the sons of Bahirji, of Narhar's mortgage-deed to Manikji, the latter has not produced it, nor has it been given in evidence either here or in the lower Courts. The writer of Manikji's mortgage states that he indorsed upon Narhar's mortgage-bond a release thereof which was signed by Narhar—a circumstance which may perhaps account for the non-production of that mortgage. No excuse for its non-production has been given by or on behalf of Manikji, and secondary evidence of it, therefore, is inadmissible. Hence there was not before the lower Courts and is not here any lawful evidence that Narhar's mortgage ever existed. But, even if there were, there is naught (as we have said) to show any assignment of it by Narhar, or of any intention, on his part, to assign it to or to keep it on foot for the benefit of Manikji.

Under these circumstances we must reverse the decree of the District Judge (except so far as it reverses the decree of the Subordinate Judge), and make a decree that the plaintiffs, Damodar and Apaji, do recover the premises in the plaint mentioned. We give no mesne profits in consequence of the laches of the plaintiffs in enforcing their claim, and we direct that the parties, respectively, bear their own costs throughout. This decree is made without prejudice to any equities which may exist between the plaintiffs, Damodar and Apaji.

Decree reversed.

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APPEL-
LATE
CIVIL.

6 B. 67.

6 B 67.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

NARAYAN BHIVRAV (*Original Defendant*), *Appellant v.* KASHI AND ANOTHER (*Original Plaintiffs*), *Respondents.**

[27th July, 1881.]

Landlord and tenant—Inamdar—*Notice to quit—Ejectment—Partition.*

An *inamdar* cannot eject a yearly tenant without six months' notice to quit, ending with the cultivating year. Nor can he eject other tenants, except on the expiration of their term of years or other interest in the land.

[68] Where a family of *inamdars* disagree among themselves, and one of them obtains a decree for partition against the others, he cannot, in execution thereof eject (without due notice to quit) the tenantry on such portion of the land as may have been allotted to him under that decree in a suit to which such tenantry were not parties, and by which, therefore, their rights are not barred.

[R., 6 B. 70.]

THIS was a second appeal from a remand order of R. F. Mactier, District Judge of Satara, reversing the decree of K. S. Vinchurkar, First Class Subordinate Judge of the same place.

The suit was for possession of certain land under the following circumstances :—The defendant, Narayan, obtained a decree against one Khanderav Balvant for a partition of certain *inam* lands, and in execution of it ejected the plaintiffs, Kashi and Lakshman, from the land in dispute on the 13th April, 1877. The plaintiffs thereupon applied, under s. 230 of the Civil Procedure Code (Act VIII of 1859), to the Subordinate Court of Satara by which the execution was granted, alleging that they were the *mirasdar* owners of the land; that they and their ancestors had been in possession of it for a very long time; that the defendant was merely an *inamdar* not entitled to the land or possession of it. They, therefore, prayed for the restoration of the land to them. The defendant, Narayan, answered (*inter alia*) that he had been put in possession of the land by the Court as his share under a decree for partition.

The Subordinate Judge rejected the plaintiffs' claim. In appeal, the District Judge reversed that decision, and remanded the case for the trial of the issue whether Khanderav Balvant, under whom the defendant claimed, had a right to the land or to rent only.

The defendant appealed to the High Court.

G.R. Kirloskar, for the appellant.

S.V. Bhandarkar, for the respondent.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—The plaintiffs, it is not denied, were in possession of certain lands (4½ *bighas* and 4½ *pands*) at Vargaon, and have been so for several years. The defendant, Narayan Bhivrav, as an alleged co-parcener in an *inam* estate, obtained a decree against Khanderav Balvant for partition of lands, whereof the land, the subject of the present suit, forms a part, and was, [69] under that decree, put into possession of the last-mentioned land on the 13th April, 1877, and the plaintiffs were

* Second Appeal No. 29 of 1880 from order.

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6 B. 67.

then dispossessed thereof. The plaintiffs were not parties to the partition suit, and had not received six months' notice to quit. They applied, on the 4th of June, 1877, for restitution of possession, and accounted for their delay by the circumstance that, when they ought to have made an application under s. 230 of Act VIII of 1859, the Court of the Subordinate Judge was closed. The latter made his order, under that section, converting the application into a suit, and directing it to be numbered and registered as such. In that application, the plaintiffs alleged that the defendant was merely an *inamdar* entitled to rent, and not to the land or possession thereof, and that the plaintiffs were *mirasdars* of the land, and they and their ancestors in the same capacity had possession of the land for many centuries. *Inamdars* may or may not be entitled to eject tenants, but cannot eject even a yearly tenant without six months' notice to quit ending with the cultivating year (*Pandurang Sakharam* v. *Yedneshwar Shitaram Chitnis* (1), a Satara case), or other tenants except on the expiration of their term of years or other interest in the land. It is not to be tolerated that, if a family of *inamdars* disagree amongst themselves, and one of them obtains a decree for a partition against the others, he should thereupon, in execution of that decree, thrust out of possession (without due notice to quit) the tenantry on such portion of the land as may have been allotted to him under that decree in a suit to which such tenantry are not parties, and by which their rights are, therefore, not barred. On this ground alone, if on no other, the plaintiffs are entitled to restitution of possession of which they were summarily deprived under an award (converted into a decree) in proceedings to which they were not parties.

But the plaintiffs further claim (as we have said) to be *mirasdars*, and also deny that the *inamdars* are entitled to the land or to anything but their rent (it is not pretended that the rent is in arrear); and it is competent for the plaintiffs, if they please, to waive their right to restitution of possession on the ground of want of notice to quit, and to elect to have this case decided **[70]** on the question of title, *viz.*, whether the defendant, as *inamdar*, to whom this portion of the land has been allotted under the partition decree, is entitled to recover the land even on due notice to quit. We are not, however, to be understood as advising the plaintiffs to waive their right to restitution on the mere ground of expulsion from possession without notice to quit. They may, if they please, leave the defendant to serve his notice to quit hereafter, and in a new suit, to be brought by the defendant, to prove, if he can, that on such notice he has the right to eject the present plaintiffs.

If the plaintiffs now elect to waive the notice, and prefer to have in this suit a decision on the right of the defendant to eject them even upon notice, then some such issue as that directed by the District Judge should be laid down and tried. The issue suggested by the District Judge may, perhaps, be advantageously paraphrased thus: "Is the *inamdar*, under his grant in *inam* (*sanad*), or otherwise entitled to obtain possession of the land in the plaint mentioned? Subject to the above remarks we affirm the order of remand of the District Judge; and the Subordinate Judge is upon the new trial, to be guided by those remarks. The costs of suit and of both appeals are to abide the final result of such new trial.

Order of remand affirmed.

(1) See next case 6 B. 70, *infra*.

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APPEL-
LATE
CIVIL.

6 B. 70.

6 B. 70.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

PANDURANG SAKHARAM AND OTHERS (*Original Defendants*), *Appellants v.* YEDNESHWAR SHITARAM CHITNIS (*Original Plaintiff*), *Respondent.** [16th November, 1881.]

Inamdar—Landlord and tenant—Notice to quit—Ejectment.

Tenants cannot be ejected as mere trespassers. If they are yearly tenants, they are entitled to a clear six months' notice to quit before they can be evicted. If they are tenants for a term of years or for a life or lives, there must be proof of an expiration of the term by effluxion of time or of the falling of the life or lives.

[R., 6 B. 67 ; 20 B. 759.]

THIS was a second appeal from the decision of R. F. Mactier, District Judge of Satara, affirming the decree of P. S. Binivale, First Class Subordinate Judge at the same place.

[71] The plaintiff, Yedneshwar, brought this suit for possession of certain land, alleging that he had obtained a decree in a partition suit against one Khanderav Balvant for certain *inam* lands, including the land in dispute ; that he had been obstructed by the defendants in obtaining possession of the land ; that, therefore, he prayed for the removal of their obstruction and possession of the land.

The defendants Pandurang and two others answered (*inter alia*) that the *inamdar* never held the land, but only received rent ; that they were permanent occupants as *mirasdars*.

Both the lower Courts awarded the plaintiff's claim.

The defendants appealed to the High Court.

Shantaram Narayan, appeared for the appellants.

The Hon. Rao Saheb *V. N. Mandlik*, appeared for the respondent.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—The plaintiff is a member of a family alleged to be owners of certain lands (including the land in dispute), which lands are contained in the village of Vargaon. That village was granted, A. D. 1752 to their ancestor, Ramrav Jivaji. The plaintiff alleges that by a decree in a partition suit, in which he was plaintiff and Khanderav Balvant Chitnis was a defendant, the lands in dispute were allotted to him as part of his (the plaintiffs) share in the village. Neither that decree nor any copy of it has been given in evidence in this case—an omission which ought not to have been permitted by the Courts below. The defendants' written statement admits that there has been a decree in a partition suit, and that a sixteenth share in the village has been awarded to the plaintiff, but it does not admit that the lands in dispute were awarded by that decree to the plaintiff. On the plaintiffs' own showing, that decree was the foundation of his title and yet he has not placed it on record. Assuming, however, that such a decree was made, and that it awarded the land in dispute to the plaintiff, that alone would not entitle the plaintiff summarily and without due notice to eject tenants on the land previously to

* Second Appeal No. 313 of 1880.

the decree for partition and not parties to the suit in which it was [72] made. It should be shown that their right of tenancy had terminated. Assuming that their tenancy was merely from year to year, there has not been any proof of its determination by a six months' notice to quit, nor is there any allegation of a refusal by the defendants to pay their usual annual rent as such yearly tenants. Assuming their tenancy to be for a term of years are for a life or lives, there is not any proof of an expiration of the term of years by effluxion of time, or of the falling of the life or lives. The plaintiff, although in his evidence he admits that the defendants have held the lands for twenty or twenty-two years, has ventured in his plaint to treat them as trespassers who have prevented him from taking possession of the lands. To treat as simple trespassers persons who are admitted to have occupied the lands for twenty years or upwards, and who are not alleged to have failed or refused to pay their usual rent, and to turn them out of possession summarily and without notice is, even though they may be only yearly tenants, such a high-handed proceeding as cannot be properly countenanced by any Court of Justice.

Again, we see no satisfactory investigation of the claim of the defendants to a *mirasi* or perpetual tenancy. The village books do not appear to have been examined for the purpose of ascertaining when the tenancy of the defendants and their predecessors commenced. Nor is their any other clear evidence on that point which has been brought to our attention. If the tenancy were in existence previously to the granting of the *sanad* of A.D. 1752 to Ramrav Jivaji, and there has been no evidence of its being renewed from time to time by him and his successors, there would be strong reason for inferring that the defendants and their predecessors held in *miras*. We have not any intention of now determining whether or not the defendants are entitled to a perpetual tenancy. But we are clear that, at all events, they cannot be ejected, as this suit seeks to eject them, as mere trespassers. If they be only yearly tenants, they are entitled to a clear six months' notice to quit before they can be evicted. That notice they have not had: so we reverse the decrees of the Courts below, with costs of suit and of both appeals to be paid by the plaintiff.

Decrees reversed.

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6 B. 73=6 Ind. Jur. 259.

[73] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

BHAGVANSANG BHARAJI, (*Applicant*) *v.* BECHARDAS HARJIVANDAS, (*Opponent*).* [28th June, 1881.]

Civil Procedure Code (Act X of 1877), s. 50—Probate—Wills—Wills in Mofussil.

There is no law at present in force in the Mofussil which obliges a person, claiming under a will, to obtain probate of the will, or otherwise establish his right as executor, administrator, or legatee, before he can sue in respect to any property which he claims under the will. In any suit or proceeding instituted by him, it is for the Court, in which the suit or proceeding is pending, to determine, for the purposes of such suit or proceeding, whether the will is genuine and valid, and confers upon the plaintiff or applicant the right which he claims.

[R., 19 B. 832; 37 C. 939=15 C.W.N. 185=8 Ind. Cas. 655.]

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* Extraordinary Civil Application, No. 102 of 1880.

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APPELLATE CIVIL.

6 B. 73 = 6 Ind. Jur. 259.

THIS was an application for the exercise of the High Court's extraordinary jurisdiction.

One Bechardas Harjivandas on the 14th of March, 1879, obtained a decree against Jora Bawa and others for Rs. 522-13-1. In execution thereof he attached some property, which he alleged belonged to his judgment-debtors. The applicant, Bhagvansang Bharaji, applied to the Subordinate Judge of Vagra to raise the attachment. He alleged that, by virtue of a will executed by one Bai Umed on the 10th of January, 1879, he was entitled to the attached property. Bechardas Harjivandas contended, amongst other things, that s. 50 of the Civil Procedure Code (Act X of 1877) necessitated the applicant to prove the will set up by him before he could be allowed to assert his claim as an executor; and that his omission to comply with this requisition precluded him from proceeding with his application.

The Subordinate Judge, Rao Saheb Krishnmukhram, allowed this contention, and dismissed the application.

The applicant moved the High Court to exercise its extraordinary jurisdiction.

Nanabhai Haridas, Government Pleader, for the applicant.—The Code of Civil Procedure in ss. 278, 279, 280 and 281 lays down the rules for the investigation of claims to attached property. Section 278 directs that the objector shall be regarded as if he was a party to the suit. There is no law according to which [74] probate could be asked for or granted in regard to wills executed in the Mofussil.

The Court on the 23rd September, 1880, granted a *rule nisi* to show cause why the Subordinate Judge should not be directed to proceed with the application on its merits.

Dayabhai Jaduram (with *Cumroodin Tyabji*) showed cause.—The last paragraph of s. 50 of Act X of 1877 enacts that "when the plaintiff sues in a representative character, the plaint should show, not only that he has an actual existing interest in the subject-matter, but that he has taken the steps necessary to enable him to institute a suit concerning it." And the Legislature illustrates this by saying: "*A* sues as *B's* executor. The plaint must state that *A* has proved *B's* will." Moreover, s. 187 of the Indian Succession Act, X of 1865, absolutely forbids an executor or legatee to establish his right as such, unless a Court of competent jurisdiction shall have granted probate of the will or letters of administration.

[MELVILL J.—That section has been made applicable to Hindu wills by s. 2 of the Hindu Wills Act, XXI of 1870, as amended by s. 154 of Act V of 1881; but the preamble to that Act shows that it does not apply to Hindus in the Mofussil of the Bombay Presidency. What, then, do you consider to be the Court of competent jurisdiction to prove this will? The District Court of Surat.

[MELVILL, J.—The new Probate Act applies to the whole of British India, and extends to Hindus exempted under s. 332 of the Indian Succession Act; but it distinctly provides in s. 2 "that, except in cases to which the Hindu Wills Acts, 1870, applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay* * * and no High Court in exercise of the concurrent jurisdiction over such local area hereby conferred, shall receive applications for probate or letters of administration until the local Government, with the previous sanction of the Governor-General in Council, by a notification in the official gazette, authorized it so to do."]

Nanabhai Haridas in reply. The applicant does not appear in any representative capacity. To the will in question neither the Indian Succession Act, nor the Hindu Wills Act, nor the Probate [75] Act applies. No preliminary proceeding is necessary, or can be taken to prove it. It can, therefore, be proved in any suit or proceeding in which it may be produced as a basis of claim or right.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—The *rule nisi* must be made absolute. There is no law at present in force in the Mofussil which obliges a person, claiming under a will, to obtain probate of the will, or otherwise establish his right as executor, administrator or legatee, before he can sue in respect to any property which he claims under the will. In any suit or proceeding instituted by him it is for the Court, in which the suit or proceeding is pending, to determine, for the purposes of such suit or proceeding, whether the will is genuine and valid, and confers upon the plaintiff or applicant the right which he claims. The order of the Subordinate Judge refusing to enquire into the applicant's claim until he shall have proved the will of Bai Umed in the District Court, is reversed, and the cases remanded for inquiry and decision according to law. Costs of this application on the respondent Bechardas.

Rule made absolute.

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6 B. 75.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

GANESH KRISHN (*Original Plaintiff*), *Appellant v.* MADHAVRAV RAVJI (*Original Defendant*), *Respondent.** [27th November, 1881.]

Limitation Act (*XV of* 1877), *sch. II, arts.* 66 *and* 116—*Registered bond—Compensation for breach of contract.*

A suit to recover a specific sum of money due upon a registered bond or other written contract is a suit for compensation for breach of contract in writing registered, within the meaning of art. 116 of sch. II of Act XV of 1877, and may be brought within six years from the time when the period of limitation would begin to run against a suit brought on a similar contract which is not registered.

[**F.**, 13 A. 200=11 A.W.N. 5; 12 C.L.J. 423=8 Ind. Cas. 788; **Appr.**, 15 C. 221; **R.**, 36 C. 394=9 C.L.J. 226=13 C.W.N. 1004; 11 C.W.N. 903; 6 S.L.R. 148.]

THIS was a second appeal from the decision of R. F. Mactier, Judge of Satara, confirming the decree of the Assistant Subordinate Judge of Satara.

[76] The plaintiff, on 21st October, 1879, sued the defendant to recover a sum of Rs. 575, balance of principal, and Rs. 175, interest,—in all Rs. 750,—due on a bond dated 12th August, 1867, which stipulated for the repayment of the sum advanced by biennial instalments;—Rs. 875 having been repaid, credit was given to the defendant to that extent.

The defendant did not appear.

The Subordinate Judge held that the limitation of three years was applicable to the suit, and he gave the plaintiff a decree for sums payable

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* Second Appeal, No. 477 of 1880.

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6 B. 75.

to the plaintiff within three years of the date of suit. The District Judge, in appeal, upheld that decree. He said: "The sections of the schedule of the Limitation Act, XV of 1877, to which the six years' rule applies, are Nos. 116, 117, 118, 119, 120, and in none of these is a suit of this nature contemplated,—this suit being merely to recover instalments overdue on a bond so payable to which s. 74 applies. There is nothing in the suit about 'compensation for a contract broken,' and clearly the three years' limit is the only one which applies here."

The plaintiff appealed to the High Court.

Vinayak Mahadev Pandit, for the appellant.—The bond being registered, the limitation is six years as for a suit for compensation for breach of contract.

There was no appearance for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—We think that the lower Courts were in error in holding that art. 116, sch. II, of Act XV of 1877 is not applicable to this case. The general remedy for breach of contract is a suit for compensation "for any loss or damage" sustained by the plaintiff (Indian Contract Act, s. 73); and the suit is none the less a suit for compensation, because it is brought for the specific sum due on a bond. (See Addison on Contracts, pp. 1060, 1062, 6th ed.). Article 116, sch. II, of Act XV of 1877 appears to be intended to cover all such cases, and to extend the period of limitation to six years, whenever the bond or other written contract has been registered. This view is in accordance with that taken by the Calcutta and Allahabad Courts in the cases of [77] *Nobocoomar Mookhopadhaya* v. *Siru Mullick* (1) and *Gauri Shankar* v. *Surju* (2).

The decrees of the Courts below are amended, and the claim allowed in full for Rs. 750.

The defendant must bear all costs throughout.

Decree amended.

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6 B. 77.

APPELLATE CIVIL.

Before Sir. Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice Birdwood.

LAKHMICHAND MANSARAM (*Plaintiff*) *v.* ARJUNA BIN RAMJI, (*Defendant*).* [1st March, 1881.]

The Dekkhan Agriculturist's Relief Act (No. XVII of 1879), *s.* 44—*Agreement of compromise.*

Under s. 44 of Act XVII of 1879 the plaintiff presented to the Subordinate Court of Talegaon an agreement compromising the amount of a decree obtained by the plaintiff against the defendant in the Small Cause Court at Poona. The agreement stipulated that the plaintiff was to receive, in full satisfaction of the amount of the decree (which was for Rs. 59-15-1), the sum of Rs. 40 to be paid by yearly instalments of Rs. 4 each, and that in default, the plaintiff was to recover the whole amount of the decree by executing it. The Subordinate Judge refused to file the agreement, being of opinion that it did not finally dispose of the matter. The case being referred to the High Court,

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* Civil Reference No. 7 of 1881.

(1) 6 C. 94.

(2) 3 A. 276.

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Held that the agreement was one finally disposing of the matter within the meaning of s. 44 of Act XVII of 1879, and that, therefore, the Subordinate Judge of Talegaon was bound to receive it, and to proceed as directed in that section.

UNDER s. 617 of the Civil Procedure Code (Act X of 1877) and s. 36 of Act XVII of 1879, Dr. A. D. Pollen, Special Judge under the Dekkhan Agriculturists' Relief Act, referred this case for the orders of the High Court. The following are the facts, of the case as stated by Rao Saheb A.G. Bhave, Subordinate Judge of Talegaon, who refused to file the agreement presented by the plaintiff :—

"This is an agreement compromising the plaintiff's claim against the defendant under a decree of the Small Cause Court at Poona. The plaintiff has thereby agreed to accept, in full satisfaction of **[78]** the amount recoverable under the decree, which is for Rs. 59-15-1, a sum of Rs. 40 to be paid by annual instalments of Rs.4 each, and that, in default of regular payment of instalments by the defendant, the plaintiff has a right to recover the whole amount of the decree by executing the same.

"The question is, whether such an agreement is one finally disposing of the matter within the meaning of s. 44 of the Dekkhan Agriculturists' Relief Act (No. XVII of 1879).

"I am of opinion that it is not. It is a contingent and conditional compromise, and it restores the plaintiff to the same situation in which he would have been if no compromise was effected upon the happening of the contingency or the breach of condition imposed upon the respondent. The debtors generally are so poor that in 75 out of 100 cases the breach must take place, and practically, the compromise has merely the effect of suspending the operation or execution of the decree for a short time. I do not think that s. 44 was intended to apply to such agreements. It directs only those agreements to be filed which finally dispose of the matter in question.

"I, therefore, refuse to file this agreement."

In referring the case to the High Court the Special Judge observed :—

"The Subordinate Judge of Talegaon, in charge of the Poona First Class Subordinate Judge's Court, has sent to me for perusal his proceedings in the matter of an agreement sent to his Court under s. 44 of the Dekkhan Agriculturists' Relief Act, from which it appears that he, of his motion, refused to file the agreement.

"This order of refusal appears to me to be illegal and without authority ; and I have, therefore, the honour to forward the proceedings for such notice as the Honourable the Chief Justice and the Judges of the High Court may think fit to take of them.

"It seems to me that the agreement was a very fair and proper one, decidedly advantageous to the judgment-debtor ; and that I may mention that agreements of a similar nature are very common."

There was no appearance of parties in the High Court.

[79] The following is the judgement of the Court :—

JUDGMENT.

WESTROPP, C.J.—The Court is of opinion that the agreement was one finally disposing of the matter within the meaning of s. 44, Act XVII of 1879, and, therefore, that the Subordinate Judge of Talegaon, was bound to receive it, and to proceed as directed in the above-named section.

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Whether the Special Judge is right in supposing that the agreement is one for the benefit of the judgment-debtor, would depend to some extent on the question whether the decree, the subject of it, was or was not barred by limitation at the time of the agreement. See cl. 3, s. 25, of the Indian Contract Act IX of 1872.

6 B. 77.

6 B. 79.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

KALIDAS (*Original Defendant*), *Applicant v.* VALLABHDAS (*Original Plaintiff*), *Opponent.** [27th September, 1881.]

Jurisdiction—Court of Small Causes—"Damages on account of rent"—Suit for use and occupation—Trespass—Ejectment—Mesne profits.

The plaintiff obtained a decree declaring him entitled to a certain house. He thereupon gave to the defendant, who was in occupation notice to pay him rent and on default of such payment he sued the defendant in the Court of Small Causes to recover "damages on account of rent."

Held that the suit was not maintainable in a Court of Small Causes, which could not be used as a medium for ejecting, by indirect means, a person in possession of immoveable property.

Held, also that the plaintiff's suit was only maintainable as a suit for damages on account of trespass, and in such a suit it would be necessary for the plaintiff to prove possession prior to the trespass, or to have obtained a decree in ejectment which would relate back to the date of the trespass. The plaintiff had obtained nothing more than a decree declaring him to be the owner of the house; but this did not necessarily import a right to immediate possession, nor could the plaintiff be allowed to derive from it all the benefit which he might derive from a decree in ejectment.

[R., 31 C. 340=8 C.W.N. 246; D., 15 B. 400.]

THIS was an application for the exercise of the High Court's extraordinary jurisdiction against a decree passed by Khan Bahadur Cursetji Manekji Cursetji, Judge of the Court of Small Causes at Ahmedabad.

[80] The facts of the case were as follows :—

A house situated in the city of Ahmedabad belonged to one Khusal, brother of the plaintiff. On the death of Khusal the plaintiff obtained a certificate of heirship to his brother and laid claim to the house. Khusal's widow, Ganga, disputed the claim, and by a suit had it established that her husband and the plaintiff had been divided, and that, therefore, she was entitled to the house for her lifetime.

Some time afterwards Ganga executed a mortgage of the house to one Hargovandas, who sued her upon it, and obtained a decree. After the passing of this decree, Ganga died, and Hargovandas proceeded to sale, and the house was bought by the defendant's father.

The plaintiff thereupon brought a suit against Hargovandas, as well as the defendant's father, and obtained a decree declaring that Ganga had only a life-interest in the house, and that what passed to the purchaser at the sale under the decree against her was nothing more than her life-interest, which alone she could convey. The decree declared the plaintiff entitled to the house.

The plaintiff now sued in the Court of Small Causes at Ahmedabad. He alleged that he was the owner of the house; that Ganga fraudulently

* Extraordinary Application No. 99 of 1881.

executed the mortgage to Hargovandas who collusively with her obtained a decree, and sold the house to the defendant's father; that he having obtained a decree, in the Court of the Subordinate Judge declaring him to be the owner of the house, the defendant's father should have given up possession to him, but did not; that since the death of the defendant's father in September, 1880, the defendant himself had been in possession; that the plaintiff gave a notice to the defendant, but the defendant would neither vacate the house nor pay him rent; and the plaintiff prayed for Rs. 8, being damages for the loss of rent for four months.

The defendant (*inter alia*) contended that the plaintiff must first sue in the Court of the Subordinate Judge for ejectment, and that his present action could not be maintained.

The Judge of the Court of Small Causes held that "the effect of the decisions in the plaintiff's favour is that the defendant's father, buying after Ganga's death, absolutely took nothing by his **[81]** purchase. Ganga had, at least, only a life-interest, and that, of course, ceased on her death. The defendant's father paid money only for such right, title, and interest as Ganga had in the house, * * * The defendant's vakil has contended that the plaintiff is bound to bring a suit for ejectment before he can sue for use and occupation. * * * But, after the decisions in his favour, the plaintiffs' title I consider to be fully established, and he is not bound to sue for ejectment. He can certainly bring a suit of this nature in this Court for wrongfully holding over premises which it has been decided by a competent Court do not belong to them but to the plaintiff. It would, under the circumstances, be plainly unjust and inequitable to assist the defendant in his wrongful occupation by making the plaintiff (who has already suffered much by costs of litigation) bring a suit for ejectment, which would cost him a deal of money and delay the remedy."

The Judge of the Court of Small Causes made a decree in favour of the plaintiff for the rent asked for.

Nanabhai Haridas, Government Pleader, on behalf of the defendant moved the High Court for a *rule nisi*, calling on the plaintiff to show cause why the decree of the Small Cause Court should not be annulled. The rule was granted on the 14th of July, 1881, by Kemball and Pinhey, JJ.

Pandurang Balibhadra showed cause.—The plaintiff has done all he could. He has got a declaratory decree as regards his title, and the defendant's possession is clearly wrongful. And a suit to eject him properly lies in a Court of Small Causes, and the circumstance that an incidental inquiry into title is necessary, does not deprive that Court of its jurisdiction. In *Mugun Chunder Chuttoraj* v. *Surbessur Chuckerbutty* (1) a person was an innocent purchaser for value, and held *bona-fide* possession in ignorance of the plaintiff's rights, and the plaintiff obtaining a decree sued him for mesne profits for the time during which he had been kept out of possession by the defendant. The Court held that mesne profits could always be recovered from a person who had enjoyed them, even though he had been in *bona-fide* possession without **[82]** knowledge of the defect in his title. In *Ram Chunder Surmah* v. *Ram Chunder Pal* (2) it was held that where intermediate holders combined wrongfully to keep an auction-purchaser out of possession, they must all be held liable for mesne profits. [MELVILL, J.—But can

(1) 8 W. R. 479.

(2) 23 W. R. 226.

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you cite any authority for holding that a suit for rent or mesne profits could be brought before suing for possession, and merely on the strength of a declaratory decree in which no consequential relief is given ?] No; I cannot.

Nanabhai Haridas in reply.—This case must be decided on the same principle as that in which *Jamnadas* v. *Bai Shivkor* (1) was decided. That suit was before the same Judge, and was for damages on account of rent, and this Court held that the suit could not be regarded as one for use and occupation, the claim not being based on an express or implied contract, and that the plaintiff's proper remedy was by a suit in ejectment accompanied by a claim for mesne profits. The plaintiff's present suit is premature, and not cognizable by a Court of Small Causes.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—This claim purports to be one for "damages on account of rent," and, therefore, resembles that in *Jamnadas* v. *Bai Shivkor* (1). The case differs, however, from *Jamnadas* v. *Bai Shivkor* in two particulars, *viz.*, that the plaintiff has obtained a decree declaratory of his title, and has given to the defendant a notice to pay him rent. The notice cannot make the defendant the plaintiff's tenant, nor create a contract between the parties; and, therefore, if regarded as a suit for rent, or for use or occupation, this action will not lie. It can only be maintainable as a suit for damages on account of trespass; and, before such a suit can be maintained, the plaintiff must, we are inclined to think, prove possession prior to the trespass, or have obtained a decree in ejectment, which would relate back to the date of the trespass (*Turner* v. *Cameron's Coalbrook Steam Company* (2)). The plaintiff has obtained nothing more than a decree declaring him to be the owner of the house; but this does not necessarily import a right to immediate possession, nor can the plaintiff be allowed [83] to derive from it all the benefit which he might obtain from a decree in ejectment. If this were permitted, a plaintiff would never bring a suit for possession; but, having obtained a cheap declaratory decree, he would proceed to worry the defendant by constant suits for mesne profits in the Small Cause Court, until the defendant would throw up the property, and the plaintiff would obtain, to the detriment of the public revenue, all the advantages which he could derive from a suit in ejectment. Assuming, (though it is very doubtful), that the present action is maintainable in any Court without a previous decree, or simultaneous claim for possession of the property, for trespass on which mesne profits are asked, we feel no doubt that it is not maintainable in a Court of Small Causes, which cannot be used as a medium for ejecting, by indirect means, a person in possession of immoveable property.

Rule made absolute with costs.

(1) 5 B. 572.

(2) 5 Exch. 932.

6 B. 83.

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6 B. 83.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Birdwood.

RUNGO BUJAJI (*Plaintiff*) *v.* BABAJI AND OTHERS (*Defendants*),*
[23rd March, 1881.]

Limitation Act XV of 1877, *s.* 25—*Native date—Month.*

The plaintiff sued on a note, bearing a native date, Ashad Vadya 13th, Shake 1799 (7th August, 1877), and containing a stipulation for payment of the money to this effect:—"In the month of Kartik, Shake 1799,—that is to say, in four months,— we shall pay in full the principal and interest." The plaint was filed on the 6th December, 1880, in the Court of Small Causes at Poona. The Judge was of opinion that the claim was barred. On his referring the case to the High Court for its decision.

Held, that the period of four months was, for the purpose of ascertaining whether the suit was barred by lapse of time, to be calculated according to the Gregorian Calendar, under s. 25 of the Limitation Act XV of 1877, and that the claim was not barred.

[R., 24 C. 382 ; 11 C.P.L.R. 91.]

RAO BAHADUR MADAN SHRIKRISHNAJI, Judge of the Small Cause Court at Poooa, referred the following case, with his opinion thereon, for the decision of the High Court under s. 617 of Act X of 1877 :—

"This is a suit to recover Rs. 60 on a note dated Ashad Vadya [84] 13th, Shake 1799, corresponding with 7th August, 1877 ; and the question for decision is, whether the suit is barred by the law of limitation.

"I am of opinion that it is barred.

"The question hinges upon the construction of the clause fixing the time for payment. It runs as follows :—'In the month of Kartik, Shake aforesaid (1799)—that is to say in four months—we shall pay in full the principal and interest ; herein we shall not fail.' By this stipulation I understand that the defendants meant to pay the amount of the note with interest in the month of Kartik, Shake 1799, and that the mention of the words 'four months' after the word 'Kartik' was made to fix the date on which the payment was to be made. The note thus became payable on Kartik Vadya 13th, Shake 1799, corresponding with 2nd December, 1877, whereas this suit was filed on the 6th December, 1880.

"It is contended on behalf of the plaintiff that the time fixed for payment is four months from the date of the note, and that the four months should be calculated according to the Gregorian Calendar, as provided in s. 25 of the Limitation Act.

"To me it seems that s. 25 is not applicable to the present case, because, according to the Gregorian Calendar, the four months expire on 7th December, 1877, corresponding with Margashirsh Shudha 3rd, while the note is expressly made payable in Kartik, the last day whereof corresponds with 4th December, 1877 ; and if the four-months' time be calculated according to the Gregorian Calendar, the word Kartik will have no effect at all. The only construction that can be put on the clause—'in Kartik, Shake 1799 ; that is to say, in four months'—is within the time of four months which would expire in the month of Kartik, Shake 1799.

"Under this view of the case I have dismissed the suit, subject to the decision of the Honourable the High Court."

* Small Cause Court Reference, No. 2 of 1881.

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There was no appearance of parties in the High Court.

The following is the judgment of the Court :—

JUDGMENT.

WESTROPP, C.J.—The Court thinks that the true construction of the note is that the maker was to pay within four lunar [85] months from the date, which period would expire in the month of Kartik. Four months, according to the Gregorian Calendar, would extend beyond that month, and expire in Margashirsh. But the legislation in s. 25 of Act XV of 1877 is absolute. There is no saving of cases in which it appears on the face of the contract that lunar months were intended by the parties. This Court must, therefore, be guided by s. 25, and hold the period of four months to be, for the purpose of ascertaining whether or not the suit is barred by lapse of time, four months according to the Gregorian Calendar, which period expired on the 7th December, 1880. The plaint having been presented on the 6th December, 1880, was in due time, and this suit is not barred. The Court, therefore, reverses the decree of the learned Judge of Small Cause Court of Poona, and directs the suit to be reinstated.

Decree reversed.

NOTE.—See *Nilkanth* v. *Dattatraya*, 4 B. 103.

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6 B. 85 = 6 Ind. Jur. 260.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

BULAKHIDAS (*Original Plaintiff*), *Appellant v.* KESHAVLAL AND OTHERS (*Original Defendants*), *Respondents.**

[6th December, 1881.]

Hindu law—Inheritance—Daughter's right of survivorship—Joint estate—Widows—Difference in the law of Bombay and the other Presidencies.

In those parts of the Presidency of Bombay where the doctrines of the Mayukh prevail, daughters take not only absolute but several estates, and, consequently, when without any issue, may dispose of such property during life, or may devise it by will.

The rule is different in Bengal and Madras, where daughters take by inheritance a joint estate with rights of survivorship : *Aumirtolall Bose* v. *Rajoneekant Mitter* (1) ; *Kattama Nachiar* v *Dorasinga Tevar* (2).

Result of the application of the Bombay rule to widows stated.

[F., 9 Bom. L.R. 1293; R., 21 B. 739 (745) : 24 B. 192 = 1 Bom. L.R. 574 ; 2 S.L.R. 59.]

THIS was a second appeal against the decision of A. H. Unwin, Assistant Judge of Ahmedabad, confirming the decree of the Subordinate Judge of Ahmedabad, Rao Bahadur Mukundrai Manirai.

One Aditram, a separated Hindu Grihastha, died in 1824, leaving a widow and two daughters, Kashi and Ganga. The [86] widow died in 1865, and was in possession of her husband's property till her death, since which event the possession continued with Ganga alone. The other daughter, Kashi, died in 1868, leaving her step-son, the plaintiff Bulakhidas, as her heir and also devisee of her property by a will. Ganga died

* Second Appeal, No. 226 of 1881.

(1) 2 I.A. 113.

(2) 6 M.H.C.R, 310.

in 1869, leaving the defendants as her heirs in possession of the entire property formerly owned by her father, Aditram.

Under these circumstances the plaintiff claimed to recover half a share of that property,—first, as heir of his step-mother, Kashi, and, secondly, as the devisee under her will. The defendants (*inter alia*) contended that Kashi having predeceased Ganga, the latter became the sole owner by survivorship, and that, consequently, the entire property was theirs to the total exclusion of the plaintiff. Both the lower Courts allowed the defendant's contention, and rejected the claim of the plaintiff, who appealed to the High Court.

Nanabhai Haridas, Government Pleader, for the appellant.—According to the Hindu law which obtains in the Presidency of Bombay and especially in Gujarat, there is no right of survivorship between daughters: Mayukh, c. IV, s. 8, para 1, and s. 8, para 10; West and Bühler (2nd ed.) pp. 50, 155, 292, note (*f*), 475, note (*c*).

Manekshah Jehangirshah, for the respondents.—The case of daughters is analogous to that of co-widows, who take a joint estate for life, with rights of equal beneficial enjoyment and of survivorship: *Gajapathi Nilamani* v. *Gajapathi Radhamani* (1). [KEMBALL, J.—In the case of *Aumirtolail Bose* v. *Rajoneekant Mitter* (2) the Privy Council held that where two daughters had already succeeded jointly by inheritance to their father's estate, and at the death of one of them the survivor was a childless widow, the latter would nevertheless take by survivorship the whole estate. The High Court at Madras seems to have held similarly: *Kattama Nachiar* v. *Dorasinga Tevar* (3); Mayne's Hindu Law (2nd ed.), pp. 501, s. 475.] These cases seem to be conclusively in the defendant's favour.

[87] *Nanabhai Haridas* in reply.—The cases cited by the other side are not Bombay cases. In Bombay the principal authority of Hindu law is undoubtedly the Mitakshara, and, according to it, the daughters take a limited estate. The case of sons or co-widows is different. They generally remain in the family or near one another; but, as regards daughters, the presumption is that they would be widely separated and placed in different circumstances. To apply the rule of survivorship to them would be inconvenient.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—The decision of the acting Assistant Judge—that daughters take by inheritance a joint estate, with rights of survivorship—is in accordance with the law as laid down in Madras and Bengal: *Aumirtolall Bose* v. *Rajoneekant Mitter* (2); *Kattama Nachiar* v. *Dorasinga Tevar* (3). The only question which we have to consider is whether the rule is the same on this side of India. In this Presidency, and especially in Gujarat, from whence this case comes, the Vyavahara Mayukha is a principal authority; and on the strength of chapter iv, s. 8, para 10 of the Mayukha it has become the established rule in this Presidency that daughters take by inheritance an absolute estate and not a limited interest, as they would under the Mitakshara: *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar* (4). The concluding words of the same paragraph, *viz.*, "if there be more daughters than one, they are to divide [the estate], and take [each a share]" seem to us sufficient authority for holding that, where the doctrines of the Mayukha prevail, daughters

(1) 1 M. 290.
(2) 2 I.A. 113.
(3) 6 M.H.C.R. 310.
(4) 8 I.A. 99.

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6 B. 85 = 6 Ind. Jur. 260.

take, not only absolute, but several estates, and, consequently, when not having any issue, may dispose of such property during life, or may devise it by will: *Haribhat* v. *Damodarbhat* (1). This is the view which appears to have generally been taken by the shastris, and to have commended itself to the learned authors of West and Bühler's Digest (2); and it is certainly a far more convenient rule than that of regarding as joint tenants two or more daughters who have married into different [88] families. No doubt it involves the application of the same rule to widows, of whom, in the paragraph immediately preceding the one which we have cited, Nilakuntha says: "If there be more than one, they will divide the wealth, and take shares": and such rule, when applied to widows, would not be in accordance with that which the Privy Council has held to prevail in Bengal and Madras: *Bhugwandeen Doobey* v. *Myna Baee* (3); *Gajapathi Nilamani* v. *Gajapathi Radhamani* (4). But as regards the devolution of the state of one of two widows, the result of the two rules would not, practically, be different. If the widows take a joint estate, the surviving widow takes the undivided share of the other widow by right of survivorship. If they take several estates, the surviving widow would take the divided share of the deceased widow by right of inheritance, as her husband's next heir.

We reverse the decree of the acting Assistant Judge, and remand the case in order that it may be determined whether the suit is barred by limitation, and, if not, whether the plaintiff is entitled to succeed to Kashi's half share under Kashi's will, and, if not, whether he is her next heir.

Costs to follow the final decision.

Decree reversed.

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6 B. 88.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

SAYAD MAHOMED ALI (*Original Defendant*), *Appellant* v. SAYAD GOBAR ALI (*Original Plaintiff*), *Respondent*.* [19th July, 1881.]

Mahomedan law—Wakf—Grant—Descent per stirpes—*Grant in inam to grantee and his children, without restriction as to names, in order that they may pray for the perpetuity of Government.*

A *sanad* of the Emperor Shah Jehan, dated A.D. 1651-52, granted in *inam* to one Sayad Hasan the village of Dharoda and certain lands of another village in these terms:—"Let the whole village above-mentioned, as well as the above-mentioned land, be hereby settled and conferred as above, manifestly and knowingly as a help for the means of subsistence for the children of the above-mentioned Sayad [89] Hasan without restriction as to names, in order that, using the income thereof from season to season and from year to year for their own maintenance, they may engage themselves in praying for the perpetuity of this ever-enduring Government."

Held that this grant did not constitute *wakf*, or a religious endowment, making the village descendible to the issue of the donee *per stirpes* (that is, allowing representation) rather than according to the ordinary Mahomedan law; and the direction that the donee and his issue were to pray for the perpetuity of the then existing Government, meant no more than an inculcation of gratitude for the

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* Second Appeal, No. 336 of 1880.

(1) 3 B. 131.
(2) West and Bühler, pp. 50, 154, 155, 475, note (c).
(3) 11 M.I.A. 487.
(4) 1 M. 290.

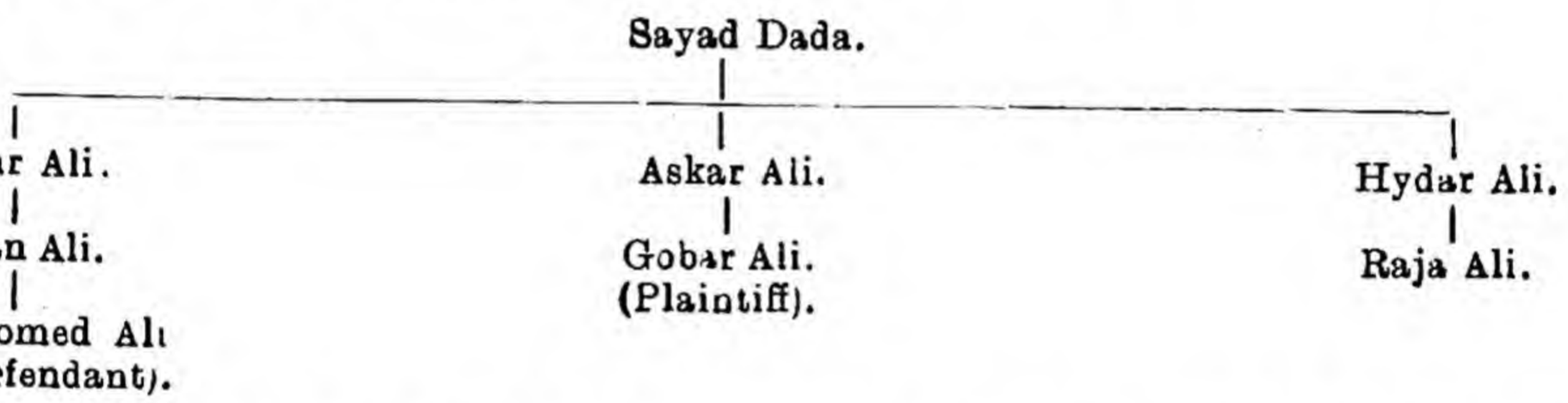
gift; and that neither neglect to fulfil the direction nor the downfall of the Government, would work a forfeiture or avoidance of the grant.

Although a *wazifa* grant may be a religious endowment, such is neither necessarily nor even generally its nature. Hence the use of term *mauzif* (alias *wazif* or *wazifa*), with regard to the grant of a village, does not stamp the grant as a *wakf* or religious endowment.

[R., 13 B. 264 (269)].

THIS was a second appeal from the decision of S. H. Phillpotts, Judge of Ahmedabad, reversing the decree of R. B. Mukundraya Maniraya, Subordinate Judge (First Class) of Ahmedabad.

The Emperor Shah Jehan in A.D. 1651-52 granted in *inam* the village of Dharoda, pargana Matar, in the Collectorate of Kheda, to one Sayad Hasan. The substantial words of the *sanad* ran thus:—"Let the whole village above-mentioned as well as the land above-mentioned be hereby settled and conferred as above, manifestly and knowingly as a help for the means of subsistence for the children of the above-mentioned Sayad Hasan, without restriction as to names, in order that, using the income thereof from season to season and from year to year for their own maintenance, they may engage themselves in praying for the perpetuity of this ever-enduring Government." In pursuance of this grant the descendants of Sayad Hasan have been enjoying the proceeds of the village of Dharoda. The last holder of the half share of the village was one Sayad Dada, whose descendants were as follows:—



[90] Of the sons of Dada the youngest, Hydar Ali, died first, and Raja Ali succeeded as a sharer. The plaintiff's father died next, and the plaintiff succeeded him. Next died Raja Ali, childless. Then died Bakar Ali, leaving his grandson Mahomed Ali, the defendant. Under these circumstances the plaintiff sued to establish his right to a half-share of the proceeds of the village enjoyed by Raja Ali on the ground that the property was *wakf*, and, as such, descendible *per stirpes*. He also set up a family custom.

The defendant denied that the property was *wakf*, and that any custom favouring representation existed in the family; and contended that, in accordance with the ordinary principles of the Mahomedan law, the plaintiff was entirely excluded, and could claim no more than a third share.

The Subordinate Judge rejected the plaintiff's claim: the District Judge reversed his decree, and awarded the claim.

The defendant appealed to the High Court.

Nanabhai Haridas, Government Pleader, for the appellant.

Rao Saheb *Vasudev Jaganath Kirtikar*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

WESTROPP, C. J. The learned District Judge founded his decree on the assumption that the village of Dharoda is held by the family of Sayads,

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who are the contending parties in this suit, as a religious endowment, to which the passages which he quoted from the Khizanat ul Muftien and the Alamgiri, as given at p. 342 of the Appendix to McNaghten's Mahomedan Law, are applicable. To us it seems that those passages are properly applicable to what is known to Mahomedan law as *wakf*, and not to a mere grant to a man and his children, without restriction as to names, for his and their maintenance,—they engaging themselves in praying for the perpetuity of the then existing Government. The *farman* or *altamgha* grant, which contained that limitation, was dated A.D. 1651-52, and seemed to be a renewal of a former grant, but with the additional provision in favour of the children of the donee "without restriction as to names," which addition is not sufficient to enable us to say that the village was to be descendible [91] to the issue of the donee *per stirpes* (*i.e.*, allowing representation) rather than according to the ordinary Mahomedan law. Our Persian interpreter says that he has never previously met the expression "children without restriction of names." We are unable to say that such a grant, as that contained in the *farman* of 1651-52, constitutes *wakf*, and we are inclined to think that the direction that the donee and his issue were to pray for the perpetuity of the then existing Government, meant no more than an inculcation of gratitude for the gift; and that neither neglect to fulfil the direction, nor the downfall of the Government, would have worked a forfeiture or avoidance of the grant (see the now repealed Bombay Reg. XVII of 1827, s. 38, cl. 2). Nor would a Civil Court have given damages for the neglect, or enforced the offering of the prayers by any proceeding in the nature of *mandamus* or injunction. An attempt, however, was made on behalf of the plaintiff (the respondent) to show, *dehors* the *farman* of 1651-52, that the village of Dharoda was, in fact, held as a religious endowment; and for this purpose a passage, alleged to have been extracted from the Mirat Ahmadi, the historical work in Persian of Ali Mahamadkhan, at one time revenue minister of the province of Gujarat, was given in evidence. That passage (if genuine and accurate) seems to us to show that the villages of Basna, Aishpad, and Sarsa were held by the Shahya Sayads for the purpose of meeting their own expenses as managers of the shrine or sanctuary of the Pir Sayad Mahamad Shah Alam Saheb Bokari and a masjid and monastery appendant thereto, situate in the district of Rasulebad, and the expenses of the fairs or festivals held in connection with that shrine, but that the villages of Dharoda, Nehali, Bakrol (Yakrol), Amburali and Jalalpor were held for the maintenance (vajh-maash) of the same Sayads "in accordance with the ancient *farmans* of mauzif" (*wazifa*, *wazif*). Distinguishing thus between the objects for which those two sets of villages were granted, that extract does not appear to us to carry the case any further in favour of the plaintiff than the *farman* of 1651-52. For the respondent, however, it was argued that *mauzif* alias *wazif* meant a religious endowment; but the learned Government Pleader, on behalf of the defendant, has referred to Johnson's Persian and Arabic Dictionary, p. 1274, [92] column 1, where we find the following passage:—"Muwazzaf, allowed a fixed pay or pension—*wazifa*—ordained, limited. "Muwazzif" one who orders a daily stipend," p. 1370, "'wazifat' (pl. wazasif and wazuf.) a pension, stipend, salary, soldier's pay, allowance of provisions, commons (by the day, month or year), anything stipulated or agreed upon, a task, religious duty, employment, post, office, use, purpose." "'Wazif khuwur' a pension." Professor H. H. Wilson in his Glossary, p. 557, describes 'wazifa' as "a pension, a stipend, a grant of land rent free, or at a quit-rent, to

pious persons, or for past services; revenue collected at a stipulated or fixed rate for a certain quantity of land," and "wazifadar" as "the holder of a pension or of a rent-free grant of land." Mr. E. P. Robertson, in his Glossary at p. 49, plac. 2, speaks of 'wazifa' as "land granted rent free or at a quit-rent by the Mahomedan Government to pious persons for past services and to Kazis. It now (he continues) in many instances pays *salami* to Government. Some of the Padshahi and other grants are still forthcoming. When Gujarat was subordinate to the Court of Delhi, the Emperors of Hindustan and their subordinate Governors gave many grants even of entire villages under the term 'wajipha,' signifying a deduction,—that is, an authorized deduction from the gross revenue on account of alienations. In addition to the above there are lands, which are called 'wajipha,' that were claimed by purchase or gift from the late Governments, and for which many of the proprietors hold vouchers; while, with regard to others, the plea of long possession is all that they can urge in support of their claims." Morley (Digest, Vol. I, p. 646) mentions 'wazifah' as "land assigned for the payment of pension or stipend." There are three cases reported by Borradaile (1) in relation to *wazifa* lands, in none of which cases are the lands there in litigation treated as held by way of religious endowment or *wakf*. Of *wazifa* lands in the district of Surat the Bombay Gazetteer (2) says that they were granted by the Mussalman rulers, and yield a small quit-rent of from annas six to rupees three per bigha. In the same work (3), with respect to similar lands in the district of Broach, occurs the following passage:—"The second class of lands held free **[93]** of service are those known as *wazifa* or stipendiary lands. This is a Mussalman form of gift, and is of importance in this district, as the estates of the *thakors* are technically alienations of this class. In a report on the alienated lands of the Broach sub division in 1776 (4), *wazifa* lands are said to have extended over 5,873 acres, representing a yearly revenue of Rs. 30,000. Most of these lands were, it was stated, then enjoyed by Mahomedans, Kajis, Sayads, Fakirs and others who chiefly resided at Surat. Some of these alienees held under grants from the Delhi Emperors, others under grants from the Ahmedabad Sovereign, and a third class under grants from the Nawabs of Broach. These lands are now said to have almost entirely passed into the hands of Hindu money-lenders—Wanias, Brahmins, Brahma Kshatris, and others." In a report of Mr. Davies, Collector of Broach, dated 13th December, 1847, and published at p. 92 of No. XXX of the New Series of the Selections from the Records of the Bombay Government, a particular species of *wazifa* is mentioned under the name of 'wuzzeefa khyrat' as denoting "lands held in prescriptive endowment of Mahomedan shrines (included under the general term of *Pasaeeta* in Appendix A to Reg. XVII of 1827)"; and at p. 95 Mr. Davies says: "The 'wuzeefa khyrat' is analogous to devasthan, the one being a Mahomedan and the other a Hindu term for lands originally bestowed with one and the same object, the support, *viz.*, of religious establishments. I do not anticipate that much would be resumable out of this class of lands, nor indeed any, except in cases where the alienation was found to be continued to the benefit of individuals rather than of establishments." '*Khyrat*,' *khairat*, is by H. H. Wilson (5) described as

(1) 2nd ed., Vol. I, 131; II, 370. (2) Vol. II, p. 221, published in 1877.
(3) Vol. II, p. 496.
(4) Mr. Perrott's Rep, 16th May, 1776, Pol. Dep., Diary No. 70.
(5) Glossary, p. 274, and see 2 Malcolm's Central India, pp. 28, 74, 3rd ed.; Galloway's India, p. 76.

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"alms, charity; lands given as charitable endowments: (the term is more especially applicable to grants or alms given by or to Mahomedans)." It is derived from 'kair' which, Wilson says, means "good, well, best" (1).

The result of these references is that, although a *wazifa* grant may be a religious endowment, such is neither necessarily nor [94] even generally its nature. Hence the use of the term 'mauzif' (*alias* wazif, wazifa) with regard to Dharoda does not stamp the grant of that village to the Sayads as a religious endowment or *wakf*; and, as already observed, it is, as an allotment of maintenance, placed in antithesis to Basna and two other villages devoted to the purpose of maintaining the fairs or festivals held in connection with the shrine of Shah Alam. The plaint filed by Sayad Hasan Ali against the Talukdari Settlement Officer in February, 1875, does not aid the respondent; inasmuch as the claim there made (third in order) in respect of village expenses in relation to the fairs is expressly rested on agreement by way of compromise, and not upon the terms of any original grant. To countervail the inference sought by the respondent to be drawn from the Mirat Ahmadi and the plaint just mentioned, that, *dehors* the *farman*, it appeared that the village of Dharoda must originally have been granted to the Sayads for the purpose of supporting the shrine and its fairs, the appellant was rightly permitted to use in evidence the record in Special Appeal 254 of 1871, a suit in which the present respondent Gobar Ali and others of his family were defendants. Those defendants had, in their written statement, set up against the plaintiff (who sued to establish the title of his judgment-debtor Ladli Begum to a share in the village of Dharoda) as a defence that she had not any share in the village,—it being a joint ancestral property and a charitable endowment which could not be divided. But in the judgment of Mr. F. D. Melvlll (our late esteemed colleague), then Acting District Judge of Ahmedabad, it is stated that "on the hearing of the (regular) appeal it is admitted by the respondents that their plea—that the property is an endowment, and, therefore, not liable to the rules ordinarily applicable in regard to its descent and alienation—cannot be sustained." He held her entitled to a twelfth share in Dharoda as heir of her husband Gulam Mahamed (one of the Sayads), which decree was affirmed with costs in this Court by Sir C. Sargent and Mr. Justice M. Melvill on the 22nd January, 1873, and is at direct variance with the mode of descent insisted upon by the respondent (Gobar Ali), the plaintiff in the present case.

It may be that there are instances in which grants by way [95] of *maddad i. maash* or *wazifa* are accompanied by such circumstances and conditions as to render them religious endowments, and descendible in a manner different from the ordinary law of descent prevailing amongst Mussalmans; but the present case is not, in our opinion, such an instance.

Bibi Kuneez Fatima v. *Bibi Shahba Jan* (2) in many of its circumstances resembled the present case. The grant there in question was held not to amount to *wakf*; yet there, as here, the grant was made to a Sayad the descendant of a Pir, was described as '*aima*' *ayma* (3), and stated to be for the support of himself and his family; and he was to pray for the grantor. There was the additional circumstance in that case, not

(1) Glossary, p. 274.
(2) 8 W.R. 313, (315).
(3) Wilson's Gloss., 13. He describes it as "land granted by the Mogul Government either rent free or subject to a small quit rent to learned and religious persons of the Mahomedan faith or for religious and charitable uses in relation to Mahomedanism."

found in the *farman* with which we have to deal, that one of the objects of the grant was to defray the expenses of a khankah, *i.e.*, "a monastery, a place where religious mendicants of the Mahomedan religion temporarily reside" (1). Whether we should concur with the High Court of Calcutta in holding that a grant for the support of a khankah is not a religious endowment, we do not express any opinion, and it is not necessary that we should do so.

The terms of the sanad by way of *maddad i. maash* in *Shah Uzeezoollah* v. *The Collector of Saharanpur* are not set forth in the report in 4 Sadr Divani Adalat (Calcutta) Reports, 312; but we observe that the law officers of the Sadr Adalat (page 316) described it, in their opinion, as "sadkah" (2) or "for charitable purposes." It was a grant by a Hindu potentate (Madhavrav Scindia) to Shah Abdulla and other faquirs.

We reverse the decree of the District Judge and restore that of the Subordinate Judge. The respondent having had the opinion of the District Judge in his favour, and there having [96] been two instances in which the succession to shares in Dharoda has by the family been permitted to be *per stirpes*—the mode of descent for which he contends—we direct that the parties, respectively, do bear their own costs of this appeal. Those two instances, though insufficient to constitute an ancient and invariable custom, probably induced him to bring this suit. He must pay the costs in both of the Courts below.

Decree reversed.

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6 B. 96.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

ISAK MAHAMAD AND ANOTHER (*Plaintiffs*), *Appellants v.* BAI KHATIJA AND OTHERS (*Defendants*), *Respondents.**

[21st November, 1881.]

Registration—Presentation—Residence of executant—Intending to register—Special cause—Registration Act VIII of 1871, *ss.* 31 *and* 85.

The words "any person intending to register any document" in s. 31 of the Registration Act VIII of 1871 include not only the person or persons in whose favour a document is executed, but also any person or persons executing the same.

Under the provisions of that section, therefore, the presentation of a document for registration, on special cause shown, at the residence of a party executing it, is valid.

The registering officer is the judge of the sufficiency of the special cause; and if he is satisfied, the Civil Court has no power to question his decision on that point.

Assuming the presentation at the residence of one of the executants of a document for registration to be an irregularity, it is one which, if committed in good faith, is covered by the provision of s. 85 of Act VIII of 1871.

THIS was a second appeal from the decision of S. Hammick, Acting Assistant Judge of Surat, confirming the decree of Rao Sahab Chunilal Maneklal, Subordinate Judge of Broach.

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* Second Appeal No. 279 of 1880.

(1) Wilson's Gloss. 278.

(2) 'Sadkah' Wil. Gloss. 550. "Alms, property, dedicated to pious uses, voluntary alms in distinction to those imposed by law: also propitiatory offerings to avert sickness from a friend or relative indisposed."

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On the 21st of August, 1874, the defendant, Khatija, executed to the plaintiffs, Isak Mahamad and Addesar Nasarvanji, a deed of sale of a certain field for Rs. 999. The deed was registered on the 5th of September following; but the defendants refusing to give up possession of the field, the plaintiffs brought the present suit.

[97] The defendants (*inter alia*) contended that the plaintiff's title was bad, inasmuch as the sale deed had not been presented for registration at the registrar's office or at the residence of any person intending to register it. The Subordinate Judge as well as the Assistant Judge allowed the contention, and rejected the plaintiff's claim. The Assistant Judge said: "The document was presented for registration by Mahamad Jiva, father and guardian of the plaintiff, Isak, a minor, and all the legal formalities were apparently gone through. But the presentation and registration took place, not in the office of the sub-registrar, but in Khatija's lodging. This fact, in my opinion, invalidates the proceedings *ab initio*. The place of registration is of sufficient importance to occupy a special part (Part V) of the Registration Act (VIII of 1871); and s. 28 lays down in general terms that, "save as otherwise provided, every document shall be presented for registration in the office of the sub-registrar." The question of place of registration (within the proper registration district) is settled in s. 31, which says that "in ordinary cases the registration of documents under this Act shall be made only at the office of the officer," "but such officer may, on special cause being shown, attend at the residence of any person intending to register any document which would ordinarily be registered at such office, and register or accept for registration such document. The terms of the law are clear. They declare that in ordinary cases registration shall be made at the office alone; but in the case now in question it was not made at that office. Second: it is provided that, on special cause being shown, the officer may attend elsewhere; but in this case it is not proved that any special cause was shown, or existed in fact. If Khatija's illness is the alleged special cause, I cannot accept it as a sufficient one, as she was able to take the journey from her village to Broach, and to drive about in a bullock cart. Third, under special circumstances the officer may attend at the residence of the person intending to register the document; but here Mahamad Jiva was the person intending to register the document, and the place at which the registration took place was Khatija's residence, and Mahamad is not stated to have been even temporarily residing there. The several failures to comply with the clear provisions of the Code compel me to find that no **[98]** legal presentation ever took place, and, therefore, the document cannot have been legally registered. Section 85 and the judgment quoted from the Allahabad Series of I. L. Reports, Vol. I, p. 465, appear to apply to errors in procedure after a document has been properly presented for registration, and do not confer validity on the registration of a document which has not been legally presented. A decision to this effect may, in a particular instance, inflict loss on a *bona-fide* purchaser or others intending to register; but, on the other hand, if the registration in this instance be held to be legal, the place of registration can never again be held to be material, —no evidence having been shown in this case why the document should not have been presented in the place required by law, namely, the sub-registrar's office.

"I, therefore, find that the document in question has not been legally registered. It is, therefore, inadmissible in evidence, and the plaintiff's case falls to the ground."

The plaintiffs, therefore, appealed to the High Court.

Shantaram Narayan and Shivram Bhandarkar, for the appellants.—The sole question for decision was whether the registration of the plaintiff's deed of sale is valid. Section 35 of Act VIII of 1871 by which this case was governed permitted the presentation of a document at the residence of any person intending to register it on special cause being shown. This language included the obligors as well as the obligees. The sub-registrar was satisfied with the cause shown for not presenting the deed at his office, and he accepted it at the residence of one of the executants. His act is not only not irregular, but cannot be questioned: *Shoe Shunkur Sahoy* v. *Hirdey Narain Sahu* (1); *Mahammed Ewaz* v. *Birj Lall* (2); *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (3). But assuming, without granting, that the sub-registrar acted irregularly, there was nothing to show he acted otherwise than *bona fide*. His act was, therefore, protected by s. 85 of the Act, and was not invalid. At best his error was one of procedure especially provided for in that section.

Nanabhai Haridas, Government Pleader, and *Gokuldas Kahandas Parekh*, for the respondents.—If there was an impropriety **[99]** in regard to the place of presentation it involved a question of jurisdiction not one merely of procedure. The appellate Court had found that the cause set up for not presenting the deed at his registration office—*viz.*, Khatija's illness—was not sufficient. The precedents cited did not meet the present case. A plaint presented out of Court could not be accepted. The Court would have no jurisdiction to accept it; nor would a registrar have jurisdiction to accept a document unless presented at the right place and time.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—We think that the Courts below have construed the provisions of the Registration Act (Act VIII of 1871) with unnecessary stringency. The irregularity alleged as rendering the registration of Ex. No. 3 invalid is that the sub-registrar allowed it to be presented at the residence of Bai Khatija, one of the executants, and not at his own office. If this was an irregularity, it would, in our opinion, come within the provisions of s. 85 of the Act, which enacts that "nothing done in good faith pursuant to this Act, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure." It has not been even suggested that the sub-registrar in this matter acted otherwise than in good faith. But we see no reason for holding that any irregularity has been committed. The ordinary rule, no doubt, is that every document shall be presented for registration at the registration office. But s. 31 provides that the registering officer may, on special cause being shown, attend at the residence of any person intending to register any document. The special cause shown in the present case seems to have been that Bai Khatija was sick. The acting Assistant Judge has stated his opinion that she was not sufficiently sick to prevent her from appearing at the sub-registrar's office. But this was a question which it was for the sub-registrar to determine, and his decision on the point cannot be impeached. It would lead to the greatest inconvenience and injustice if the registration of a document were to be held invalid merely because a Civil Court was not satisfied

(1) 6 C. 25. (2) 2 I. A. 210. (3) 4 I. A. 166.

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that a case of sickness, which satisfied the registering officer, was sufficiently made out. Another objection taken by the Courts below to the [100] sub-registrar's procedure was that Bai Khatija was not "a person intending to register the document" (s. 31), and that, therefore, the sub-registrar could not go to her residence, though he might have gone to the residence of the person in whose favour the document was executed. But it appears to us that, seeing that Bai Khatija was a party executing the document and that she was willing to join in registering the document, and that the sub-registrar was called to her residence—no doubt at her desire—in order to enable her to take her part in the registration without inconvenience, she may very properly be considered to have been a person intending to register the document. The judgment of the Judicial Committee in *Mohammed Ewaz* v. *Birj Lall* (1) may with advantage be studied in connection with the question which we have been called upon to decide. We reverse the decrees of the Courts below, and remand the case for a trial on the merits. Costs to follow the final decision.

Decrees reversed.

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6 B. 100.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

RAMCHANDRA SAKHARAM, (*Appellant*) *v.* KESHAV DURGAJI BY HIS AGENT HAKMA DEPAJI, (*Respondent.*)* [12th December, 1881.]

The Civil Procedure Code Act (X of 1877), s. 37, cl. (a)—Non-resident—Recognized agent.

The term 'non-resident' in s. 37, cl. (*a*), of the Code of Civil Procedure (Act X of 1877) covers every absence which may reasonably be supposed to have been within the contemplation of the Legislature in using that term: thus, where a Marwadi had resided for forty years at Pen, and had also a place of business there, but who had gone to his native country to get his sisters married, and had been absent upwards of four months, it was

Held that he was 'non-resident' within the local limits of the jurisdiction of the Pen Court, and that a person holding a general power of attorney from him was a recognized agent within the meaning of the section.

[F., 28 A. 135 = 2 A.L.J. 626 = A.W.N. (1905) 221; Appr., 14 M.L.J. 223; R., 14 B 541 (547).]

THIS was a second appeal against the decision of C. E. G Crawford, Assistant Judge of Thana, reversing the order of Rao Saheb A.K. Kothare, Subordinate Judge of Pen.

[101] One Keshav Durgaji obtained a decree against the appellant in the Civil Court of Pen. Shortly afterwards he went to Marwad, his native country, to get his sisters married, leaving his agent, Hakma Depaji, in charge of his business at Pen. Keshav resided with his family at Pen for nearly forty years, and was a municipal commissioner of the town. Hakma applied for the execution of the decree.

The Subordinate Judge held that Keshav was a resident of Pen, and that in his temporary absence the person holding a general power of attorney from him could not be regarded as his recognized agent within the meaning of s. 37, cl. (*a*), of the Civil Procedure Code (Act X of 1877).

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* Second Appeal, No. 185 of 1881.

(1) 4 I. A. 166.

The Assistant Judge, on the authority of *Fathima* v. *Sakina* (1), came to a different conclusion.

The judgment-debtor appealed to the High Court.

Pandurang Balibhadra, for the appellant.

Shantaram Narayan, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—We think that, as was said in *Mahomed Shuffli* v. *Laldin Abdula* (2) the word "resident" in legislative enactments must be construed according to what may be supposed to have been the intention of the Legislature in using the term. The word need not necessarily have the same meaning in different enactments, nor even in different sections of the same enactment. For example, explanation 1 to s. 17 of Act X of 1877 indicates that in that section the term may be used in a different or wider sense than that which it bears in other parts of the Code. Clause (*a*) of s. 37 of the Code is a clause enabling persons who are not resident within the local limits of a Court to appear by a person holding a general power of attorney. It may be supposed that the Legislature intended to give the benefit of this provision to all persons, and especially to traders, whose interests might be seriously compromised, if, during their absence from home and their place of business, they could leave no one behind who could represent them in Court, as well as conduct their business. The intention of the Legislature may be supposed **[102]** to be favourable to the enforcement of legal rights; and just as in s. 17 the term "reside" is to be construed broadly, so as to prevent a debtor from evading the claims of his creditors, so in s. 37 it would seem right that the term "non-resident" should be construed broadly, so as not to prevent a creditor from enforcing his claims against his debtor. We certainly should not be disposed to adopt a highly technical view of a question which in no way affects the merits of the case between the parties. No doubt the term "non-resident" cannot be allowed to cover every absence from home, whatever its nature or duration; but it may be allowed to cover every absence which may reasonably be supposed to have been within the contemplation of the Legislature. In the present case the plaintiff is a Marwadi, who has been resident at Pen for forty years. He still has his place of business at Pen. But, previously to the presentation of his *darkhast* on the 1st December, 1879, he had gone to his native country, Marwad, to get his sisters married. When the Subordinate Judge delivered judgment on the 17th April, 1880,—*i.e.*, after four and a half months—he was still absent. Considering the distance of his native country and the purpose for which he had gone, his absence must necessarily have been intended to be a prolonged absence. It would be exceedingly hard upon him if, during such an absence, suits, which would otherwise be time-barred, and for which he could not have provided before his departure, could not be brought on his behalf by the manager of his business. We cannot doubt (though it is impossible to lay down any precise rule to suit all cases) that this case was exactly such a case as was within the contemplation of the Legislature when enacting the clause enabling non-resident persons to appear by general agent. We, accordingly, confirm the order of the Assistant Judge, with costs.

(1) 1 A. 51.

(2) 3 B. 227.

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[103] ORIGINAL CIVIL.

Before Mr. Justice Bayley.

NARRONJI BHIMJI AND OTHERS, (*Plaintiffs*) *v.* MUGNIRUM CHANDAJI, (*Defendant*).* [14th and 21st December, 1880.]

Limitation Act (XV of 1877), ss. 9 and 13 —Defendant's absence from British India——Computation of the period of limitation—Adjusted and signed account—Payments under s 20 of the Limitation Act.

Sections 9 and 13 of Act XV of 1877 adopt the law of limitation in England, and they must be read together in computing the period of limitation.

Where the statutory period has once begun to run in respect of any cause of action, the subsequent absence of the defendant from British India will not stop it from running.

Where, subsequently to the adjustment of his account with the plaintiffs, the defendant had been credited with amounts of surplus proceeds of goods and of a *hundi*, *held* that such amounts were not payments within the meaning of s. 20 of the Limitation Act.

The defendant adjusted and signed his account with the plaintiffs in Bombay on the 13th of January, 1871, and shortly afterwards went to reside out of British India, in the territories of His Highness the Nizam. There was no subsequent payment of interest *as such*, and no payment of any part of the principal.

Held that the plaintiff's suit for the balance of the account was barred by the law of limitation, not having been brought within three years after the adjustment.

[Diss 4 A. 530=2 A W.N. 127; 8 B. 561; R., 14 C. 457; 25 C. 496=2 C.W.N. 269 (F.B.); U.B.R. (1892—1896) 466; D., 31 A. 285=6 A L.J. 207=1 Ind. Cas. 137.]

14*th Dec.*—THIS was a suit to recover from the defendant Rs. 29,415-8-0, with interest, being the balance due on an adjusted and signed account. By the adjustment, a sum of Rs. 30,092-2-0 had been found due. The plaintiff had in his hands certain goods belonging to the defendant, which he subsequently sold, giving the defendant credit for the proceeds.

The plaintiffs, who were merchants in Bombay, carried on business in the years 1870 and 1871 as commission agents of the defendant for the purchase and sale of goods in Bombay and shipment of goods for sale in England on his account. The defendant was described in the title of the suit as having "lately carried on business under the name and firm of Joharimul Mugnirum at Latton, in the territories of His Highness the Nizam of Hyderabad." The plaint was filed in the latter part of 1880.

[104] In respect of the agency business the plaintiffs had a running account with the defendant. In their plaint (paras. 3 and 5) they stated—

"3. The said account was examined and adjusted by the defendant on the 7th of Posh Vad 1927 (13th of January, 1871), and a balance of Rs. 30,092-2-0 was then found due by the defendant to the plaintiffs, which said balance was acknowledged as correct by the defendant's *munim* in an entry signed by him in the plaintiff's books."

"5. The defendant ever since the date of the said adjustment of accounts has been and is now residing at Latton, in the territories of His Highness the Nizam, and the plaintiffs, therefore, submit that the time during which the defendant has been absent from British India should be excluded in computing the period of limitation applicable to this suit."

* Suit No. 466 of 1880.

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The suit came on for hearing as a short cause, and was undefended.

It was proved in evidence that at the time of the adjustment, the defendant was in Bombay; that a few days afterwards he left for the Nizam's territories; and that he had never returned to Bombay since that time.

Vicaji for the plaintiff.—We submit that, under s. 13 of the Limitation, Act (XV of 1877), the time during which the defendant has been absent from British India is excluded from computation, and that this suit is, therefore, not barred. Section 9 refers to cases of personal disability in the plaintiff. Section 13 must have been intended to give the plaintiff a special privilege in case of the defendant's absence, inasmuch as under the Civil Procedure Code (s. 39. &c.), it is always possible to sue an absent defendant. The privilege given to him by s. 13 is analogous to that which is given to plaintiffs by ss. 12, 14, 15, 16, 17, and 18. In all these cases, although time has continued to run, yet certain periods are to be excluded, so as to preserve the plaintiff's right to sue. The Act makes a distinction between *stopping* the time which has once begun to run against him, and *excluding* certain periods of time from consideration.

JUDGMENT.

[105] 21*st Dec.*—BAYLEY, J.—This is an undefended suit brought upon a running account between the plaintiffs—who are carrying on their business as merchants in Bombay—and the defendant, who until recently, traded at a place called Latton, in his Highness the Nizam's Dominions. The claim is for the balance of his account, namely Rs. 29,415 8-0 and interest, due to the plaintiffs in respect of expenses incurred, commission earned, and moneys paid by them as commission agents of the defendant for the purchase, shipment and sale of goods on his behalf.

On the 13th of January, 1871, it appears that the agency account was adjusted between the parties, showing a balance of Rs. 30,092-2-0 in favour of the plaintiffs, and on that day the defendant also signed an entry for that sum in the plaintiffs' books. The evidence goes to show that the defendant was in Bombay at the time of the adjustment, that he left for Latton very soon afterwards, and that he has never since returned to Bombay. The plaintiffs in their plaint say that "after the date of the adjustment, they continued to act as the commission agents of the defendant, and incurred expenses, and paid and received moneys on his account;" and the plaintiffs' *munim* has said in his examination that the balance of Rs. 29,415-8-0, became due on the 1st of Kartick Sud 1928 (13th of November, 1871), and he has shown in detail how the amount of the adjustment was reduced to that sum. He stated that there had been no dealings since and no payments on account. There is no further evidence offered. I am of opinion that there is nothing special in this case to defer the plaintiffs' right to sue after the date of the adjustment. The period of limitation began to run from that moment or that day. Mr. Vicaji relied on s. 13 of the Limitation Act (XV of 1877), which enacts that, "in computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded." But that section ought to be read in connection with s. 9, which provides that, "when once time has begun to run, no subsequent disability or inability to sue stops it." These two sections adopt, in fact, what had long before been the law of limitation in England. In *Doe d. Durour*e v. *Jones*(1) it was held by the King's Bench in 1791 that **[106]** "when

(1) 4 P. R. 300.

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once five years, allowed to an infant to make an entry for the purpose of avoiding a fine, begin, the time begins to run notwithstanding any subsequent disability." In *Cotterell* v. *Dulton*(1) which was a real action upon a writ of formedon, it was held that the demandant was barred by the Statute of Limitation (21 Jac. I, c. 16). Chambre, J., said: "The ten years do not run at all while there is a continuance of liabilities, but they run without intermission from the time that the disabilities first cease" (p. 830). Gibbs, J., said: "When once the statute begins to run, nothing stops it." In *Rhodes* v. *Smethurst*(2), decided in the Exchequer Chamber, it was held that "when time has once begun to run, no subsequent interruption to the (plaintiff's) right of suing, even from causes beyond his control, will stop it." I hold, therefore, that the period of three years allowed by the Act began to run in this case from the date the account was adjusted.

There has been no subsequent adjustment or acknowledgment in writing given after the defendant went to reside at Latton; nor is there any payment of interest, *as such*, or of the principal, since the defendant went to reside there. Hence it is clear there is nothing to bring the case within s. 20 of the Limitation Act. The particulars of demand state the credit items of the account as consisting of "moneys received by surplus proceeds of bales of cotton shipped and sold" in "England and of the proceeds of a *hundi*." These amounts are not "payments" within the meaning of s. 20. If there had been payment, there might have been a question as to which Limitation Act—that of 1871 or 1877--would apply to the present claim. The plaintiffs' case, so far as regards the credit items in the account, is not unlike that of *Hanmantmal Motichaud* v. *Rambabai* (3). Neither the early part of s. 20 as to interest, nor that relating to part payment of the principal, applies here; because the fact of payment does not appear to be in the handwriting of the person making the same.

The law of limitation is a law relating only to procedure (4)and applying s. 9 of Act No XV of 1877, I hold that the claim, so far as this Court is concerned, is time-barred. I will **[107]** however, allow the plaintiffs to elect between a dismissal of this suit or a withdrawal of it under s. 373 of the Code of Civil Procedure, to enable them, if so advised, to proceed against the defendant in the Nizam's territories, where the law of limitation may not be the same as that of British India.

[The latter course being chosen, the suit was allowed to be withdrawn, with liberty to the plaintiffs to bring a fresh suit, if so advised, in respect of the same subject-matter.]

Attorneys for plaintiffs.—Messrs. *Jefferson*, *Bhaishanker*, *and Dinsha*.

(1) 4 Taunton. 826. (2) 6 M & W. 351. (3) 3 B. 198.
(4) *Ruckmaboye* v. *Lulloobhoy Motichund*, 5 M. I. A. 234.

6 B. 107=6 Ind. Jur. 313.

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Before Sir Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice Kemball.

GOPAL NARHAR SAFRAY, A MINOR (*Original Plaintiff*), *Appellant* v. HANMANT GANESH SAFRAY AND ANOTHER (*Original Defendants*), *Respondents.** [20th July, 1881.]

Review—Delay—Adoption of daughter's son—Custom—Breaches of custom—Practice—New case set up in special appeal.

An application for review was presented to the High Court more than eighteen months after time, the applicant alleging that, soon after the decision sought to be reviewed, he was engaged in collecting instances of the special custom relied upon by him in support of his claim. The special custom was not set up in the Courts below, but an objection was taken for the first time in special appeal that an issue regarding it should have been raised in the lower Courts. No instance of such special custom had been given in evidence. It was urged that the applicant was a minor until shortly before the making of the High Court decree, and was only represented by his adoptive mother as his guardian.

The High Court considered that there was no sufficient excuse for the delay, and rejected the application, observing that, unless upon very strong grounds and under very special circumstances, the Court would hesitate to permit a party at such a stage of his suit to set up a case which was not set up for him in the Courts below, where his professional representatives must have been well aware whether such a case could be legitimately set up, and abstained from any attempt to do so.

[R., L.B.R. (1893—1900) 518 (520).]

THIS was an application by the appellant, Gopal, praying for a review of the decree passed by High Court (Westropp, C. J. and Kemball, J.) on the 14th April, 1879 (1). The following (*inter alia*) were the grounds on which the review was asked:—

[108] That the applicant was a minor during the pendency of the suit and appeals (regular and special), and was represented by his adoptive mother as his guardian; that, soon after the decision of the High Court in special appeal, he was engaged in collecting instances of the special custom set up by him in support of his claim; that the High Court should have given him an opportunity to prove that, by the custom of the country and the caste, his adoption was valid; that the High Court did not give proper effect to the admitted fact that the Swamariacharya, as head of the Brahman community, had held the adoption of the applicant to be valid after due inquiry, and had set aside the excommunication of the applicant's father by the Brahmans of his caste; that in obedience to the decision of the Swamariacharya, the Brahmans had admitted the appellant's father into the caste; that the applicant was justified in asking an issue on the question of the special custom set up by him, as it was supported by the instances specified in the affidavit annexed to the application.

K. T. Telang and *Ghanasham Nilkanth* appeared for the appellant, and asked for a rule *nisi* on the 20th July, 1881.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C.J.—It does not appear to us that any sufficient reason for excusing the delay in the presentation of this petition has been assigned

* Review in Special Appeal, No. 250 of 1874.

(1) See 3 B. 273.

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on behalf of the petitioner. The decree was made on the 14th April, 1879. The three months allowed to the party to apply for a review consequently expired on the 14th July, 1879. The petition of review was not presented until the 28th January, 1881,—*i.e.*, more than eighteen months after time. The alleged special custom was not set up in the Subordinate Judge's or District Court. Objections were made for the first time in special appeal to the High Court that an issue to try whether there was a special custom in the caste and country for Brahmans to adopt a daughter's son, should have been raised, but it was admitted by the appellant's pleader that not a single instance of such an adoption had up to that time, been offered or given in evidence. It is urged that the plaintiff was a minor until shortly before the making of the High Court decree in July, 1879, and was only represented by his adoptive mother **[109]** as his guardian. But, both in the Subordinate Judge's Court and in the District Court, he (the appellant and plaintiff) was represented by pleaders of his own caste, *viz.*, Rigvedi Brahmans, and the Subordinate Judge was a Rigvedi Brahman, and, if there had been any such well-established special custom in that caste, they must have been cognizant of it. The circumstances that the pleaders did not ask for, and the Subordinate Judge did not suggest, any issue as to the existence of such a custom, and that the Subordinate Judge rested his decree in favour of the plaintiff solely on the maxim *quod-fieri non debuit factum valet*, afford strong reason for supposing that there is not any such duly established special custom sanctioned by the caste. The plaintiff has, in the affidavit filed in support of his petition of review, specified fifteen alleged instances of adoption by Brahmans of daughters' sons, collected from various places far from and near to his place of residence, but it is admitted by his learned and able counsel that only eleven of these alleged instances occurred in the plaintiff's caste of Rigvedi Brahmans, and that of these eleven only the three first instances of adoption mentioned in his affidavit occurred in the locality (Satara) to which the plaintiff belongs. Of these one is stated to have occurred about fifteen years ago; the second about seventeen or eighteen years ago ; and the third about twenty years ago. Of the residue of the eleven, which residue is said to have occurred in other districts, the oldest is not alleged to have occurred more than thirty years ago. Occasional breaches of general rules of caste or law do occur, but a few modern breaches of such a rule do not constitute an ancient and invariable custom—more especially when we remember that the caste itself expelled Narhar, the plaintiff's adoptive father, for his adoption of the plaintiff. We could not have stronger evidence than that as to the caste's view with respect to the existence of any such special custom as would justify the plaintiff's adoption. It is stated in the petition of review that it is an "admitted fact" that Narhar, after the interference of the Swamariacharya, was restored to the caste. The learned counsel and pleader for the plaintiff have, however, been unable to point to any such admission on the record of this case, and there was not any statement made at the hearing of the special appeal before this Court that **[110]** Narhar had been restored to the caste. The plaintiff himself, in the third paragraph of his affidavit already mentioned, swears that Narhar died a few days after the adoption of the plaintiff. Even if he had been so restored, under pressure of the Swamariacharya, it would not detract from the weight of the act of the caste in expelling him. There is not, in our opinion, any reason to suppose that the best case that could be

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made for the plaintiff has not been made in the Courts below by his Brahman pleaders, and we are personally cognizant that his case on the special appeal was argued with great ability, energy and discretion by Mr. Shantaram Narayan, who stands second to no pleader at the Bar of this Court, and omitted no legitimate effort to obtain success. Unless upon very strong grounds and under very special circumstances, we should hesitate to permit a party at such a stage of his suit, as the present suit now is, to set up a case which was not set up for him in the Court of first instance or primary appeal, where his professional representatives must have been perfectly well aware whether such a case as this alleged special custom could be legitimately set up, and abstained from any attempt to set it up. To yield to such an application as the present would be to make an evil precedent, and to hold out a premium to perjury and interminable litigation. Whether we look to the lateness of the application or to the merits of it, we think it our duty to refuse a rule *nisi* for review.

Rule refused.

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6 B. 110.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

NILVARU (*Original Plaintiff*), *Appellant v.* NILVARU AND OTHERS (*Original Defendants*), *Respondents.** [15th November, 1881.]

Res judicata—*Appeal—Effect of appealing against a judgment—Civil Procedure Codes, Act VIII of* 1859, *s.* 2 ; *Act X of* 1877, *s.* 13, *Expl.* 4—*Title—Trespass—Damages.*

When the judgment of a Court of first instance upon a particular issue is appealed against that judgment ceases to be *res judicata*, and becomes *res sub-judice* ; and if the appellate Court declines to decide that issue and disposes of the case **[111]** on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of appeal.

[**F.**, 11 A. 148=9 A.W.N. 42 ; 5 C.L.J. 653 ; 1 S.L.R. 171 ; **R.**, 9 B. 75 (81) ; 15 B. 370; 8 Ind. Cas. 736=9 M.L.T. 64 ; **D.**, 4 N.L.R 98.]

THIS was a second appeal against the decision of J. W. Walker, Assistant Judge of Ratnagiri, confirming the decree of Rao Saheb K. B. Kher, Subordinate Judge of Sangameshvar.

In 1872 the plaintiff brought a suit against some of the present respondents for damages caused to the plaintiff by the defendants' cutting and removing certain trees on a piece of land which the plaintiff alleged belonged to him. The Court of first instance raised two issues: first, whether the land did, as alleged, belong to the plaintiff; and, secondly, whether the alleged act of trespass had, in fact, been committed. Having found both of these in the negative, he rejected the plaintiff's claim. The plaintiff thereupon appealed, and took exception to both the findings. The appellate Court neither raised the issue of the title nor decided it, but, virtually deciding that the defendants had not done the wrong complained of, upheld the decree of the Court of first instance.

The present suit was brought in 1876. In this the plaintiff added some more members of the Nilvaru family as defendants, and claimed to recover possession of the identical piece of land which had been held not

*Second Appeal, No. 111 of 1881.

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to be his by the Subordinate Judge in the previous suit. The new defendants did not oppose the plaintiff's suit, but admitted his claim; the other defendants contended that, by reason of the adverse finding in the previous suit, the question of title was *res judicata*, and that the present suit was barred. Both the Courts below allowed their contention. The plaintiff, therefore, appealed to the High Court.

Manekshah Jehangirshah, for the appellant.—This case was governed by s. 2 of the Civil Procedure Code, Act VIII of 1859. Neither under that section nor under s. 13 of the New Civil Procedure Code, Act X of 1877, is the present suit barred. The Subordinate Judge in the first suit decided the question as to the plaintiff's title to the land; but that finding was appealed against, and the plaintiff had a right that it should be revised. From the moment of the plaintiff's making the appeal it became *sub judice*. It did not, therefore, bar the present suit.

[112] *Yashvant Vasudev Athalye*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—The former suit was one for damages for trespass. The Subordinate Judge framed two issues—one relating to title and the other to the act of trespass complained of. The Subordinate Judge found that the plaintiff had not proved his title, and that the trespass had not been committed. The plaintiff appealed on both points. The appellate Court omitted to state the points for determination as required by law, and gave the following short and unsatisfactory judgment:—"To entitle plaintiff to damages, he must show a trespass on defendants' part. This he certainly has not done. The evidence of one witness (No. 53) is clearly not sufficient. Decree confirmed with costs." It is impossible to say that the appellate Court decided anything more than that no act of trespass had been proved. The Court gave no decision on the question of title. We consider that when the judgment of a Court of first instance upon a particular issue is appealed against, the judgment ceases to be *res judicata*, and becomes *res sub-judice*; and if the appellate Court declines to decide that issue, and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of appeal. This very clearly appears from Expl. 4, s. 13 of the Civil Procedure Code, Act X of 1877; and we consider that that explanation introduces no new law, but merely states the law as it previously existed.

The decrees of the lower Courts are reversed, and the case is remanded for a decision on the merits. Costs to follow the final decision.

Decree reversed.

NOTE.—See, also, *Gungabishen* v. *Raghonath*, 7 C. 381.

6 B. 113.

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6 B. 113.

[113] APPELLATE CIVIL.

Before Sir Michael Roberts, Westropp, Kt., Chief Justice and Mr. Justice Pinhey.

SAKHARAM MAHADEV DANGE AND OTHERS (*Original Defendants*), *Appellants v.* HARI KRISHNA DANGE (*Original Plaintiff*), *Respondent.** [4th October, 1881.]

Appeal—Power of the Court of appeal to vary decrees appealed from in consequence of circumstances occurring subsequently to the date of such decrees—Partition suit—Death of a co-parcener pendente lite—*Decree for partition when a severance.*

When the decree of a Subordinate Court is under appeal to the High Court, it is open to the High Court to vary it, either in points in which it is erroneous, or in respect of matters occurring subsequently to the date of such decree which are admitted.

The plaintiff obtained a decree in a partition suit in the Subordinate Judge's Court for his share in certain joint family property in the possession of the defendants (his co-parceners). The decree was affirmed on appeal. The defendants filed a second appeal in the High Court; but, before it was decided, one of the defendants died. The plaintiff at the hearing of the second appeal claimed a larger share in the family property than he had been awarded by the decree of the Courts below.

Held that he (plaintiff) was entitled to a share in that of the co-parcener who died *pendente lite*, and that the decree appealed from, ought to be varied accordingly.

Joy Narain Giri v. *Girish Chunder Myit* (1) distinguished.

A decree for partition does not operate as a severance so long as it remains under appeal.

[F., 1 Bom. L.R. 218; R., 19 B. 532 (537); 25 B. 606; 28 B. 201; 19 M. 345; 35 M. 239=10 Ind. Cas. 660=21 M.L.J. 240=9 M.L.T. 421=(1911) 1 M.W.N. 223; 6 C.L.J. 74=11 C.W.N. 732; 8 Ind. Cas. 736=9 M.L.T. 64; 24 M.L.J. 112 (126)=13 M.L.T. 60; Expl., 36 B. 550=14 Bom. L.R. 733=16 Ind. Cas. 991; D., 21 M. 288=8 M.L.J. 121.]

THIS was a second appeal from the decision of W. H. Newnham, Judge of the District Court of Poona, affirming the decision of D. J. Karmarkar, Joint Subordinate Judge at the same place.

The plaintiff Hari Krishna instituted this suit against Sakharam Mahadev and his two brothers, Lakshman and Apaji, for a partition of certain family property in their possession, and claimed one-eighth share in the same. He alleged that his father and the defendants were full brothers. The defendants answered (*inter alia*) that the plaintiff's share was only one-twenty-fourth in the family estate. Vasudev and Keso were made co-defendants on the application of the other defendants. Their defence is not material to the case.

[114] The Subordinate Judge allowed the plaintiff's claim to one-eighth portion of the moveable and immoveable property belonging to the family estate and in the possession of the first three defendants. That decree was affirmed by the District Judge on appeal. Both the lower Courts found that Vasudev and Keso were divided in interest from Sakharam and his brothers.

The defendants thereupon filed a second appeal in the High Court on the 29th January, 1881. It was registered on the 10th February of the same year.

* Second Appeal, No. 126 of 1881.

(1) 4 C. 434.

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6 B. 113.

At the hearing of the second appeal on the 4th October, 1881, *Shamrav Vithal*, who appeared for the respondent (plaintiff), read an affidavit of his client to the effect that one of the principal appellants (defendants), Apaji Mahadev, had died subsequently to the filing of the second appeal, and submitted that the plaintiff was consequently entitled to one-sixth, instead of one-eighth, share in the family property.

C. R. Kirloskar, who appeared for the appellants (defendants), admitted the fact of Apaji's death, but cited *Joy Narain Giri* v. *Girish Chunder Myti* (1) as an authority against the plaintiff's claim for a larger share in the family property than that allowed to him by the Courts below.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—This Court does not feel itself at liberty to disturb the finding of the Courts below, that the defendants Vasudev and Keso are separate from the other defendants. Mr. *Shamrav Vithal* has read the plaintiff's affidavit of the 21st September, 1881. Mr. *Kirloskar* (after consulting one of his clients, *viz.*, Lakshman Mahadev Dange, the second defendant) admits that the third defendant, Apaji Mahadev Dange, has died on Magh Vad the 5th, Shake 1802 (19th February, 1881) during the pendency of this second appeal without leaving issue male or a widow surviving him, but Mr. *Kirloskar* has argued that the decree in this cause of the Subordinate Judge amounted, in law, to a division in estate between the plaintiff and his co-parceners, and that Apaji having died since that decree, the plaintiff is not entitled to any share of Apaji's share in the estate. Mr. *Kirloskar* refers to **[116]** *Joy Narain Giri* v. *Girish Chunder Myti* (1); but in that case the decree of the Fasli year 1272, treated by the Privy Council as having effected a severance of the joint estate, was not the decree under appeal before the Privy Council in that case—the decree of the year 1272 having, in fact, been affirmed not only by the High Court of Calcutta but also by the Privy Council itself, A.D. 1873. The decree of the Subordinate Judge in the present case is itself now under appeal, and it is open to this Court to vary it either in points (if any) in which it is erroneous or in respect of supplemental matters which, like the death of Apaji Mahadev Dange, are admitted. We cannot hold that the Subordinate Judge's decree operated as a severance so long as it remained under appeal. The death of Apaji Mahadev Dange *pendente lite* entitles the plaintiff to a sixth share of the estate in lieu of an eighth share awarded to him by the Courts below. We, therefore, vary the decrees of those Courts, by directing that the house be divided into six (not eight) portions, and that one of such portions be made over to the plaintiff,—and that the defendants Nos. 1 and 2 from the 19th February, 1881, (being the day of the death of the defendant Apaji Mahadev Dange), pay to the plaintiff one-sixth share of the net annual income derivable from the three villages held in mortgage in the decree of the Subordinate Judge mentioned, and that the annual payment to the plaintiff in respect of that income from the date of the Subordinate Judge's decree down to the death of the defendant Apaji Mahadev Dange and the other payments (including costs) in that decree directed to be made, be made as therein ordered, and the defendants are to pay to the plaintiff his costs of this appeal.

Decree varied.

(1) 4 C. 434.

6 B. 116.

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[116] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

RAMA AND OTHERS (*Original Defendants*), *Appellants v.* SHIVRAM AND OTHERS (*Original Plaintiffs*), *Respondents.**

[20th January, 1882.]

Cause of action—Jurisdiction—Suit to parade bullock on the Pola*—Damages—Dignity.*

A suit does not lie in a Civil Court for a declaration that the plaintiffs have the right of parading their bullock on the *Pola* (the last day of the month of Shravan) of one year, and the defendants on the *Pola* of the next; for damages for the invasion of the plaintiffs' right in a given year; and for an injunction restraining the defendants from interfering with the said right.

Sangapa v. *Gangapa* (1) followed.

[F., 3 N.L.R. 131; R., 10 B. 233 (237); 14 B. 25; 33 B. 278=11 Bom. L.R. 58=1 Ind. Cas. 331; D., 11 M. 450.]

THIS was a second appeal from the decision of Rao Bahadur M. G. Ranade, First Class Subordinate Judge of Khandesh, confirming the decision of the Subordinate Judge (Second Class) of Jalgaon.

The suit was brought by the original plaintiffs for a declaration of their rights in respect of a certain *manpan*, or dignity, and for the recovery of damages under the following circumstanees. The plaintiffs and defendants were *vatandar chaudaris* of the village of Asod, and between them held a *takshim*, or share, in equal proportions. The plaint alleged that it had been the custom of the parties to carry on the *Pola* day (*i.e.*, the last of the month of Shravan) the bullocks of the various *takshims* in procession through the village. With regard to their own *takshim*, the parties shared this right between them, and exercised it every alternate year. In confirmation of this right, the plaint further alleged, one of the defendants had, on behalf of the defendants' branch of the family, passed to the father of one of the plaintiffs, as a representative of the plaintiffs' branch, an agreement, dated 25th December, 1855, whereby it was arranged that the plaintiffs' bullock should be paraded in 1856 and the defendants' in 1857, and so on alternately. In conformity with this arrangement it was the plaintiffs' turn to parade their bullock in 1878; but the defendants on the 27th of August of that year prevented the exercise of their right, and carried their own bullock in procession, [117] infringing the plaintiffs' right of *manpan*, and causing them damage. The plaintiffs accordingly brought this suit—first, to have a declaration that in the Shravan of 1878 it was their turn to parade the bullock; secondly, to have a similar declaration of their right to parade their bullock every alternate year; thirdly, for an injunction restraining the defendants from interfering in future with the plaintiffs' exercise of their right; and, fourthly, to recover Rs. 25 as damages.

The defendants denied the plaintiffs' right, and asserted their own exclusive right. They also denied the genuineness of the agreement, and contended that the plaintiffs sustained no damages.

The Subordinate Judge of Jalgaon awarded the plaintiffs' claim. In appeal that decree was confirmed. In the appeal it was contended, for

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* Second Appeal, No. 419 of 1880.

(1) 2 B. 476.

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the first time, that no suit lay in a Civil Court in a matter of this kind. The appellate Court disposed of this contention in the following manner:—

"The appellants' pleader contended that, as the plaintiffs' claim was for a mere dignity, no action could be maintained for the same in the Civil Courts under the authority of the High Court's decision in *Sangapa* v. *Gangapa* (1) in which the previous decisions—*Shri Sunkur Bharti Swami* v. *Sidha Lingaya Charanti* (2) and *Narayan Sadanand Bava* v. *Balkrishna Shideshwar* (3)—were reviewed and discussed. In *Sangapa* v. *Gangapa* the suit was brought for a declaration of plaintiffs' right to take a cupola to a certain temple, to place it on the car of the idol, and to take a bambu with tomtom from his house to the temple, and to offer the first cocoanut to the idol at the annual festival of a Lingayat saint. The suit was dismissed in both the lower Courts on the ground of its being barred by limitation. In special appeal, the High Court, while expressing an opinion that the suit was not barred by limitation, dismissed it on another ground, namely, that it was brought to vindicate plaintiff's right, not to an office, but to a mere dignity unconnected with any fees, profits, or emoluments, and, as such, on the authority of the great Palki case—*Shri Sunkar Bharti Swami* v. *Sidha Lingaya Charanti* (in which the suit related to the exclusive right of sitting crosswise in a [118] palki, and was disallowed by the Sadar Court)—no action could be instituted in the Civil Courts for the same. The authority of the previous decision in *Narayan* v. *Balkrishna* (3) (in which a declaration of the right of performing the ceremonial of breaking the curd-pot in a temple had been allowed by the High Court), was questioned in this later decision, and virtually overruled on the strength of the precedent in the Palki case referred to above. The question before me, therefore, is whether the dignity, or *manpan*, claimed in this suit comes within the principle of these decisions. The grounds urged in the Palki decision for refusing to entertain the suit of the plaintiff in that case, appear to have been—(1) that the claim was unsubstantial and objectionable in a way which it was thought necessary to discourage; (2) that it was a claim by the religious head of one community against the religious head of another and heretical community; (3) that the reigning Government was the only authority which could permit or withhold the use of such honours; and, lastly, (4) under English law no action could be maintained by the grantee of a dignity against an intruder. In *Sangapa* v. *Gangapa* the ground urged for rejection was that the claim related to the vindication of plaintiff's right, not to an office, but to a mere dignity unconnected with any fees, profits or emoluments. In the present case the dignity claim relates to an office, namely, that of the *chaudhari vatan*, in which both the parties have a share, and in connection with which the plaintiffs are actually in possession of a certain portion of *inam* land attached to the *vatan*. It cannot, therefore, be said that the right claimed here relates to a mere dignity. It relates to an office and a *vatan*, and the annual procession of the bullocks on *Pola* day is the most prominent non-official recognition of the plaintiffs' status as *vatandars* in the village. It is true the right claimed is not accompanied with any fees or emoluments, but this circumstance is not indispensable to secure a recognition for a dignity which is attached to an office. The High Court, in another case—*Ramchandra* v. *Sadashiv* (4)—have held that it does not follow, from the decision in the

(1) 2 B. 476. (2) 3 M.I.A. 198. (3) 9 B.H.C.R. 413.
(4) Printed Judgments (Bombay) for 1878, p. 271.

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Palki case, that 'no dignities, provided a money gain is not attached to them, are fit subjects to be protected [119] by the Civil Courts.' The dignity in that case related to a right to settle with Government or its assignees for certain revenue collections, and was admittedly unattended with any profits; and yet the claim was allowed on the ground that 'the dignity was of a very practical kind' which the Civil Courts could protect without encouraging frivolous litigation. It was observed in that judgment that 'dignities, the essence of which consists in voluntary tributes of respect, and which derive their whole value from their spontaneousness, do not in their nature admit of effectual protection by the Municipal Courts. These remarks go to show that it is chiefly with a view to check frivolous litigation, or to check the tendency to exact as of right what should be spontaneous recognition of superiority, that suits for mere dignities are discouraged. Neither of these considerations have any place in the present case. It is clear, further, that the analogy of the English law about the grant of dignities has no application in respect of these village disputes for precedence or equality, as these rights are communal, and have not sprung from any gift of the Crown, and the Executive Government claims no power either to confer or to withhold them. It is also to be noted that in all the three cases referred to above, the dispute related to some right in connection with religious ceremonies or between rival priests. They did not refer to civil persons or civil rights. The right claimed by the plaintiffs in this case, is not, moreover, a *dignity* in the usual sense. It is not a claim for precedence against strangers, who deny the obligation of subordinating themselves to the plaintiffs by its recognition. It is a dispute between *bhaubands*—admitted sharers in a *vatan*; and all that plaintiffs seek, is to be recognized as the *equals* of the defendants. For the several reasons set forth above,—namely, (1) that the right claimed belongs to an office and a *vatan*; (2) that it is a Civil right between civil persons, and has no relation to religious ceremonies; (3) that it is a communal right, and not a gift of the Crown nor under the control of the Executive Government; (4) that it is not a claim for precedence against strangers, but it is a claim for equal recognition among sharers; (5) that it is not a preposterous, but a substantial, claim, the recognition of which, one way or the other, affects the status of the plaintiffs as [120] *vatandar chaudari*,—I hold that the principle of the decision in *Shri Sunkar Bharti Swami* v. *Sidha Lingaga Charanti* and *Sangapa* v. *Gangapa* does not apply to the present case, and that it comes within the class of cases referred to in *Ramchandra* v. *Sadashiv*, where the dignity is a fit subject for the protection of the Civil Courts."

The defendants thereupon appealed to the High Court.

Yashvant Vasudev Athalye, for the appellants.—The present suit refers to a mere dignity, and it is not maintainable in a Civil Court: *Sangapa* v. *Gangapa* (1) and *Shri Sunkur Bharti Swami* v. *Sidha Lingaya Charanti*(2). The right in dispute having been held by the lower Courts to be unaccompanied by any fees or emoluments, the lower Courts were wrong in awarding a claim in reference thereto. The circumstance that the litigant paties are office-bearer cannot, by itself, make the right claimed in any way dependent upon an office, particularly when it is conceded that the official recognition of the plajntiffs' status is independent of the dignity

(1) 2 B. 476.
(2) 3 M.I.A. 198.

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in dispute. As to the agreement set up it is not binding upon the parties to this suit.

Santaram Narayan, for the respondents.—The case of *Sangapa* v. *Gangapa* is distinguishable from the present case. I also rely upon it to show that the present action is maintainable. The suit in that case was for declaration, not for damages; and, secondly, the plaintiff there held no hereditary office. There was no office to which fees, profits or emoluments were attached. Mere dignity attached to no office and yielding no fee may not be actionable; but in this case the plaintiffs are hereditary *chaudaris*. As held by the High Court in *Ramchandra* v. *Sadashiv* (1), and as remarked by the Appellate Court, it does not follow from the decision in the Palki case that no dignities, provided a money gain is not attached to them, are fit subjects to be protected by the Civil Courts. The natives of this country are very jealous of such *manpans*, and it is right they should be protected.

JUDGMENT.

MELVILL, J.—I am unable to hold that this case is distinguishable in principle from that of *Sangapa* v. *Gangapa* (2), in which it [121] was held, on the authority of the Privy Council in *Shri Sunkar Bharti Swami* v. *Sidha Lingaya Charanti* (3), that a suit is not maintainable to establish a right to a mere dignity unconnected with any fees, profits, or emoluments. It is said that in the present case the dignity is connected with an office. If that be so, the circumstance creates no distinction between this case and the Privy Council case, in which the holder of the office of arch-priest of a certain sect claimed, by virtue of a grant to a predecessor in office, the right of being carried crosswise in a palanquin. It is also said that there is an agreement between the parties in the present case, by which the plaintiffs' right is recognized, and a penalty is provided for its invasion. But this was equally the case in *Sangapa* v. *Gangapa*. The law applicable to such questions was clearly laid down in that case; and I am in no way disposed to depart from it, and to involve the Civil Courts in the determination of trivial questions of dignity and privilege, which are much better left to the decision of the society in which they arise.

We reverse the decrees of the Courts below. The plaintiffs to bear the costs of appeal and second appeal. The parties to bear their own costs in the Court of first instance.

PINHEY, J.—The case as stated is on all fours with *Sangapa* v. *Gangapa* (2) and, therefore, it would be sufficient to say that, following the decision in that case, we must reverse the decrees of both the Courts below and reject the claim.

But there is a further reason why the plaintiffs in this case cannot possibly succeed. They sue for a declaration that they are entitled to take their bullock first in the procession on the *Pola* day in alternate years, and their suit is based on the agreement (Ex. No. 48), dated 25th December, 1855. That agreement is a personal one, and passed by Gana Supa and Vithu Jairam (appellants 7 and 8) to Dhanji Khandu, who is not a party to the case. Not one of the plaintiffs was a party to the agreement; but plaintiff Wahadan (No. 2) is said to be a son of Dhanji

(1) Printed Judgments for 1878, p. 271.
(2) 2 B. 476.
(3) 3 M.I.A. 198.

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Khandu, who has died. Moreover, by the terms of the agreement (Ex. No. 48) even if the present plaintiffs could sue [122] the present defendants on it, the right of Dhanji Khandu to take his bullock first in the procession in alternate years named in the agreement would be terminated by Vithu Jairam personally paying Rs. 25 once for all to Dhanji Khandu—a payment for which there does not appear to have been any consideration. And even this Rs. 25 is payable by Vithu Jairam personally to Dhanji Khandu only if the latter sustains damage or loss from his bullock being obstructed in the *Pola* procession. Not only is there no evidence of damage or loss, but it is admitted that no damage or loss of a pecuniary character had been caused to any one.

We must reverse the decrees of both the lower Courts and reject the claim. The parties should bear their own costs in the Court of first instance, but the costs in the District Court and in this Court must be borne by plaintiffs.

Decree reversed.

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6 B. 122.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

DHADPHALE (*Original Defendant*), *Appellant v.* GURAV (*Original Plaintiff*), *Respondent.** [19th December, 1881.]

Cause of action—Offering of food to idol—Suit for damages on account of omission to offer food.

The plaintiff, alleging that he was a member of a family of *Guravs* holding a *vatan* attached to a temple, complained that the defendant was the holder of an *inam* allowance, granted in consideration of his daily offering to the idol some rice and cake and burning a lamp; and that he had omitted to make such offering for one year. The plaintiff claimed Rs. 15 damages.

Held that the plaintiff had no cause of action. The defendant's obligation, if any, was towards the idol; and, if that obligation had not been performed, it could only be enforced by some person claiming to have a right to insist that the worship of the idol should be properly performed.

[R., 12 B. 247; 33 B. 278=11 Bom. L.R. 58=1 Ind. Cas. 331; 27 M. 435 (449)=14 M. L.J. 105 (118).]

THIS was a second appeal from the decision of W. H. Newnham, Judge of Poona, confirming the decree of the First Class Subordinate Judge of Poona.

[123] The plaintiff alleged that he was a member of the family of *Guravs* the holders of a *vatan* attached to the temple of Bahiroba in the village of Pashan; that the defendant was the holder of an *inam* allowance granted in consideration of his daily offering to the idol some rice and cake and burning a lamp; that the defendant omitted to make such offering for one year; and hence the plaintiff claimed damages to the extent of Rs. 15. The defendant, among other things, urged that, during the year in dispute, he had offered the food in his own house to the idol, and that he had eaten it himself, and that it was not obligatory on him to take the food to the temple, and offer it to the idol there.

Both the lower Courts allowed the plaintiff's claim.

The defendant appealed to the High Court.

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* Second Appeal No. 193 of 1881.

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Shantaram Narayan, for the appellant.
Pandurang Balibhadra, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—We think that the plaintiff, as he puts his case, has no cause of action. As a temple servant, he may have a right to take the food offered to the idol, and may maintain this right against any intruder who takes away the food after it has been offered. But in the present case he claims damages from the defendant on account of his omission to offer food to the idol, and the consequent loss, by the plaintiff, of the perquisites which he would otherwise have received. He brings this action on his own account, and for his own benefit, and not as the representative of the idol. We think that the defendant's obligation, if any, was towards the idol, and if that obligation has not been performed, it can only be enforced by some person claiming to have a right to insist that the worship of the idol shall be properly performed. The defendant is under no legal obligation to supply food to the temple servants; and though the result of his omission to supply food to the idol may involve a loss to the plaintiff, it is *damnum absque injuria*, and cannot entitle the plaintiff to maintain the present suit.

We reverse the decrees of the lower Courts, with costs in this Court. Each party to bear his own costs in the Courts below.

Decrees reversed.

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6 B. 124=6 Ind. Jur. 317.

[124] APPELLATE CRIMINAL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

EMPRESS *v.* LAKSHMAN BALA AND BALA RAMSETH.*
[11th January, 1882.]

Evidence—Confession—Joint trial—Evidence Act (I of 1872), s. 30—The Code of Criminal Procedure (X of 1872), s. 250.

The two accused persons were jointly tried before the Session Judge on a charge of murder. The Session Judge examined each of the accused in the absence of the other making the latter withdraw from the Court during the examination of the former, though without objection from the pleaders of the accused persons.

Held that the examination of each accused could be used only against himself, and not against his fellow accused.

Imperatrix v. *Chandra Nath Sirkar* (1) followed.

[R., 14 A.W.N. 11.]

THE two accused were tried on a charge of murder and sentenced to death by W. H. Crowe, Joint Session Judge at Nasik.

The facts of the case are not material for the purpose of this report. It is sufficient to say that the evidence recorded included the examination of each of the accused taken by the Session Judge in the absence of the other. The Session Judge stated in his judgment that when he examined Lakshman he ordered Bala to withdraw from the Court; and that when he examined Bala, Lakshman was ordered to leave the Court. The Session

* Confirmation Case No 48 of 1881.

(1) 7 C. 65.

Judge stated, moreover, that he was in the habit of examining accused persons in this manner. He said: "I can see no objection legally to this course; nor can I see that the accused is prejudiced thereby. It has been a practice of mine on several occasions to examine prisoners separately in order that those who are to be examined afterwards may not hear what the others have said, and to that end it is necessary to remove from the dock all those except the one undergoing examination. No objection was made by the pleaders until after the examination had been recorded, and the inquiry had terminated, and the address for the defence closed." In coming to the conclusion on the evidence the Session Judge used the examination of each of the accused against the other.

Both the convicts appealed to the High Court.

Branson (with him *Shivshanker Govindram*), for appellant No. 1.—The confessions are illegal, and cannot be used to the [125] prejudice of absent prisoners who had no opportunity of cross-examining the persons who made them: *Imperatrix* v. *Chandra Nath Sarkar* (1). They are not confessions properly so called, because each person tries to exculpate himself, and inculpate his fellow accused.

K. T. Telang (with him *Daji Abaji Khare*), for appellant No. 2.

Nanabhai Haridas, Government Pleader, for the Crown.—If confessions be left out, there is sufficient evidence left for conviction.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—This Court is of opinion that the so-called confession made by each prisoner cannot be taken into consideration against the other prisoner, if for no other reason, because the examination of each prisoner took place in the absence of the other, and that other had no opportunity of denying or even of knowing, what his fellow prisoner had said. No doubt, s. 30 of the Indian Evidence Act allows a confession to be used against another prisoner although made in his absence, but it requires that such confession should be "proved" as against the prisoner to whose prejudice it is to be used. In the present case the Session Judge says that he examined the prisoners separately, in order that neither of them might hear what the other had said; and it would appear that the statements so obtained were not read over to, or in any way proved against, those against whom it was intended to use them. The attention of the Session Judge may be directed to the observations of the Calcutta High Court in *Imperatrix* v. *Chandra Nath Sarcar* (1).

There is, however, no objection to using the examination of each prisoner against himself, and we think that the statements contained in the examinations, coupled with the fact of the discovery of the stolen property concealed in the prisoners' houses, and the evidence of witness No. 10, the mother of the second prisoner, are fully sufficient to sustain the convictions.

The murder was one of a very cruel and cold-blooded description, and we are unable to see any ground for a mitigation of sentence.

The convictions and sentences are confirmed.

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(1) 7 C. 65.

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6 B. 126.

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[126] APPELLATE CRIMINAL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

EMPRESS *v.* UMI, WIFE OF DHULA, AND SEVEN OTHERS.*

[11th January, 1882.]

Indian Penal Code (Act XLV of 1860), *ss.* 494 *and* 109 *—Marrying again during the lifetime of husband—Abetment—Divorce among Rajput Gujaratis in Khandesh—Deed of divorce by husband—Validity of divorce.*

A member of the caste of Ajanya Rajput Guzars residing in Khandesh executed a deed of divorce to his wife. The Court held on the evidence that the deed was proved, and that in this caste a husband was for a sufficient reason, such as incontinence, allowed to divorce his wife; that the deed in the present case had not been executed for a sufficient reason; and that, consequently, the parties entering into second marriage were guilty of an offence under s. 494 of the Indian Penal Code (XLV of 1860); and that the priest who officiated at that marriage was an abettor under ss. 494 and 109.

Mere consent of persons to be present at an illegal marriage, or their presence in pursuance of such consent or the grant of accommodation in a house for the marriage does not necessarily constitute abetment of such marriage.

[R., 19 B. 363 (368); Rat. Unr. Cr. Cas. 440.]

THE first accused, Umi, was convicted of marrying again during the lifetime of her husband, and the other seven accused of having abetted her in the performance of the illegal marriage by M. H. Scott, Session Judge of Khandesh, who passed upon each of them a sentence of rigorous imprisonment for six months.

The following facts were admitted or proved :—

The first accused, Umi, was legally married to the complainant Dhula, both parties being members of the caste of Ajanya Rajput Gujaratis residing in Khandesh; that Dhula subsequently married another wife, and did not live with Umi in consequence of certain differences which arose between them; that Umi went through the ceremony of a second marriage with the accused Nago; that the accused Damodar Bhat officiated as a priest at the marriage; that Umi's father—the accused Pundu—and her sister—the accused Chimi—approved of the marriage; that accused Lalchand and Bhagvan lent their influence by consenting to be present at the marriage, and that the accused Hula allowed the parties the use of his house upon that occasion.

On behalf of the difference it was alleged, amongst other things, that divorce was allowable in the caste to which Umi belonged, [127] and that her husband the complainant had in 1872 executed a deed of divorce addressed to Umi's father, and releasing Umi from her marital bonds, leaving her free to re-marry if she felt so disposed. The Session Judge held on the evidence that this deed of divorce was a forgery; and, being of opinion that the fact of the second marriage was established, convicted Umi of re-marrying during her husband's lifetime, and the others of abetting her.

All the accused appealed to the High Court.

Branson (with him *Daji Abaji Khare*), for the appellants.—The evidence clearly establishes the deed of divorce. Divorce is permissible among Hindus of the lower castes—that is, other than Brahmans and Vaishyas.

* Criminal Appeal No. 178 of 1881.

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[The Court referred to answer No. 7 to questions put to the caste of Rajput Gujaratis by Mr. Borradaile under the head "Divorce, Gujaratis."]

Nanabhai Haridas, Government Pleader, for the Crown.—According to the answer, divorce would be valid only on the ground of incontinence.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—We are of opinion that five out of the eight prisoners in this case are not proved to have done any act which would amount to abetment of the principal offence. The Session Judge says: "Hula valad Bhivaji allowed the marriage to be performed in his house. Accused Punja and Chimi are the father and sister of Umi; and they and accused Lalchand and Bhagvan, the two last of whom are influential patels of the village, are alleged to have abetted the marriage by their consent, and by being present." It does not, however, appear that the consent of any of the prisoners was necessary for the performance of the marriage ceremony, and certainly mere presence at an illegal marriage would not constitute abetment on the part of the person present. Nor would the grant of accommodation in a house for a marriage, which could equally well be celebrated elsewhere, be such an act towards facilitating the marriage as would constitute abetment. There is no proof of any conspiracy on the part of the five prisoners referred to. On the contrary, as the Session Judge says, "the truth probably is, that Umi, finding herself pregnant by Nago, persuaded him to marry her." After the marriage had **[128]** been thus arranged between Umi and Nago, the mere consent of other persons to be present at the celebration, would not, we think, constitute abetment.

On this ground the convictions and sentences on prisoners Nos, 3, 5, 6, 7, and 8 are reversed.

As regards the other three prisoners—*viz.*, Umi, Nago, and the priest Damodar, who performed the ceremony—the case stands on different grounds. The contention that no marriage ceremony was gone through, has been abandoned by the learned counsel for the defence. What he relies on is the execution of a *farigh-khat*, or writing of divorce, by the prosecutor to his wife Umi, which, he argues, rendered the second marriage permissible and valid. On a careful consideration of the whole evidence we are of opinion that the execution of the *farigh-khat* is established. The evidence on the point is very strong, and the prosecution fail to explain away the circumstance that the stamp on which the document was executed was undoubtedly purchased more than ten years ago in the name of the prosecutor, whom there was at that time no apparent reason for personating. But, taking the *farigh-khat* as proved, we do not find sufficient evidence on the record to show that it would have the effect of a valid divorce. The very witnesses who say that a divorce is allowed by the custom of their caste, admit that the prosecutor was punished by being made to give a caste dinner on account of the divorce. Among the answers to Mr. Borradaile given by the castes in 1830 we find one from the Rajput Gujaratis (to which the parties in the present case appear to belong), in which they say that in their caste a husband is allowed to divorce his wife for incontinence. But it is not alleged for the defence in this Court that the writing of divorce given by the prosecutor was on account of Umi's incontinence; and, therefore, so far as the available evidence goes, we

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must come to the conclusion that, though, in the caste to which the parties belong, a husband may divorce his wife for a sufficient reason, yet in this case it was done for an insufficient reason, and probably it was on this account that the prosecutor was punished by the caste. We are, consequently, not satisfied that there is sufficient reason for [129] disturbing the convictions in the case of prisoners Nos. 1, 2 and 4. As, however, we have come to the conclusion that a *farigh-khat* was actually executed, and as the persons concerned probably believed that it was valid, we think that a lighter sentence than that inflicted by the Session Judge will satisfy the ends of justice; and we, accordingly, reduce the sentences on prisoners Nos. 1, 2 and 4 to two months' rigorous imprisonment; and, as the sentence has been undergone, we direct the prisoners to be discharged.

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6 B. 129=6 Ind. Jur. 315.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

VASUDEV VITHAL SAMANT (*Original Defendant*), *Applicant*
v. RAMCHANDRA GOPAL SAMANT, DECEASED,
AND ANOTHER (*Original Plaintiffs*), *Respondents.**
[31st August, 1881.]

The Hereditary Officers Act (Bombay) No. III of 1874, *ss.* 24 *and* 25—*Act* X *of* 1876, *s.* 4, *cl.* (*a*), *para* 2—*Civil Courts.*

Under Bombay Act III of 1874 the Civil Courts cannot entertain a suit which seeks to recover damages against the defendant for wrongly continuing in office as patel, instead of resigning in favour of the plaintiff, in obedience to a family custom which entitled the plaintiff to serve as patel every fourth year, whereby the plaintiff lost the emoluments of office.

Quære—whether the claims excluded by Act X of 1876 as amended by Act XVI of 1877, s. 1, are limited to claims against Government.

[R., 12 B. 614; 34 C. 828=11 C.W.N. 782.]

THIS was an application, under the extraordinary jurisdiction of the High Court, against the decision of J. W. Walker, Assistant Judge at Ratnagiri, affirming the decree of P. B. Joshi, Second Class Subordinate Judge at Vengurla.

The facts of the case are fully stated in the judgment of the High Court.

The Assistant Judge, in affirming the decree of the first Court on appeal, observed: "It is said that no suit lies, as the Collector had the right of appointing. The case alleged, and found proved, is that, by the village custom, certain families have the right of acting as *kabulayatdars* of the village in rotation, and that each outgoing *kabulayatdar* has to give his assent to the Collector for the appointment of his successor, and that, when plaintiff's [130] turn came round, defendant wrongfully withheld his assent, and so remained in the management himself. Plaintiffs are, therefore, clearly entitled to sue. Next, it is said that the suit is barred by the Hereditary Officer's Act and by a previous suit brought by plaintiffs for partition. The Vatan Act and the previous suit, referred to in the defendant's reply, have nothing whatever to do with the claim. The right in

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* Application No. 6 of 1881 under Extraordinary Jurisdiction.

question appears to be that of a farmer of the land revenue appointed by the Collector. The former suit cannot possibly bar this claim, as this is a suit for damages; and the partition suit could not include the right in dispute, as the right cannot admit of partition."

On the 20th January, 1881, on the application of *Ghanasham Nilkanth Nadkarni* on behalf of the defendant, the High Court (Nanabhai Haridas and Birdwood, JJ.) granted a *rule nisi*, calling upon the plaintiffs to show cause why the decrees of the Lower Courts should not be set aside. The rule was argued before Westropp, C.J., and Pinhey, J., on the 31st August 1881.

Ghanasham Nilkanth Nadkarni, appeared for the applicant.

Pandurang Balibhadra, appeared for the respondents.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C.J.—This is an application to reverse the decree of the Subordinate Judge of Vengurla awarding Rs. 24 to the plaintiff as damages, and also to reverse the decree of the Assistant Judge which affirmed that of the Subordinate Judge. The plaintiff claims to be a member of a family in which is vested the hereditary office of patel of the village of Parula, and alleged that it is the custom of the family that the co-parceners should act as patel in rotation, each patel holding office for a year, and that the turn of the plaintiff occurs every fourth year, and that, according to this family custom, the defendant was bound to give his written consent to the plaintiff's *kabulayat* being accepted by the revenue authorities for the official year 1875-76; but states that, notwithstanding this, the defendant, in order to cause him damage, refused to give his written consent as aforesaid, and himself gave the *kabulayat* for that year, in consequence of which the Mahalkari declined to take the plaintiff's *kabulayat*, and that thereupon the plaintiff applied to the Assistant Collector of Ratnagiri to direct that the plaintiff's *kabulayat* **[131]** should be taken, and inquiry into that application having continued until the end of the year, an order was passed by the Assistant Collector to the effect that, the year having expired, nothing remained to be done; the plaintiff thereupon applied that his *kabulayat* to serve as patel should be taken for the next year, but an order was passed rejecting that application on the ground that the official year 1876-77 was not the plaintiff's turn, and that the defendant refused to assent to the acceptance of the plaintiff's *kabulayat*. For these reasons the plaintiff claimed Rs. 98 damages, whereof, as already stated, the Local Courts awarded to him Rs. 24.

The suit of the plaintiff is then, when more concisely stated, an action to recover damages against the defendant for wrongly continuing in office as patel instead of resigning in favour of the plaintiff, in obedience to a family custom which entitled the plaintiff to serve as patel every fourth year, whereby the plaintiff lost the emoluments of office.

The learned pleader for the defendant refers to two enactments as excluding the jurisdiction of the Civil Courts to entertain any such claim as that put forth in the present suit, *viz.*, Act X of 1876, s. 4, cl. *a*, para. 2, which prohibits Civil Courts exercising jurisdiction over "claims to perform the duties of any such officer or servant (*i.e.*, hereditary officers appointed or recognized under Bombay Act III of 1874, or any other law in force or any other village officer or servant) or in respect of any injury caused by exclusion from such office or service." That Act has, however,

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been amended by Act XVI of 1877, s. 1, which restores to the Civil Courts of certain districts, amongst which Ratnagiri is one, such jurisdiction as, according to the terms of any law in force on the 28th March, 1876, they could exercise over claims against Government relating to property appertaining to any hereditary officer appointed or recognised under Bombay Act III of 1874, &c., or of any other village officer, &c. And, independently of that and of whatever may be its effect, there may be a question whether the claims excluded, as above, by Act X of 1876 are limited to claims against Government—a point on which we do not deem it necessary at present to express any opinion, inasmuch as we think that the other enactment, relied upon by the defendant **[132]** as excluding the jurisdiction of the Civil Courts, is fatal to any such jurisdiction. That enactment is the Hereditary Officers' Act (Bombay) III of 1874. Its 24th section enacts that the duties appertaining to any hereditary office shall be performed by the representative vatandars or by deputies or substitutes as hereinafter provided, and by no other persons." The 25th section then enacts that "it shall be the duty of the Collector to determine, as hereinafter provided, *the custom of the vatan as to service*, and what persons, shall be recognized as representative vatandars for the purpose of this Act, and to register their names." Subsequent sections point out the mode in which the Collector is to inquire into and determine who are representative *vatandars*, and what is the custom of the *vatan* as to service. Notwithstanding this legislation, which expressly assigns to the Collector the ascertainment and determination of the family custom, the Local Courts have taken upon themselves the function which belongs exclusively to the Collector, and have determined the family custom as to service in relation to the patelship of Parula, and have given damages to the plaintiff for a breach by the defendant of that custom in not resigning the office of patel at the end of the official year 1874-75 in favour of the plaintiff. They have, in fact, held that the defendant was bound by that custom not only to resign office, but to assent, in writing, to the nomination of the plaintiff as his successor. If this be not entertaining a suit for what is substantially the establishment of the right of a particular person to officiate as a hereditary officer, we do not know what it is; and there are at least, three reported decisions that, since the Hereditary Officers' Act came into force, such an action cannot be entered by a Civil Court—*Khando Narayan Kulkarni* v. *Apaji Sadashiv Kulkarni* (1) and *Chinto Abaji Kulkarni* v. *Lakshmibai kom Sakharam Antaji* (2); and see *Gopal Hanmant* v. *Sakharam Govind* (3), *Ganpatrav* v. *Rangrav* (4) and *Gavdapa* v. *Shivbasangavda* (5).

We are at some difficulty to understand how the Assistant Judge considered himself justified in saying that the Hereditary Officers' Act has "nothing whatever to do with the claim."

[133] For these reasons we hold that the Local Courts had not any jurisdiction to entertain this suit; and we, therefore, reverse the decrees therein, respectively, of the Assistant Judge and of the Subordinate Judge, with costs throughout, including the costs of this application.

Decree reversed.

6 B. 133-N.

NOTE (1).—*Ganpatrav* v. *Rangrav* (Second Appeal No. 263 of 1879) was decided by Melvill and Pinhey, JJ., on the 30th September, 1879. The following are their judgments :—

(1) 2 B. 370. (2) 2 B. 375. (3) 4 B. 254.
(4) See note (1) *infra*, 6 B. 133. (5) See note (2) *infra*, 6 B. 133.

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JUDGMENT.

MELVILL, J.—The only injury which the plaintiff alleges in his plaint is that the defendants have prevented the recognition, by the Collector, of his right to officiate as patel. This is an injury of which the Civil Courts can no longer take cognizance—*Khando Narayan Kulkarni* v. *Apaji Sadashiv Kulkarni* and *Chinto Apaji Kulkarni* v. *Lakshmibai kom Sakharam Antaji* (1). If the plaintiff had alleged that he had been interfered with in the enjoyment of the estate or emoluments attached to the *patelki vatan*, it might have been competent to the Civil Courts to make a decree declaratory of his right to enjoy or participate in such estate or emoluments; but no such interference is alleged, and, in the absence of an allegation of any cause of action, the Courts cannot make any declaration of the plaintiff's right to share in the *vatan* property.

PINHEY, J.—The mukhtyar of the plaintiff was examined, and distinctly admitted that there had been no interference with the *vatan* property; and the wording of the plaint distinctly shows that the only thing of which the plaintiff has to complain is the refusal of the Assistant Collector to appoint the plaintiff to officiate as patel on the representation of the defendants. The case, therefore, clearly falls within the rulings in *Khando Narayan Kulkarni* v. *Apaji Sadashiv Kulkarni* (2) and *Chinto Abaji Kulkarni* v. *Lakshmibai kom Sakharam Antaji* (3).

The decree of the District Court must be confirmed with costs [F., 6 B. 129.].

6 B. 133-N.

NOTE (2).—*Gavdapa* v. *Shivbasangavda* (Second Appeal 317 of 1877) was decided by Westropp, C.J., and Kemball, J., on the 18th February, 1878. The following is the judgment:—

JUDGMENT.

WESTROPP, C.J.—This suit was instituted upon the 1st of March, 1876,—that is to say, since Bombay Act III of 1874 came into operation, which, it has been already decided, excludes the jurisdiction of Civil Courts to declare that persons are eligible to serve as hereditary officers of such a kind as are dealt with by that Act. The reasons for this ruling are fully given in *Chinto Apaji Kulkarni* v. *Lakshmibai* (Second Appeal 270 of 1877), Printed Judgments of 1878, p. 5. We must on this ground reverse the decree of the District Judge, and restore that of the Subordinate Judge. The plaintiff must pay to the defendant the costs of the suit and both appeals. We express no opinion on the merits of the plaintiff's case. The precedent—Special Appeal 49 of 1877 (Printed Judgments of 1877, p. 98)—referred to by the District Judge, is not in point. It did not relate to an office, but to land [F., 6 B. 129.]

6 B. 134.

[134] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice.

NARRANDAS HEMRAJ AND OTHERS (*Plaintiffs*) *v.* VISSANDAS HEMRAJ (*Defendant*).* [26th November, 1881.]

Limitation—Act IX of 1871, *sch II, cl.* 87—*Mutual accounts—Reciprocal demands.*

From the month of September, 1873, until the month of May, 1874, the plaintiffs at Bombay and the defendant at Karachi had dealings with one another. It was the practice for the defendant at Karachi to draw *hundis* upon the plaintiffs at Bombay, which the plaintiffs duly accepted and paid at Bombay; and, in order to put the plaintiffs in funds, the defendant was in the habit of drawing *hundis* upon other firms in Bombay in favour of the plaintiffs, the amount of which *hundis* the plaintiffs realised from time to time at Bombay. Until the 8th January, 1874, the balance of the account was sometimes in favour of the plaintiffs and sometimes in favour of the defendants. After that date the balance of the account was always in favour of the plaintiffs, who continued to make advances up to the 10th May, 1874. The last payment made by the defendant was on the 27th April, 1874. The last advance made by the plaintiffs was on the 10th May, 1874. On the 10th May, 1874, the total balance due by the defendant was Rs. 8,514-12-2. The plaintiffs calculated interest on this sum up to the 9th April, 1877, and on the 19th April, 1877, filed the plaint in this suit to recover the said amount. The defendant pleaded limitation. The plaintiffs contended that the account between them and the defendant was a mutual account, and that under cl. 87 of sch. II

* Suit No. 382 of 1877.

(1) 2 B. 370 and 375. (2) 2 B. 370. (3) *Ibid.* 375.

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of the Limitation Act XV of 1877, the period of limitation dated from the day of the last advance made by them to the defendant, *viz.*, 10th May, 1874.

Held, on the authority of *Ghasceram* v. *Manohar Doss* (1) that the account between the plaintiffs and the defendant was a mutual, current and open account within the meaning of cl. 87, and that the suit was not barred.

Literally construed, cl. 87 would apply only to those cases in which both parties have in the course of their dealings made *actual* demands on one another. The more reasonable and more probable intention of the framers of the clause appears to have been that it should apply to cases where the course of business has been of such a nature as to give rise to reciprocal demands between the parties; in other words, where the dealings between the parties are such that sometimes the balance may be in favour of one party and sometimes of the other.

[R., 22 B. 606; 10 M. 199; 17 M. 293=4 M.L.J. 140; 16 A.W.N. 186; 7 Bom.L.R. 151; 6 C.L.J. 158; 7 Ind. Cas. 715=75 P.R. 1910=124 P.L.R. 1910=99 P.W.R. 1910.]

SUIT to recover Rs. 10,999-11-5, the balance of an account.

The plaintiffs were merchants, and carried on business in Bombay. The defendant resided and carried on business at Karachi. The plaint stated that "the plaintiffs and the defendant commenced to have dealings with each other in or about the month of September, 1873. In the course of such dealings it was the **[135]** practice of the defendant at Karachi to draw *hundis* upon the plaintiffs at Bombay which the plaintiffs duly accepted and paid at Bombay; and, in order to repay the plaintiffs the money so advanced by them as paid upon such *hundis*, the defendant was in the habit of drawing *hundis* upon other firms in Bombay in favour of the plaintiffs, the amount of which *hundis* the plaintiffs realized from time to time at Bombay. The said mutual dealings between the plaintiffs and the defendant continued up to the 10th May, 1874, at which date there was a balance due from the defendant in respect of the said dealings amounting to Rs. 8,514-12-2. The plaintiffs have calculated interest upon the said sum from the said 10th May, 1874, to the 9th April, 1877, and have ascertained that at the last-mentioned date the total amount due by defendant to the plaintiffs in respect of the said dealings was Rs. 10,999-11-5, the amount sued for in this action."

The plaint was filed on the 19th April, 1877.

The defendant (*inter alia*) pleaded that the suit was barred by limitation. At the hearing an issue was raised upon this plea, and was determined without going into the merits of the case. The evidence for the plaintiffs proved that money was received by the plaintiffs from the defendant, and payments made by the plaintiffs, on the defendant's account at the dates and of the amounts stated in the following list:—

Receipts by plaintiffs.			*Payments by plaintiffs.*		
1873, 15th September	...	Rs. 600	1873, 20th September	...	Rs. 600
„ 27th „	...	„ 600	„ 25th „	...	„ 600
„ 6th October	...	„ 1,200	„ 7th October	...	„ 1,200
„ 30th „	...	„ 1,200	„ 4th November	...	„ 600
„ 3rd November	...	„ 1,000	„ 4th „	...	„ 600
„ 13th „	...	„ 2,000	„ 12th „	...	„ 1,200
„ 11th December	...	„ 1,200	„ 12th „	...	„ 1,200
1874, 8th January	...	„ 3,400	„ 15th „	...	„ 600
„ 16th February	...	„ 1,200	„ 3rd December	...	„ 1,200
„ 16th March	...	„ 1,000	„ 4th „	...	„ 600
„ 27th April	...	„ 1,200	„ 27th „	...	„ 1,000
		14,600	„ 28th „	...	„ 600
			1874, 10th January	...	„ 1,800
			„ 10th „	...	„ 1,200
			„ 14th „	...	„ 600

(1) 2 Ind. Jur. N.S. 241.

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Payments by plaintiffs—contd.

1874	26th January	...	„	1,200
„	27th „	...	„	600
„	4th February	...	„	600
„	6th „	...	„	600
„	6th „	...	„	600
„	7th „	...	„	600
„	27th „	...	„	600
„	2nd March	...	„	1,200
„	2nd „	...	„	1,200
„	12th April	...	„	600
„	10th May	...	„	900

From the above account it will be seen that up to the 8th January, 1874, the balance of the account was sometimes in favour of the plaintiffs and sometimes in favour of the defendant. After that date the balance of the account was always in favour of the plaintiffs, who continued to make advances on the defendant's account up to May, 1874. The last payment made by the defendant was on the 27th April, 1874.

Kirkpatrick (with him *Jardine*), for the plaintiffs.

Inverarity (with *Lang*), for the defendant.

The following authorities were cited in argument:—*Ghaseeram* v. *Manohar Doss* (1); *Hirada Basappa* v. *Gadigi Muddappa* (2); *Watson* v. *Aga Mehedee Sherazee* (3); *Navroj* v. *Chartered Bank of India* (4); *Astly* v. *Gurney* (5); Thompson on Limitation, p. 215.

JUDGMENT.

SARGENT, J.—This is a suit to recover the balance of an account of certain dealings in *hundis* between the parties carrying on business as merchants at Bombay and Karachi respectively; and the question I have now to decide is, whether the plaintiff's present claim is, as defendant contends, barred, except so far as it consists of the last item of account.

The plaintiff's contention is that the balance is due on a mutual and open and current account, and that the case falls under art. 87 of sch. II of Act IX of 1871, the statute of limitations in force when this plaint was filed; that the time, therefore, when the statute began to run, as regards the balance, was the date of the last item.

[137] The nature of the business between the parties is stated thus in the second paragraph of the plaint. [His Lordship read the paragraph above set forth.] In his cross-examination, Narranji Mathuradas, one of the plaintiffs, says: "He (meaning the defendant) used to draw on us, and in order to keep us in funds used to remit *hundis* drawn in our favour on firms in Bombay. We used to collect the proceeds, and credit him with them in account." It was urged for the defendant that this course of dealing did not give rise to a mutual account, the *hundis* which were sent by defendant in favour of the plaintiffs being nothing more than payment on account of the *hundis* accepted and paid by the plaintiffs. Now, cl. 87 of sch. II of the Limitation Act IX of 1871, provides for the case of suits brought "for the balance due on mutual open and current account where there have been reciprocal demands between the parties." In the case of *Ghaseeram* v. *Manohar Doss* (1)—which fell under the earlier Act of Limitation, *viz.*, Act XIV of 1859, the corresponding clause of which is confined to "suits for balances of accounts current between merchants"—the plaintiff used to send *hundis* and treasury drafts from

(1) 2 Ind. Jur. N.S. 241. (2) 6 M.H.C.R. 142. (3) 1 I.A. 346 (451).
(4) 3 C.P. 444. (5) 4 C. P. 714.

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Puttealla to the defendant at Calcutta to put him in funds to meet the purchase of goods on plaintiff's behalf, and *hundis* drawn by the plaintiff on the defendant—Phear, J., held that this did not constitute an act of trading on the part of plaintiff as against the defendant, and that he was only supplying the defendant with money to meet his own liability, and that there was, therefore, no trading with the defendant so as to constitute, relatively to the defendant's trading, a "mutual dealing." The Court of appeal, however, consisting of Peacock, C.J., and Norman, J., were of a different opinion. The Chief Justice in delivering judgment said that he did "not think it necessary that there should have been such a buying and selling by each of the parties as to constitute him a trader within the strict sense of the term;" 2nd, that the fact of the defendant's advancing money for the plaintiff, and the plaintiff sending money to the defendant, constituted a mutual dealing, and that "if there were such dealings between the plaintiff and the other firm in the course of business that sometimes the balance was in favour of one party and sometimes of **[138]** the other, the dealings were mutual within the meaning of the section."

NORMAN, J., in his judgment said: "The plaintiff remits moneys to the defendants. He thus advances money, and has a right to sue as for money lent or received for his use. On the other hand, the defendants are shown to make advances by paying *hundis* drawn on them apparently without waiting to see whether they are in funds or not. The defendants, therefore, in like manner, are from time to time in a position to sue for moneys lent by them in the course of their business to the plaintiff. There is thus a course of mutual lending and dealing, apparently as between bankers."

The latter part of cl. 87 of Act IX of 1871, which is intended to define more particularly the class of cases contemplated by the clause, is far from clear. Literally construed, it would confine the clause to those cases only in which both parties have, in the course of their dealing, made actual demands on one another. The more reasonable and more probable intention of the framers of the clause appears to have been that it should apply to cases where the course of business has been of such a nature as to give rise to reciprocal demands between the parties—in other words, where the dealings between the parties are such that sometimes the balance may be in favour of one party and sometimes of the other.

As to the course of dealing in the present case, it is virtually the same as in the case of *Ghaseeram* v. *Manohar Doss*. The plaintiffs accepted bills, and the defendant transmitted *hundis* to them to keep them in funds. The account was one in which the balance might be sometimes on one side and sometimes on the other; and, as a matter of fact, down to 8th January, 1874, the balance was sometimes on one side and sometimes on the other. After that it is true it would appear to have been always on the side of the plaintiffs, and it continued to be so until the 10th May, 1874, when the last *hundi* was accepted by them; but there is nothing to show a change in the nature of the dealings,—the account being a continuous one from the time it was first opened, with the balance carried over at the end of 19th February, 1879.

[139] I am, therefore, of opinion that the account falls within cl. 87 of sch. II of Act IX of 1871, and that the plaintiff's claim is not barred. I ought to mention that in the recent case of *Khushalo* v. *Behari Lal* (1),

(1) 3 A. 523.

before the Allahabad High Court, the Court expressed an opinion that cl. 85 of Act XV of 1877 (the Limitation Act now in force), which is similarly worded to cl. 87 of Act IX of 1871, would apply to ordinary banking accounts.

The case must, therefore, be set down for hearing on the merits.

Judgment for the plaintiffs.

Attorneys for the plaintiffs.—Messrs. *Hearn, Cleveland, and Little.*
Attorneys for the defendant.—Messrs. *Craigie, Lynch, and Owen.*

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice Pinhey.

KRISHNAJI RAVJI GODBOLE (*Original Plaintiff*), *Appellant v.* GANESH BAPUJI PATVARDHAN (*Deceased*) AND ANOTHER.*

[26th September, 1881.]

Mortgage—Right to redeem—Vendor and purchaser—Good title at time of hearing of suit—Certificate of sale.

The property in dispute was mortgaged by its owner to the defendant with possession on the 3rd October, 1847. On the 3rd December, 1861, A obtained a money-decree against the son and heirs of the mortgagor. In execution of that decree the property was sold subject to the mortgage, and purchased by B on the 12th August, 1864. Before confirmation of the sale, B, on the 1st September, 1864, sold it to C, who, on the 30th March, 1877, conveyed it by deed to the plaintiff. On the 27th September, 1877, the plaintiff brought a suit for redeeming the property, and at the hearing produced a certificate of sale, dated the 27th October, 1877. The certificate was applied for in May, 1877, and issued to C, reciting the sale to B, and the sale by B to C. The Court of first instance allowed the plaintiff to redeem on payment of a certain sum of money to the defendant. The Assistant Judge, in appeal, reversed the decree of the first Court on the ground that the certificate of sale was not in existence at the date of the institution of the suit, and that, therefore, the plaintiff had then no complete title. On appeal to the High Court,

[140] *Held* that the plaintiff, having purchased and paid for the equity of redemption, was entitled to redeem, although the certificate of sale was not issued until after the suit had commenced.

If a party, whose title is to some extent imperfect, seeks to redeem, and is able to prove a perfect title at the hearing of his cause, he should have a decree for redemption.

Harkisandas Narandas v. *Bai Icha* (1) and *Lalbhai Laksmidas* v. *Naval Mirkamaludin Husen Khan* (2) referred to and distinguished.

[R., 10 B. 453 ; 12 B. 589 ; 17 B. 375 ; 15 C.P.L.R. 175 (178) ; 8 Ind. Cas. 17=21 M. L.J. 422=8 M.L.T. 448.]

THIS was a second appeal from the decision of J. W. Walker, Assistant Judge at Ratnagiri, reversing the decree of K. S. Joglekar, First Class Subordinate Judge at the same place.

The plaintiff Krishnaji instituted this suit for the redemption of certain land. The facts of the case are stated in the head-note, and more fully in the judgment of the High Court.

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*Second Appeal No. 53 of 1881.

(1) 4 B. 155.

(2) 12 B.H.C. R. 247.

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The Subordinate Judge made a decree, allowing the plaintiff to redeem the property on payment of Rs. 955-13-7 to the defendants. On appeal, the Assistant Judge reversed that decree, and dismissed the suit on a preliminary point, as stated in the following extract from his judgment:—

"The first point for determination is whether the plaintiff's right to sue as the representative of the mortgagor is proved. My finding is in the negative.

"The plaintiff's case is that the mortgagor's right was sold at a Court sale in execution of a decree to one Govind Chatre on the 12th August, 1864, and that Govind sold his right, on the 1st September, 1864, to one Yashwant Lingshet, who sold his right to plaintiff on the 30th March, 1877. The defendant contends that the sale to plaintiff is illegal.

"The certificate of the Court sale to Govind Chatre was not obtained until *after* this suit was brought. It is the only evidence of the sale, and, hence, the plaintiff's suit must fail: *Harkisandas Narandas* v. *Bai Ichha* (1) and *Padu Malhari* v. *Rakhmai* (2). Further, under the old Procedure Code, s. 256, the Court sale was not made absolute until one month after the date of sale. But the auction-purchaser Govind sold his right before the expiration of that month. As, therefore, Govind's title was [141] not then complete, he could not make a valid transfer of his right."

The plaintiff appealed to the High Court on the 9th January, 1881.

The Hon. Rao Saheb *V. N. Mandlik*, appeared for the appellant.

Pandurang Balibhadra, appeared for the respondents.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C.J.—Balaji Sadashiv mortgaged his one-sixth share of a khoti village to Ganesh Patvardhan for Rs. 422 on the 3rd October, 1847, with possession on certain conditions. Subsequently on the 3rd December 1861, Hari Ganesh, having obtained a money decree against Vital Balaji (son of the deceased mortgagor) and his heirs, attached the share, and, subject to the mortgage, that share was sold on the 12th August, 1864, for Rs. 53 to Govind Chatre, who, before confirmation of the sale, sold the share to Yashwant Lingshet, who, on the 30th March 1877, sold and conveyed it by deed to Krishnaji, the plaintiff. The plaintiff instituted the present suit for redemption on the 27th September, 1877, and at the hearing produced a certificate of sale, dated 27th October 1877, to Yashwant Lingshet reciting the sale to Govind Chatre and the sale by Govind Chatre to Yashwant Lingshet. The delay which has occurred in obtaining the certificate of sale is, no doubt, due to the circumstance that the mortgagees were in possession, and that probably Yashwant Lingshet was not sufficiently in funds to be able to redeem the mortgage. It may be contended that the application for the certificate of sale was so long deferred that the right to it was barred by the law of limitation. Whether that was so or not, it is unnecessary for us to decide; for, as a matter of fact, the certificate was granted by the Court which originally sold the property, and, not having been since set aside, is in full force. Moreover, it appears that it was applied for in May, 1877, before this suit commenced, though not issued until the 27th October, 1877, after this suit had been instituted. The ground upon which the Assistant Judge has reversed the decree of the Subordinate Judge for

(1) 4 B. 155.

(2) 10 B.H.C.R. 435.

redemption is, that the certificate of sale was not in existence when the suit was brought, and that, consequently, the plaintiff [142] had not then a complete title. The Assistant Judge relied on the case of *Harkisandas Narandas, deceased, his heir, his widow Bai Jamna* v. *Bai Ichha* (1); and the case of *Lalbhai Lakhmidas* v. *Naval Mirkamaludin Husen Khan* (2) has been cited to us for the respondents, but those were suits in ejectment on the title. This suit for redemption is of an equitable nature. Equitably the plaintiff and, before the conveyance to him, Yashwant Lingshet, were entitled to redeem. They had successively purchased and paid for the equity of redemption, although the certificate of sale was not issued until after this suit had begun. It is quite true that a purchaser at a judicial sale is not, strictly speaking, entitled to possession until a certificate of sale has been granted to him [*Basapa* v. *Marya* (3)]; but, as a matter of fact, he not unfrequently is put into possession after the confirmation of the sale and before the issuing of the certificate; and, as will be seen by the observations in *Tukaram* v. *Satvaji* (4), it is exceedingly doubtful that he could be ousted merely for want of the certificate. Sir R. Couch, C. J., was satisfied with proof of the order confirming a sale where the certificate of sale was unregistered, and, therefore, inadmissible in evidence,—*Raj Kishen Mookerji* v. *Radha Madhub Holdar* (5). Where time is not of the essence of a contract of sale, and the title is bad, but the defect can be cured, if the vendee is unwilling to stay, Lord St. Leonard says "the vendor should file a bill to enforce the contract; for it is sufficient, if the party, entering into articles (of agreement) to sell, has a good title *at the time of the decree*. And where the vendor, at the time he filed the bill, had only a term of years in the estate, of which he had articled to sell the fee, and after the bill filed, procured the fee by means of an Act of Parliament, as the day on which the contract was to be carried into execution was not material, a specific performance was decreed" (6). If this be so in the case of a contract for sale, we do not see any reason why if a party (whose title is to some extent imperfect) seeking to redeem is, at the hearing of his cause, able to prove [143] a perfect title, he should not have a decree for redemption. We cannot perceive that we should confer any benefit upon the mortgagees by rejecting the present suit. The plaintiff might to-morrow file another suit for the same purpose if we were to reject this suit.

We reverse the decree of the Assistant Judge, and remand the cause in order that the District Court may take an account of what is due to or from the mortgagees, the defendants, and may make the usual decree for redemption of the premises. Any sum or sums which the plaintiff may have paid into Court in virtue of the decree of the Subordinate Judge should be taken into consideration by the District Court in making its decree. The plaintiff should pay the costs of the suit up to the present time. The defendants must pay the costs of this appeal. The costs of the appeal to the District Court should be disposed of by that Court.

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(1) 4 B. 155. (2) 12 B.H. C. R. 247. (3) 3 B. 433.
(4) 5 B. 206. (5) 21 W. R. 349.
(6) Sugden's Vendors and Purchasers, Ch. VI, s. 3, pl. 2, pp. 263, 264, (14th ed.), where the authorities are collected.

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Before Sir Michael Roberts Westropp, Kt., Chief Justice.

LADUBHAI PREMCHAND, (*Petitioner*) *v.* REVICHAND VENICHAND AND ANOTHER (*Opponents*).* [23rd December, 1881.]

The Indian Contract Act (*IX of* 1872), *s.* 265—*Appeal—Stamp—Court Fees' Act VII of* 1870, *s.* 7, *cl. iv* (*f*).

The stamp duty payable on an appeal from an order made by a District Judge on an application under s. 265 of the Indian Contract Act (IX of 1872) should be an *ad valorem* fee, as in a suit for accounts, under s. 7, cl. iv (*f*) of the Court Fees' Act VII of 1870.

Javali Ramasami v. *Sathambikami* (1) and *Lachman Lall* v. *Ram Lall* (2) referred to and approved.

[F., 22 C. 692; R., 10 C. 669.]

THIS was a reference by the Taxing Officer of the High Court under s. 5 of the Court Fees' Act VII of 1870.

The petitioner under s. 265 of the Indian Contract Act (IX of 1872) applied to the District Court of Poona to wind up the partnership business which had existed between him and two others. The Judge made an order from which the petitioner proposed to appeal.

[144] The question referred by the Taxing Officer for decision was—whether the appeal should bear a stamp of Rs. 2, as when the appeal is not from a decree or an order having the force of a decree (*vide* sch. II, cl. 11, Court Fees Act), or whether it should bear an *ad valorem* stamp.

The Taxing Officer was of opinion that the proposed appeal was an appeal in a suit for accounts, and should be stamped according to the amount at which the relief sought was valued (*vide* s. 7, cl. iv (*f*), Court Fees Act).

Pandurang Balibhadra appeared for the petitioner.

JUDGMENT.

The following is the judgment delivered by

WESTROPP, C.J.—The question referred to me in this case by the Taxing Officer is—what stamp, by way of Court-fee, should be attached to an appeal from an order in the nature of a decree by the District Judge of Poona in an original application made to him under s. 265 of the Indian Contract Act (IX of 1872) for the winding up of a partnership, and the taking of the accounts necessary for that purpose?

The term "apply" unfortunately used in that section has occasioned some difficulty as to the nature of the procedure intended to be resorted to. Whether that procedure be styled an application or a suit, the nature of the objects to be attained by resort to that section is absolutely inconsistent with summary procedure strictly so called. The winding up of the business of a partnership firm, the provision for the payment of its debts, the ascertainment and the distribution of the surplus according to the shares of the partners, preclude in ordinary cases a rapid disposal of the task imposed by s. 265 upon that District Judge. It is difficult to understand why an original jurisdiction should have been given to the District Court in such a matter, and, when given, why it should have been limited

* Reference by the Taxing Officer under s. 5 of the Court Fees' Act.

(1) 1 M. 340. (2) 6 C. 521.

to cases where the partnership had already terminated. See *Sorabji* v. *Dulebhai* (1). The impossibility of dealing with the work to be done by the District Court in a summary manner probably led to the express enactment in the last clause of s. 213 of the Civil Procedure Code (Act X of 1877), that "applications under s. 265 of the [145] Indian Contract Act (IX of 1872), shall be deemed to be suits within the meaning of this section" (213 of Act X of 1877), which lays down the mode of conducting ordinary suits for an account of property and for its due administration under the decree of the Court, which would be the Court of the lowest grade competent to try it (s. 15, Act X of 1877, and see Act XIV of 1869). It has been held—and, as I think, most rightly—that s. 265 of Act IX of 1872 is intended to be ancillary to, and not in supersession of, the ordinary suit for winding up the affairs of a partnership: *Javali Ramasami* v. *Sathambakami* (2); *Lachman Lall* v. *Ram Lall* (3).

The parties seem to be agreed as to the fact that the partnership had ceased to exist some time previously to the institution of these proceedings. Hence the application or suit is so far within s. 265 of the Contract Act (IX of 1872). The District Judge, however, being under the impression that this case could be more effectively dealt with as an ordinary civil suit, declined to entertain it under s. 265 of Act IX of 1872. But a Division Bench of this Court (M. Melvill and F. D. Melvill, JJ.) being of opinion that the case came within that section, subject to any objection which might be made by the parties other than the applicant, by an order of the 25th November, 1880, directed the District Judge to receive it, and to proceed upon it according to law.

The District Judge has heard the case, and made an order or decree thereon, against which the applicant now desires to appeal.

In *Devidas* v. *Narsidas* (4) a Division Bench (Pinhey and F. D. Melvill, JJ.) were of opinion that the proceeding permitted by s. 265 of Act IX of 1872 might be commenced either by plaint or petition. It is not necessary for me now to decide how such plaint or petition should be stamped, the question here being how an appeal from an order or decree on the plaint or petition should be stamped. Mr. Pandurang Balibhadra, the proposed appellant's pleader, contends that the appeal is not from a decree or order having the force of a decree, and, therefore, that a two rupee stamp is, under art. 11 of sch. II of Act VII of [146] 1870, the proper Court-fee, and that s. 213 of Act X of 1877 has not any bearing upon the fiscal question as to the amount of Court-fee. I am unable, however, to follow his argument; for, if the order, subject to be appealed against, be not, by force of s. 213 of Act X of 1877, rendered substantially a decree in a suit within the meaning of the term "decree" in s. 2 of the same Act, I cannot perceive what right of appeal the applicant can have. Chapter XLIII of that Act (which chapter regulates appeals from orders) does not give him any appeal in such a case as the present. It is only by assuming that the application may have been by s. 215 declared to be a suit, and that the order falls within the term "decree" in s. 2, and is therefore, under s. 540 of the same Act, open to appeal, that I can entertain the idea of an appeal in the present case. If, then, an appeal lie at all from the order of the District Judge (a point which I cannot now fully decide), I agree with the Taxing Officer in thinking that it would do so in virtue of ss. 2, 213 and 540 of the

(1) 5 B. 65. (2) 1 M. 340. (3) 6 C. 521.
(4) See Printed Judgment for 1880, p. 69.

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Civil Procedure Code, and that, the Court-fee payable would be as in a suit for accounts under s. 7, cl. iv (*f*), of Act VII of 1870, and should, therefore, be, as there pointed out, an *ad valorem* fee—liable, in case of undervaluation, to correction under s. 11 of that Act.

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6 B. 146 = 6 Ind. Jur. 317.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

PATANKAR (*Plaintiff*) *v.* DEVJI (*Defendant.*)* [24th January, 1882.]

Decree—Execution—Satisfaction or part satisfaction out of Court, but not certified—Subsequent execution of decree for full amount—Suit for money previously paid—Civil Procedure Code, X of 1877, ss. 244-258—Limitation Act (XV of 1877), sch. II, art. 161.

A suit for the recovery of money paid to a judgment-creditor out of Court in satisfaction of a decree, but not certified, is barred by s. 244 (*c*) of Act X of 1877 and by the last paragraph of s. 258 as amended by Act XII of 1879.

[Overr., 11 B. 6 (**F.B**); **Diss.**, 7 **A.** 124 = 4 A.W.N. 277 ; 17 C.P.L.R. 61 ;**F.**, 10 B. 155; **R.**, 10 B. 288 ; 11 B. 724 ; 22 B. 463 (472) ; 9 C. 788 = 12 C.L.R. 390; 10 C. 354 ; **D.**, 15 C. 187.**]**

THIS was a reference by Rao Saheb Dhondo Janardan Karmarkar, Subordinate Judge of Junnar, under s. 617 of the Code of Civil Procedure.

[147] The defendant obtained a money decree against the plaintiff, and presented an application for its execution without deducting from the amount of his claim Rs. 21-12-0 paid out of Court in satisfaction of it. The plaintiff, therefore, now sued for the recovery of that sum from the defendant. The defendant denied the receipt of the sum, and contended that this suit was barred by ss. 244 and 258 of the Code of Civil Procedure (X of 1877). The Subordinate Judge was of opinion that the suit would not lie, but he said that his opinion was not free from doubt ; and as the suit fell within ch. 2 of the Dekkhan Agriculturists' Relief Act XVII of 1879, and as no appeal lay against the decision, he referred the case for the opinion of the High Court.

There was no appearance on either side in the High Court.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—The Court is of opinion that the view taken by the Subordinate Judge is correct. The suit for the recovery of money paid to a judgment-creditor out of Court, and not certified, appears to be barred by s. 244 (*c*) of Act X of 1877 and by the last paragraph of s. 258 as amended by Act XII of 1879.

The Court regrets to come to the conclusion that judgment-debtors have been thus deprived, by a change in the law, of a remedy against fraud which they previously possessed. The provision of s. 258, which enables a judgment-debtor to apply for a notice to the decree-holder to show cause why payments made out of Court should not be recorded, is, in effect, rendered nugatory by the shortness of the period (twenty days from the date of payment), within which the Limitation Act requires that such an application should be made (art. 161, sch. II, Act XV of 1877).

* Civil Reference, No. 41 of 1881.

The class of debtors, who make payments out of Court, consists of those who are too ignorant of the law to know the risk which they run in so doing; and the first intimation which they have of the fraud which has been perpetrated upon them is when the creditor proceeds to execute his decree without giving credit for the payments received. It is then too late for the debtor to apply to the Court; and, being deprived of the right to sue, he is left without any remedy.

1882 JAN. 24 — APPELLATE CIVIL. — 6 B. 146 = 6 Ind. Jur. 317.

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6 B. 148.

[148] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

PARANJPE (*Original Defendant*), *Appellant v.* KANADE (*Original Plaintiff*), *Respondent.** [17th January, 1882.]

Decree—Compromise effected by fraud—Execution—Question arising in execution—Separate suit—Civ. Pro. Code (X of 1877), s. 244—Act XXIII of 1861, s. 11—Practice—Power of Court to vacate any judgment or order procured by fraud.

The plaintiff held two decrees against the defendant for Rs. 5,490-1-6, and applied for execution. The defendant, by misrepresentation, induced the plaintiff to receive Rs.3,900 only in full satisfaction of those decrees, and to withdraw the application. The plaintiff, on discovering the misrepresentation, brought this suit to recover the difference.

Held that the suit was barred by s. 11 of Act XXIII of 1861 (which corresponds with s. 244 of Act X of 1877), the question between the parties being a question relating to the execution of a decree.

It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud; and in the case of orders made in execution s. 11 of Act XXIII of 1861 excludes all other remedy.

[F., 9 B. 468 (472); L.B.R. (1893—1900) 639; R., 11 C. 376; 17 C. 769; 19 M. 230=5 M.L.J. 218; 12 C.P.L.R. 82 (84).]

THIS was a second appeal from the decision of W. H. Newnham, Judge of Poona, amending the decree of Rao Saheb D. J. Karmarkar Joint Subordinate Judge of Poona.

The plaintiff in suits Nos. 529 and 530 of 1875 obtained decrees for Rs. 5,490-1-6 against the defendant, which, with slight modification, were confirmed in appeal on the 12th of July, 1877. While execution proceedings were pending, the defendant specially appealed to the High Court, but was unsuccessful in getting the appeals admitted. The defendant informed the plaintiff that he had preferred his appeals to the High Court, but suppressed the fact of their rejection, and induced her to compromise the claims for Rs. 3,900. The plaintiff thereupon stated to the Court that her claims had been satisfied, and prayed that her applications for execution might be considered as disposed of. She also gave a receipt to the defendant on the 21st of August, 1877. Soon afterwards she learned that fraud had been practised upon her, and on the 30th of August 1877, she made an application to the Court, praying for full execution of her decrees. This application [149] was rejected on the 27th February, 1878, and the plaintiff was referred to a separate suit, whereupon the present suit was filed. The defendant contended that no misrepresentation or fraud was practised by him on the plaintiff, and that no separate suit, like the present, lay in an execution matter.

* Second Appeal, No. 141 of 1881.

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The Subordinate Judge held that there was no objection to the maintenance of the suit. He argued thus: "It is contended that both s. 11 of Act XXIII of 1861 and s. 244 of Act X of 1877 bar the maintenance of this suit, since the satisfaction or non-satisfaction of a decree is a matter which the Court executing it can alone decide pending the execution proceedings. I am of opinion that the question here is not whether the decrees are satisfied or not, since their adjustment was certified to the Court, and the Court acted upon the same, and held that the decrees were satisfied. The questions of adjustment and satisfaction of the decrees are relevant in so far as they would show how the adjustment or compromise was fraudulently brought about, and how much damage was sustained on that account by the plaintiff. The fraud practised upon the plaintiff has created in her favour a substantive cause of action or matter of complaint, and clothed her with the right to claim damages or indemnity for the consequences resulting from it (Leake on Contracts, pp. 390 and 397, ed. of 1878). It is a well-known rule that fraud vitiates every transaction, and hence the defendant cannot be allowed to say that the question of fraud or no fraud should not be opened again." Under this view the Subordinate Judge went into the evidence, and awarded the plaintiff's claim.

The District Judge, holding the same view, upheld that decree, and awarded, in addition, interest at 6 per cent *per annum* on the amount decreed to the plaintiff from the date of suit to the date of payment.

The defendant appealed to the High Court.

Shantaram Narayan, for the appellant.—Section 11 of Act XXIII of 1861 forbade a separate suit like the present. Section 244 of Act X of 1877 is to the same effect. The evidence shows that there was no misrepresentation or fraud. There was no obligation on the defendant to disclose to the plaintiff that his appeals to the High Court had been rejected. The suit having **[150]** been treated as one for damages, no interest should have been awarded.

Mahadev Chimnaji Apte, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—We regret that we cannot concur in the view taken by the Courts below that this suit is maintainable. The question between the parties is a question relating to the execution of a decree, and s. 11 of the Civil Procedure Code (Act XXIII of 1861) expressly excluded a separate suit for the determination of such a question. We must, therefore, though with reluctance, reverse the decrees of the Courts below, and reject the claim. But, having regard to the circumstances of the case and the conduct of the defendant, we direct that the parties bear their own costs throughout.

The order made by the Subordinate Judge on the 27th February, 1878, refusing to inquire into the allegations of fraud made by the plaintiff, and referring the plaintiff to a separate suit, on the ground that it was not competent to him to interfere with the order of his predecessor, was erroneous. It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud; and in the case of orders made in execution, s. 11 of Act XXIII of 1861 excludes all other remedy. We do not, however, think that it is now necessary for this Court to exercise its extraordinary jurisdiction, in order to set aside the

Subordinate Judge's order of the 27th February, 1878; nor that it is necessary for the Subordinate Judge himself formally to set aside that order. If the plaintiff now applies for execution of her decree in respect of the balance not paid to her (and in making such application it will probably be held that she is entitled to the benefit of s. 14 of Act XV of 1877), it will be competent to the Subordinate Judge, if satisfied that the compromise of the decrees was induced by fraud, to treat the compromise and the order of the 27th February, 1878, as a nullity, and to direct the complete execution of the decrees, as if no such compromise or order had ever been made.

Decrees reversed.

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6 B. 151.

[151] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice, and Mr. Justice Melvill.

MITHIBAI AND OTHERS (*Plaintiffs*) *v.* LIMJI NOWROJI BANAJI AND OTHERS (*Defendants*), HARI VALABDAS KALIANDAS, *Appellant.**

[15th, 16th and 17th December, 1881.]

Agreement—Construction—Parsis in Mofussil of Bombay English law how far applicable to—Lex loci—*Rule in Shelley's case—Act IX of* 1837.

The members of a Parsi family, the heirs of one Framji Cowasji Banaji, deceased, entered into an agreement dated the 24th May, 1851, by which they agreed that the remaining income (after paying the deceased's debts) of a certain estate which had belonged to the deceased, called the Poway estate, situated in the island of Salsette, and, therefore, in the Mofussil of the Presidency of Bombay, should be appropriated in certain shares among the heirs mentioned in cl 9 of the agreement—*i.e.*, among the parties to the agreement, "*but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever.*" It was contended that Parsis being subject to English law, these words conferred an absolute estate in their respective shares upon the various parties to the agreement under the rule in *Shelley's case.*

Held (affirming the order of BAYLEY, J.,) that, even assuming English Law to be applicable, the English Law so to be applied could not include the rule in *Shelley's case*, which is a law of property or tenure based on feudal considerations, and unsuited to the circumstances of India; that the rule of construction to be applied to the agreement must in any case be to give effect to the intention of the parties according to the plain meaning of the language; and that to construe the agreement as giving more than a life interest to the parties thereto, would be to defeat their obvious intention.

[**F.**, 1 Bom.L.R. 303; **R.**, 33 B. 122 (128)=10 Bom.L.R. 417.]

APPEAL from a decree of Bayley, J. See judgment reported in I.L.R., 5 Bom., p. 506.

Framji Cowasji Banaji died on the 12th February, 1851, leaving three sons—Jehangir, Pestonji and Nanabhoy; three daughters and some grandchildren by three other daughters who had predeceased him. At the time of his death he was possessed (*inter alia*) of the Poway estate in Salsette which had been granted to him in fee by the East India Company in the year 1837. He left a will and a codicil, the latter of which was as follows:—

CODICIL.

In the way thus particularly set forth this will or testament was made before. It is to be considered as confirmed and upheld. And besides this, as to the property

* Suit No. 877 of 1870.

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(called) the Sans Souci which I having sold, laid out on Poway Rs. 1½ (one and a half) lakhs. I cannot at present write at great length, because my health is much impaired; but now, by the grace of God, I am better: so I will afterwards make a memorandum, but at present this is all. On the ——, 1831, I wrote a letter to Government, an answer to which arrived on the ——, in accordance with which it shall not be competent to my heirs to sell this estate, neither shall it be competent to them to partition it. As to the conveying of water from Mugbhat to Kumateepol (or Kamathipura) the outlay for that is to be made out of this Poway Estate; and, besides that, after making the outlays, whatever balance may remain my heirs are to divide and take. And as to the whole of the outlays for the water of Mugbhat, in case my heirs should neglect the same, I have made the Government joint trustees, (and) they will, disgracing you, cause the same (outlays) to be made. Therefore you should very honourably carry on that water charity perpetually. Now, if God will bestow good health on me, I will write a separate memorandum in regard to this. The English date the 15th December of the year 1831: the Kudmi 15th day *Dukhmir*, the 4th month *Teer*, *Yezdezerdi* 1201 (*Maha Sud* 11th of *Samvat* 1888), the day of the week—Thursday.

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There was no disposition either in the will or codicil of the Poway Estate, nor did either of these documents contain any residuary clause or any words large enough to include the Poway Estate. By his will the testator virtually disinherited his eldest son, Jehangir, and his family.

Disputes having subsequently arisen with regard to the distribution of the property, an agreement was entered into on the 24th May, 1851, by the various parties interested. The following are the material clauses of this agreement:—

1. The said late Framji Cowasji Seth, deceased, had for many years past carried on an extensive business, and, agreeably to the affairs of this world and by reason of his trade, he has left behind him debts due by him, and has at the same time, by the favour of God, left very extensive landed property; but it is now the desire of all of us, the undersigned, that the deceased during the lifetime having entertained a wish to settle all his affairs with his own hand, but as it has pleased the Almighty to order him at last to leave this world and he departed this life on the 12th day of February, 1851, of the English year and the 19th day of *Furverdin* of the 6th month of *Sharavur* of the Kudmi, and carried with him the desire he had entertained of settling his affairs; but he, having been ill for a long time before his death, had, in accordance with both his wishes, commenced making out his new will, but as the same remained unexecuted and unattested, we all of us, having unanimously joined together, do entertain the same wish that the debts due by, and to him, be paid and received in a proper manner; and with a view that no blot should in any way be attached to his name, we, the undersigned, are to aid and assist in conducting this business as far as it may lay in our power, and to carry on the whole affair with peace and unanimity, and, therefore, it became necessary to make this writing, and we are to act agreeably to the conditions of this writing, which is truly to be agreed to and abided by by all of us respectively and our heirs and executors.

[153] 2. On searching the presses of the late Seth Framji Cowasji, deceased, on the 17th of February, 1851, the above-mentioned will of the 5th July, 1828, with its codicil of the 15th December, 1831, was found in a tin-box, at which all of us were delighted that, after obtaining probate under the said will, the management of the affairs and dealings of our patron, the late Framji Cowasji, deceased, would be carried on with ease; but on examining it we found it had been made many years ago, whereupon we all, the undersigned, do hereby unanimously consent and agree that the said will should only be made use of, and abided by, for the purpose of obtaining probate from the Supreme Court, in order that the affairs and dealings of the deceased may be managed by the hands of his executors. Therefore none of us, the undersigned heirs, or any one else to whom a legacy or inheritance or a lump sum has been given in the said will, shall now or at any time hereafter make any claim or demand after the probate has been obtained, of the said will; and if any one should make any claim or demand whatsoever, it shall be by this writing considered null and void, and that this writing containing this arrangement after being executed and attested by all shall be registered in the Supreme Court along with the above said will of the deceased, and we are truly to abide by the same.

4. After I, the undersigned Bai Bachubai, have obtained probate of the above-mentioned will of the 5th July, 1828, with its codicil, it is resolved with the unanimous consent of us, Bachubai and all the undersigned, to give full authority to Parsi Cursetji Nusservanji Camaji for conducting the management of my late husband Framji Cowasji

Seth's affairs and dealings, for collecting and paying (his debts), selling his landed property and other goods and effects, and managing his estates in Salsette and other villages; and this party, after I, Bai Bachubai, shall have obtained probate, is to commence to exercise his authority under this writing; but to whatever the said Cursetji Nusservanji Camaji does, neither I, Bai Bachubai, nor any of the other undersigned are to raise a dispute or objection of any kind whatever, and are not to swerve herefrom; and, should we at any time raise any dispute or objection, it is truly to be all null and void.

7. As to all the debts due by the late Seth Framji Cowasji, deceased (the proceeds of) the sale of his landed estate in Bombay and the amount of insurance of the ship *Buckinghamshire*, destroyed by fire, having been collected, and furniture and other goods and effects having been sold, and such outstanding debts as may be due by different persons having been collected, his creditors should be paid. But on selling and collecting all the above (property), should all the creditors be not paid in full, then there are six villages, inclusive of Poway in Salsette, belonging to the deceased which have been obtained from Government rent-free for ever: out of the income of these villages in the first place water should be supplied for the use of the poor community of Kamathipura in Bombay which the late Framji Cowasji Seth, deceased, has been supplying from the year 1824 A.D. out of the well in his Girgaon cart, called Mugbhat; and, in order that this charity may continue for ever, a trust-deed in English, dated the 30th September, 1837, had been made for drawing Rs. 2,400—namely, twenty-four hundred—annually out of the income of the villages, inclusive of Poway; and the English Government has been appointed trustees therein with a view that, should the heirs of the deceased be unable to supply the water properly, then Government—the trustees [154] having drawn out of the income of the village of Poway the above-mentioned sum of Rs. 2,400 every year—are to conduct and preserve that charity work for ever. Therefore, after the amounts of these charges of the karkuns and sepoys and other charges of the villages, inclusive of Poway, have been deducted from the amount of the income, the surplus, whatever it may be, should be paid in the best possible way to the creditors in part payment of the interest; and, in case there be any surplus, the same should be paid to them in equal proportions, in part payment of their principal, until all the debts of the late Framji Cowasji, deceased, are discharged: payments are to be truly made out of this income.

9. We all, the undersigned heirs of the late Seth Framji Cowasji, deceased, have by our unanimous consent acknowledged and determined by the writing of the undermentioned persons to be the heirs of the said Framji Cowasji deceased. The particulars of their names and the manner in which it is agreed their shares are to be paid, are as follows:—

25 (twenty-five) cents to Bai Bachubai the widow of our late patron, Framji Cowasji.

50 (fifty) cents to be divided equally among the sons who are living. The particulars whereof are as follows:—namely, (1) Jehangir Framji, (2) Pestonji Framji, and (3) Nanabhoy Framji—50.

25 (twenty-five) cents to be divided in equal shares among the living daughters and the heirs of the deceased daughters:—(1) Bai Ratonbai, the widow of the late Nusserwanji Rustomji Baly Hamaji, deceased.

(2) Bai Navazbai, the wife of Dhunjibhoy Byramji Rana.

(3) Bai Pirozbai, the wife of Ardasir Cursetji Seth.

(4) The late Goolbai, deceased, wife of the late Dhunjibhoy Nusservanji, deceased, is dead; and her daughter Hirabai is at present her heir, and she is the wife of Sorabji Pestonji.

(5) The late Meherbai, deceased, the wife of Pestonji Nowroji, is dead, and her heirs are her two sons, Ardesir Pestonji and Nowroji Pestonji, and these sons are at present young, and are living with their father, Pestonji Nowroji; and having appointed along with their father and guardian two other persons as trustees, and the amount of the share of these young heirs until such time as they come of age having been duly guaranteed, —that is to say, having been invested in Government paper; the accumulating interest is to be added thereto, and their shares should be paid to them as they respectively come of age. The late Manekbai, deceased, the wife of Dadabhoy Rustomji, is dead and her heirs are daughter, Sirinbai, and her son, Kaikhashru, but those children are at present young and are living with their father Dadabhoy Rustomji; and having appointed along with their father and gurdian two other persons as trustees, the amount of the shares of these young heirs until such time as they come of age having been duly guaranteed,—that is to say, having been invested in Government paper—the accumulating interest is to be added thereto, and their shares should be paid to them as they respectively come of age. According to these particulars, 100—namely, one hundred—cents are to be apportioned among Bai Bachubai, the three sons, the three living

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daughters, and the children and heirs of the three deceased daughters, agreeably to the shares of the heirs settled above.

[155] 10. Agreeably to what is written above, the said Bai Bachubai, the widow of our patron, the late Framji Cowasji, deceased, having obtained probate in her own name alone under the said will of our patron, the late Framji Cowasji, deceased, and having given a full authority to her attorney or vakil, the above-mentioned Curseţji Nusservanji Camaji is to discharge all the debts due by our patron, the late Framji Cowasji, deceased, and after paying all those debts and after paying them by selling the landed property and other goods and effects, the surplus, whatever it may be, shall be divided among the said heirs, determined in the above-mentioned paragraph 9 agreeably to what is written in that very paragraph, and the same is truly to be apportioned by the said Bai Bachubai, the widow of the late Framji Cowasji, deceased, and Curseţji Nusservanji Camaji.

11. After paying in full, agreeably to what is written above, all the creditors of the late Seth Framji Cowasji, deceased, out of the income of the Poway Estate of the late Seth Framji Cowasji, deceased, as written above; *out of the remaining income* whatever it may come to, after paying for the two charitable works—namely, supplying water and the management of fire-temple, for which trust-deeds have been made agreeably to and as mentioned in paragraphs 7 and 8—and after deducting the amount of the expenses of those villages, *the remainder is to be apportioned to the above-mentioned heirs agreeably to the shares mentioned above; but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever;* no other person shall make any claim or demand whatsoever thereon; and, should any male or female heirs give away his or her or their share to a stranger or to any improper person, the same should not take effect; and we, all the heirs, do agree by this writing that, should anything of this kind be done, it is to be all null and void, and is truly to become void; and should any of the undermentioned heirs or their heirs and children die hereafter without issue, then his or her share is truly to go to the surviving male and female heirs, and my (Bai Bachubai's) share, too, after my death, is truly to go to the male and female heirs settled above, and, in the event of their death, to their children and heirs in the manner written above. This we, all the undersigned heirs concurring with one another, are truly to abide by. Should we or our children and heirs now or hereafter, make any alterations or deviations therein, or make any claim or demand thereon, it is to be truly null and void. Moreover, the authority for the management of all the remaining estate of the late Seth Framji Cowasji, deceased, whatever it may be, and the income of the villages in Salsette, inclusive of Poway, and the management and the taking care thereof, and for the management of the supply of water for charity from the Girgaon cart to the poor of Kamathipura in Bombay belongs to us, Pestonji Framji and Nanabhoy Framji, executors and heirs appointed in the said will of the late Seth Framji Cowasji, deceased; and, in the event of the death of either of them, one of his sons and heirs is to be appointed by the other, and so from generation to generation, who is to do all the business agreeably to what is written above. Should any one die without appointing any one out of his sons as his heirs, then his eldest son, whoever he may be, is truly to join in conducting all the management on behalf of his father agreeably to what is written above, and is truly to give and receive what is due to and from the other [156] heirs appointed by this writing agreeably to what is written above; no other heirs have any authority in this matter; and, should any one whatsoever raise any claim or demand whatsoever thereon at any time, it is truly to be null and void.

12. The trust-deeds, which have been executed by our patron, the late Framji Cowsaji, deceased, during his lifetime are to be kept in force in every respect, and they shall not in any way be affected, or be suffered to be affected, by anything contained in this writing; and we are truly to agree and abide by whatever is contained therein, and conduct ourselves agreeably thereto.

14. As the late Seth Framji Cowasji, deceased, had himself no right either to sell or mortgage the villages and the estate in Salsette belonging to our patron, the late Framji Cowasji, deceased, consequently, none can ever exercise such a right over the same in any respect; but we the undersigned heirs, and our successive heirs do agree that we are in no away able either now, or at any time hereafter, to sell or mortgage the said estate in Salsette; but in addition thereto, agreeably to what is written in the above paragraph in this writing, it is agreed that the claim of inheritance of us, the undersigned heirs of our patron, the late Framji Cowasji, deceased, is to be received out of the income of this estate. As to that claim we, the undersigned, all the heirs of the late Seth Framji Cowasji, deceased, and our successive heirs do agree that *the claim of each of us separately over the above mentioned income is not in any way to be sold or to be given on writing to any one now or hereafter by any one of us or any of our successive heirs;* and should any one do any such thing it shall truly be null and void

by this writing. Our respective shares, after they shall have come into our hands, may be used and enjoyed by us in any way we like; but, agreeably to this writing, we are not to sell or give away in writing our prospective income to any body, which we all are truly to agree to and by agreeably to this writing.

15. We, after having read and understood the above-mentioned particulars, have at present signed this writing, and are truly to sign without any objection another writing also that may be made in English from this writing through an attorney.—Dated *Samvat* 1907, *Vaisak Vud* the 9th day of the week, being Saturday, the English date being the 24th of May, A.D. 1851.

The testator's eldest son, Jehangir, died on the 16th December, 1863, having by his will appointed his wife, Mithibai (the first plaintiff in this suit), his executrix, and given her authority over his inheritance and share in the property of his deceased father. Pestonji, the second son, died after the institution of the present suit; and one of his executors, Limji Nowroji Banaji, was made defendant in his stead.

The present suit was for the administration of the testator's estate, and was filed in December, 1870. The plaintiffs were Mithibai, the widow and the heiress of Jehangir, the eldest son of the testator; and the defendants were the other parties to the **[157]** family agreement of the 24th May, 1851. The plaintiffs prayed (*inter alia*) that the rights and interests of the plaintiffs and defendants under the said agreement might be ascertained and declared, and that the net residue of the testator's estate might be ascertained and divided according to the shares mentioned in the said agreement.

By a consent decree made in the said suit on the 24th February, 1872, it was declared (*inter alia*) that the plaintiffs and defendants were entitled to have the estate of the testator ascertained and distributed under the agreement of the 24th May, 1851, and that the said agreement was a binding and valid agreement between the parties thereto, and the suit was referred to the Commissioner for taking accounts to enquire and report who were entitled to share in the said estate, and in what shares and from what duties they were so entitled.

All the right, title, and interest of Nanabhoy (the third son of the testator) in his father's property having been attached in execution of decrees against him, all his interest in the property and all the rights secured by such decrees became subsequently vested in Hari Valabdas Kaliandas, who by a Judge's order, dated 18th March, 1880, was added as a party defendant to the suit.

In 1881 the Assistant Commissioner (Mr. Farran), before whom the accounts were being taken under the decree, made a special report certifying that he had decided that the persons who had signed the agreement of the 24th May, 1851, had a life-interest only in the Poway Estate, in Salsette; that they had no power to dispose of any interest in that estate, save such life-interest by deed or will; and that the interest of the defendant, Hari Valabdas Kaliandas, extended only to the life-interest of the defendant, Nanabhoy Framji, in the Poway Estate.

The defendant, Hari Valabdas Kaliandas, thereupon moved to vary the special report. The motion was heard before Bayley, J., who refused the motion, and confirmed the Commissioner's special report (1). Hari Valabdas Kaliandas and ther parties to the suit then appealed.

[158] *Latham* and *Inverarity*, for the appellants.—The question is as to the construction of cl. 11 of the agreement. It might be construed as giving—

(1) See judgment reported, 5 B. 506.

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(1) an estate in fee to the persons named in cl. 9 of the agreement, with a gift over on death without issue;

(2) or as an estate for life to the persons named in cl. 9, with remainder over;

(3) or an estate for life, without any gift over.

We contend that the first construction is the right one, and that the Court will reject the provision against alienation. By this clause a share is given to each of the parties for life, and after his death to his heirs and children. Applying the rule in *Shelley's case* to this limitation, each party takes an estate in fee. The first point to determine is, what law is to be applied: The parties here are Parsis resident in the Mofussil. We submit that the English law, as the *lex fori*, should be applied: *The Secretary of State* v. *The Administrator-General of Bengal* (1); *In the matter of Kahandas Narrandas* (2); *Naoroji* v. *Rogers* (3); *Stephen* v. *Hume* (4); *Abraham* v. *Abraham* (5); *Musleah* v. *Musleah* (6); *Sarkies* v. *Prosonomoyee* (7). The case ought probably to be dealt with under Act IX of 1837, which is the *lex fori* of this Court.

The agreement only deals with the income of the property, but by English law a gift of income gives the *corpus*: 1 Jarman on Wills, 756; Indian Succession Act (X of 1865), s. 159. The fact that the gift is a gift of income only does not prevent the application of the rule in *Shelley's case*: Tudor's Real Property Cases (2nd ed.), 765-6. There was clearly no intention to give to the issue as purchasers, and, where this is so, the rule in *Shelley's case* applies. There is no designation of heirs. The idea of the parties to the agreement was mainly that the estate should descend in the family; but there is no preference given to any particular person. Counsel referred to the Indian Succession Act (X of 1865), ss. 80 and 84; Tudor's Real Property Cases (2nd ed.), 626—858; *Bradley* v. *Peixoto* (8); *Lear* v. *Leggett* (9); Fearne on **[159]** Contingent Remainders, 200; 1 Jarman on Wills (3rd ed.), 281-82; Act XXXI of 1854, s. 2; Stat. 1 and 2 Vic., c. 110, ss. 11-13; 27 and 28 Vic., c. 112, s. 14.

Pigot, for other appellants—Clause 9 of this agreement declares who are the heirs. They take an estate of inheritance; cl. 11 merely appoints managers, and directs how these managers are to deal with the income. The words in that clause are not intended to be words of limitation, but merely restrictive of the power of disposition.

Marriott (Advocate-General), for respondent.—By this agreement the legal estate of the Poway property is in the manager. The Poway property, not being in the Island of Bombay, is a chattel real, and so Act IX of 1837 does not apply. We say the rule in *Shelley's case* does not apply, and that the parties take for life only. In importing English law into India all purely English technicalities have been discarded: *e.g.*, the law of mortmain—*Attorney-General* v. *Stewart* (10); *Mayor of Lyons' Case* (11). It is true there is no *lex loci* in the Mofussil. So that English laws, which is the *lex fori*, must be applied, but it must be modified so as to be suitable to the community. The rule in *Shelley's case* is of feudal origin, and wholly out of place in India: *Perrin* v. *White* (12); *Advocate-General of Bengal* v. *Ranee Dossee* (13). Counsel referred to Supreme

(1) 1 B.L.R. O.C.J. 87.
(2) 5 B. 154.
(3) 4 B.H C.R.O.C J. 1 (79).
(4) 1 Fulton 243.
(5) 9 M.I.A. 195.
(6) 1 Roulnois, 234 (239).
(7) 6 C. 794.
(8) 3 Ves. Jun. 324.
(9) 1 Rus. & My. 690.
(10) 2 Mer. 143.
(11) 1 M.I.A. 175 (270).
(12) 4 Burr. 2580.
(13) 9 M.I.A. 387 (424).

Court Charter, ss. 33 and 41; *In re Kahandas Narrandas* (1); *Varden Seth Sam* v. *Luckpathy* (2); *Goodtitle* v. *Herring* (3); *Knight* v. *Ellis* (4); *Ex parte Wynch* (5); *Goldney* v. *Crabb* (6); *Foster* v. *Wybrants* (7). As to the construction of the agreement, we contend that the estate is given to the children as purchasers, whatever estate they may take. We submit that the first takers, at all events, have only a life-estate. "Children heirs" is equivalent to "children," and children is a word of purchase. As to the estate taken by Hari Valabdas Kaliandas, counsel referred to Act XXXI of 1854, s. 2; *Davies* v. *Tollemache* (8).

[160] *Latham* in reply referred to Burge's Colonial and Foreign Laws, Vol. II, 376, as to how far English law is in force in a colony.

JUDGMENT.

SARGENT, J.—The question in this appeal turns upon the construction to be placed on a Gujarati agreement dated the 24th May, 1851, made between the widow Bachubai; the three sons—Jehangir, Pestonji and Nanabhoy; and the three surviving daughters—Rutonbai, Nawazbai, and Pirozbai; and the children and heirs of three predeceased daughters—Goolbai, Meherbai and Maneckbai of one Framji Cowasji who died on 12th February, 1851; leaving, amongst other property, an estate in Salsette, called the Poway Estate, which had been granted to him in fee by the East India Company. Framji Cowasji left a will and codicil; but disputes and differences having arisen respecting the same and the distribution of the property, the several persons interested in his estate entered into the above agreement for the amicable settlement of his affairs.

A suit was filed on 5th December, 1870, by Mithibai, widow of Jehangir Framji, one of the sons and his heirs, against the other members of the family to carry out the said agreement and have the rights and interests of the parties, under the agreement of 24th May, 1851, ascertained and declared; to make the surviving executors of the will account; and to have a receiver appointed. On 24th February, 1872, a decree was made, declaring the agreement to be binding between the parties, and referring it to the Commissioner to inquire and report who were then entitled to share in the estate then remaining of Framji Cowasji, and in what shares and from what dates they were so entitled on the footing of the said agreement. The appellant, Hari Valabdas Kaliandas, was subsequently made a party to the suit on 18th March, 1880, by order of the Court, as the purchaser, at an auction-sale, of all the right, title, and interest of Nanabhoy, one of the testator's sons, in the Poway Estate; and having taken out a warrant in the Commissioner's Office to show cause why the Commissioner should not issue a certificate or special report defining the extent and nature of the estate and interest in the Poway Estate of the defendants, Hari Valabdas and Nanabhoy Framji and of the other persons named as heirs in the ninth clause of the said agreement, "the Commissioner made a special report by **[161]** which he decided that the persons who signed the agreement took only a life-interest in the Poway Estate, and that the interest of Hari Valabdas Kaliandas extended only to such life-interest of Nanabhoy Framji." This report was confirmed by order of the Court on 4th August, 1881, and against that order the present appeal is now brought.

(1) 5 B. 154. (2) 9 M.I.A. 303 (320). (3) 1 East 264.
(4) 2 Bro. C. C. 570. (5) 5 De G. M. & G. 188. (6) 19 Bea. 338.
(7) 11 Ir. L. R. Eq. 40. (8) 2 Jur. N. S. 1181.

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It appears, from the judgment of the learned Judge, who made the order, that the question raised before him was whether the persons who signed the agreement took an absolute interest in the Poway Estate or only a life-interest. This issue, however, could not be properly decided in the absence of the persons who might prove to be entitled in remainder on Nanabhoy's death, assuming his interest to be a life estate, and yet, with the exception of the children of the son of Jehangir who with their mother Mithibai thought proper to support the contention that the signatories to the agreement took the estate absolutely, not one of those events apparently entitled in remainder, was either on the record or represented before the Commissioner or the Division Court. It is true that Nanabhoy appeared before the Division Court by the Advocate-General, and supported the certificate of the Commissioner; but it was only in his individual character, in which, indeed, it is difficult to see how he had any *locus standi* at all, all his interests having become vested in Hari Valabdas.

It was plain, therefore, that this appeal, if heard on the merits, would be heard in the absence of the parties really interested in supporting the order of the Court below—at any rate except so far perhaps as regards the share of Jehangir As however, great expense had already been incurred, and the special object of obtaining the certificate of the Commissioner was to obtain a declaration as to the interest of Nanabhoy, we consented to hear the appeal on the merits after having the persons placed on the record who are presumptively interested in supporting the order so far as regards the share of Nanabhoy.

Now the agreement in question, after providing for the payment of the debts of the deceased Framji Cowasji, contains in its ninth clause an unanimous acknowledgment and determination by the signatories that they are the heirs of Framji Cowasji in [162] certain shares therein particularly mentioned, and by the eleventh clause it is directed that "the remainder of the income of the Poway Estate (after providing for the payment of the debts and other charges as therein before mentioned) is to be apportioned to the above-mentioned heirs agreeably to the said shares, but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever. That, should any male or female heirs give away his or her or their share to a stranger or any improper person, the same should not take effect, and that, if anything of the kind should be done, it should be null and void; and, lastly, that if any of the under-mentioned heirs, or their heirs and children, die thereafter without issue, their, his or her share should go to the surviving male and female heirs."

It was contended for the appellants—(1). That, having regard to Act IX of 1837, the Court ought to treat the property in question as chattels real; that English law, including the rule in *Shelley's case*, was applicable to the construction of that clause, and the designated heirs took their shares absolutely; that (2) assuming the property must be regarded as real estate, the designated heirs, at any rate, took an estate tail, and that the right to bar the entail would pass tc Hari Valabdas; but that in any case, assuming that the rule in *Shelley's case* was not applicable, the language of the clause was such as is generally used in native documents and wills to confer an absolute estate, and should be so construed in the present case.

As the contract relates to immoveable property outside the territorial jurisdiction of this Court, the rights of the parties must, according to the well-established rule, be determined by the *lex loci rei sitæ*.

This rule would be applicable both as forming part of the English law, which, as stated by the Chief Justice in *Nowrojee* v. *Rogers* (1), has always been the law applicable to Parsis in this Court, subject to certain statutory and other exceptions, or as the well-established rule of jurisprudence adopted by all writers on the subject.

Much learned argument was addressed to us as to what is the *lex loci* of the Mofussil. We do not, however, think it necessary **[163]** to come to any distinct conclusion on this question which has occupied the attention of so many learned Judges with such varied results. In the view we take of this case it becomes unnecessary to determine whether there be any *lex loci* properly so called in the Mofussil, or, if there be, whether it is the English law in some modified form or the Regulations; as we cannot doubt that, even assuming English law to be the *lex loci* in the Mofussil, or that, at any rate, it must be applied in this Court in the absence of any *lex loci*, the English law so to be applied cannot include the rule in *Shelley's case*, which, although said to be a rule of law and not merely of construction (Jarman on Wills, Vol. 2, 273, 274, 278) was, at any rate, a law of property or tenure based upon feudal considerations, and is quite unsuited to the circumstances of this country. Such is the view taken by Mr. Fearne, in his Essay on Contingent Remainders, of the origin of the rule, and which was adopted by Lord Cranworth and Lord Justice Turner in *Ex parte Wynch* (2) as the ground for refusing to follow those cases in which the rule had been applied to personalty. If, however, the rule—which, as Mr. Jarman says at p. 278, generally operates to subvert the intention—be dismissed as inapplicable, it is immaterial whether the English law or the Regulations be applied in construing this agreement. In either case the rule of construction must be to give effect to the intention of the parties according to the plain and obvious meaning of the language used.

Now, we cannot doubt that the parties to this agreement have clearly expressed their intention that the enjoyment of their respective shares should be confined to a life-interest. The words are: "The remainder (*i.e.*, of the income of the property) is to be apportioned to the above-mentioned heirs agreeably to the shares mentioned above, but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever." It was said, indeed, that this amounts to nothing more than an agreement that the designated heirs and their heirs should enjoy their respective shares from generation to generation —words which, it was said, even with a clause against alienation, would be construed to give an absolute **[164]** estate in a native will. In *Arumugam Mudali* v. *Ammi Ammal* (3) the Court refused to place that construction on language almost identical with that in the present agreement, on the ground that it would defeat the intention of the testator. Now, in the present case it is to be remarked we have not to construe a will, but an instrument *inter vivos*, by which the parties have themselves defined their interest in the property by mutually agreeing in express terms that, after their respective deaths, their respective shares in the income should be enjoyed and received by another designated class, thus showing, as plainly as words can express it, a distinct intention that their own interest in the property should be confined to the enjoyment of the income during their lives. This view of the intention of the

(1) 4 B.H.C.R.O.C.J. 1. (2) 5 De G.M. & G. 188. (3) 1 M.H.C.R. 400.

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parties is quite independent of the question, whether the land be regarded as of the nature of freehold or chattels real. We may, however, remark that Act IX of 1837 only applies to immoveable property within the jurisdiction of the High Court, and, moreover, only treats such immoveable estate as chattels real and not as freehold as far as regards the transmission of such property on the death and intestacy of a Parsi or by the last will of such Parsi ; whereas in the present case the lands are outside the jurisdiction of the High Court, and the question is as to the coustruction to be placed on an agreement entered into by persons assumed to be the heirs of the testator.

Under these circumstances we think that to construe this agreement as giving more than a life-interest to the parties to it, would be to defeat their clear and obvious intention. As to the persons who are entitled to take on the death of the several designated heirs, they cannot be ascertained until that time arrives, and it would, therefore, be premature to express any opinion as to what estate they will take.

All parties to have their costs out of the estate.

Order affirmed.

Attorneys for the appellants: Messrs. *Craigie, Lynch and Owen* and Messrs. *Crawford and Boevey.*

Attorneys for respondents: Messrs. *Tobin and Roughton.*

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[165] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice M. Melvill.

HASHA (*Original Plaintiff*), *Appellant v.* RAGHO AMBO GONDHALI AND ANOTHER (*Original Defendants*), *Respondents.**

[25th January, 1881.]

Registration—Notice—Priority—Possession—Vendor and purchaser—Purchaser without possession—Subsequent purchaser with possession and without notice of prior purchase.

The plaintiff purchased the land in dispute on the 28th February, 1878, and on the same day lodged his deed of purchase with the registrar together with the registration fee. It was registered on the 29th April, 1878. He was not put in possession of the property.

The defendant purchased the same property on the 1st April, 1878, and on the following day lodged his deed of purchase with the registrar together with the registration fee. It was registered on the 26th May, 1878. His purchase was accompanied with possession.

In a suit brought by the plaintiff against the vendor and the subsequent purchaser for possession of the property.

Held that the registration of the plaintiff's deed of purchase, not having been effected until the after execution of the defendant's deed could not have operated as notice of the plaintiff's deed to the defendant, and, therefore, could not be equivalent to possession.

Held, also, that as the defendant was a purchaser without notice, either actual or constructive, of the plaintiff's prior purchase, and had taken the precaution of obtaining possession, both parties being Hindus and innocent purchasers, the defendant could not be deprived of the benefit of his possession.

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Lalubhai Surchand v. *Bai Amrit* (1) followed.

[R., 6 B. 168 (191); 20 B. 158 (162); 20 B. 290; D., 30 A. 238=5 A.L.J. 607=A.W.N. (1908) 99.]

THIS was a second appeal from the decision of C. E. G. Crawford, Assistant Judge at Thana, reversing the decree of Ramachandra Janardan, Second Class Subordinate Judge of Panvel.

The plaintiff Hasha brought this suit against Kalia (defendant No. 1) for possession of certain land, alleging that he had purchased it from the defendant on the 28th February, 1878, for Rs. 100. He further alleged that he had paid Rs. 10 as earnest-money to the defendant, and was to pay the balance on the registration of the deed of purchase; that it was registered on the 29th April, 1878, but that the defendant refused to receive the **[166]** balance and to put the plaintiff in possession of the land. The plaintiff prayed that he might be put in possession, and the defendant directed to receive the balance.

Kalia (defendant No. 1) answered, among other things, that, in consequence of the plaintiff's default in paying the balance, he sold the land with possession to Ragho (defendant No. 2), to whom it had already been mortgaged; that the plaintiff's purchase was without possession, and, therefore, null and void. Ragho, who was subsequently joined as defendant, answered that he had purchased the land from defendant No. 1 for Rs. 100 on the 1st April, 1878; that his deed was registered on the 26th May, 1878; that the land had been in his possession and entered in his name in the Collector's books; that he cultivated it, and thus became a complete owner of it.

The Subordinate Judge allowed the plaintiff's claim, and directed that he should pay Rs. 90 to the defendants, and that they should put him in possession of the land.

In appeal, which was preferred by defendant No. 2 (Ragho), the decree of the first Court was reversed by the Assistant Judge on the 2nd June, 1880. The following are his reasons:—

"Plaintiff's (respondent's) deed of sale, executed on the 28th February, 1878, was presented for registration the same day, but the registration was not effected till the 29th April. Appellant's deed of sale, executed 1st April, was presented for registration the next day, but registration was not effected till 26th May. Plaintiff has never been in possession. Appellant has acquired possession. Appellant had no notice of the sale to plaintiff. Section 47 of the Registration Act III of 1877, which was relied on for him, refers to the operation of the deed as such, not to the operation of the registration as a notice. I must hold that registration did not operate as a notice till it was completed. * * * Both deeds, therefore, being registered, they must be weighed against each other according to Hindu Law, when appellant's being accompanied by possession will prevail (*Lalubhai Surchand* v. *Bai Amrit* (1)).

[167] The plaintiff thereupon appealed to the High Court.

The Hon. Rao Saheb *V. N. Mandlik*, for the appellant.—The defendant's purchase had no priority over the plaintiff's. The plaintiff's deed being registered, and being held proved, operated as a complete conveyance from the date of its execution. The vendor having sold his title under a registered deed, had nothing more to sell at the date of the second sale.

Pandurang Balibhadra, for the respondents.

The High Court affirmed the decree of the Assistant Judge.

(1) 2 B. 299.

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The Hon. Rao Saheb *V.N. Mandlik* subsequently applied for a review on behalf of the plaintiff, but his application was rejected by the High Court on the 25th January, 1881. The following is the judgment of the Court :—

JUDGMENT.

WESTROPP, C. J.—The facts, as now brought before us, are that the plaintiff (appellant) lodged his deed of purchase, dated 28th February, 1878, with the sub-registrar of Panvel on that day together with the registration fee, and on the same day the vendor admitted in the presence of the sub-registrar execution of that deed. It was not registered until the 29th April, 1878. The second purchaser (the defendant) Ragho lodged his deed of purchase (dated the 1st of April 1878), upon the 2nd April, 1878, together with the fee for registration and the vendor then admitted the execution of it in the presence of the same sub-registrar, but that deed was not registered until the 26th May, 1878. The registration of the plaintiff's deed of purchase, not having been effected until after the execution of the defendant Ragho's deed of purchase, could not possibly have operated as notice to Ragho of the plaintiff's deed, and, therefore, could not be equivalent to possession. The sub-registrar, with whom both deeds were lodged for registration, we are informed by the report of the Registrar-General of Assurances, absconded, taking with him the registration fees, and leaving the deeds unregistered. The plaintiff was not in fault, so far as regarded the registration of his deed. He had done all that was in his power and required by law to accomplish its registration. But the defendant Ragho was a purchaser without notice (either actual or constructive) of the plaintiff's purchaser, and had taken the precaution of obtaining possession. **[168]** Both parties being innocent purchasers and Hindus, we cannot deprive the defendant Ragho of the benefit of his possession. The case, we still think, comes within the principle on which *Lalubhai Surchand* v. *Bai Amrit* (1) was decided, and we must, therefore, decline to make an order *nisi* for review.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill and Mr. Justice Kemball.

LAKSHMANDAS SARUPCHAND (*Original Plaintiff*), *Appellant v.* DASRAT (*Original Defendant*), *Respondent.** [30th August, 1881.]

Registration—Priority—Possession—Notice—How far registration equivalent to possession—Priority between registered and unregistered documents—Optional and compulsory registration—Mortgage—Indian Registration Acts—Bombay Regulation IX of 1827—*Acts I of* 1843 *XIX of* 1843, *XVI of* 1864—*XX of* 1866—*VIII of* 1871—*III of* 1877—Lis pendens.

It is a general, but not an invariable, rule that possession in the grantee or assignee is deemed essential amongst Hindus and Mahomedans to the complete transfer of immoveable property, either by gift, sale, or mortgage.

Exceptions to the above rule pointed out.

Neither in England nor in Ireland has *mere* registration been held to amount to notice to subsequent mortgagees or purchasers. In Bombay the Courts have

* Second Appeal, No. 172 of 1880.

(1) 2 B. 299.

adopted the rule which prevails in America, and have held that registration does amount to notice to all subsequent purchasers of the same property.

Possession has been deemed by Hindu and Mahomedan law, as interpreted in the Presidency of Bombay, to amount to notice of such title as the person in possession may have; and any other person who takes a mortgage or other charge upon immoveable property without ascertaining the nature of the claim of him who is in possession, does so at his own risk. This is the rule in England also.

The Indian Registration Acts prior to the year 1864, like the Middlesex Registry Act (Stat. 7 Anne, c. 20, sec. 1); the Yorkshire Registry Acts (Stat. 2 and 3 Anne, c. 4, sec. 1; 6 Anne, c. 35, sec. 1; 8 Geo. II, c. 6, sec. 1) and the Irish Registry Act (Stat. 6 Anne, c. 2, sec. 4, Ir.,) gave priority of rank to priority of registration. The later Indian Registration Acts—*viz.*, Act XVI of 1864, XX of 1866, VIII of 1871, and III of 1877—proceed upon a different principle. Under them a registered instrument operates from the time at which it would have commenced to [169] operate if no registration had been required or made, and not from the time of its registration, which rule applies both to compulsory and optionally registrable instruments.

The earlier decisions, by which registration has in India been permitted to supply the want of possession, may be attributed to this absolute preference so accorded by the earlier Registration Acts to priority of registration.

In the reported cases under the Indian Registration Acts passed in and subsequently to 1864 which have not (like the previous enactments) given priority of rank to priority of registration, the Courts have also regarded registration as an equivalent for possession where the instrument *earlier in date* has been registered but unaccompanied by possession. The Courts have gone a step further, and have held registration under Act XVI of 1864 and the subsequent Acts to amount to notice, and, therefore, to atone for the absence of, and to be a sufficient substitute for possession in the validation of title.

The rule, however, that registration is equivalent to possession, cannot be applied to cases where the registration of the instrument earlier in date has been effected subsequently to the execution of the instrument set up against it.

On the 10th December, 1866, M. mortgaged certain immoveable property to the defendant for Rs. 95. The mortgage was neither registered nor accompanied with possession. On the 12th September, 1869, M. executed a mortgage of the same property to K. for Rs. 200. That mortgage was registered, but not accompanied with possession. In 1876, K. sued M. on his mortgage of 1869. The defendant was not a party to that suit. While the suit was pending, M. on the 23rd February, 1876, executed another mortgage of the property to the defendant for Rs. 200, including the amount then due to him (defendant) on his mortgage of 1866. That mortgage was registered and accompanied with possession. On the 3rd March 1876, K. obtained a decree against M., directing satisfaction of the mortgage-debt out of the mortgaged property. The property was sold under that decree, and purchased by K. himself for Rs. 50. He obtained a certificate of sale dated the 8th March, 1877, which was not registered. On the 25th July, 1877, K. sold the property to the plaintiff for Rs. 75-4-0. The deed of sale was not registered. In 1878 the plaintiff sued for possession of the property. The defendant relied upon his mortgages of 1866 and 1876.

Held that the defendant's unregistered mortgage of 1866, which was optionally registrable, was not over-ridden by K's mortgage of 1869, which was compulsorily registrable and that, therefore, the plaintiff, whose title was derived from K, was not entitled to recover the property from the defendant without redeeming the mortgage of 1866, on which he (defendant) was entitled to rely. The registration of K's mortgage in 1869 could not have operated as notice to the defendant when he was taking his mortgage in 1866, and, therefore, was not such a registration in relation to the defendant's earlier mortgage as to fall within the scope of the rule that registration is equivalent to possession.

The operation of K.'s *lis pendens* was sufficient to bind the defendant so far as his mortgage of 1876 was concerned. The doctrine of *lis pendens* is in force in [170] British India. That doctrine rests, as stated by Turner, L.J., in *Bellamy* v. *Sabine*(1), not upon the principle of constructive notice, but upon the fact that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail. This reason

(1) 1 De. G. & Jo. 566.

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for refusing recognition to alienations *pendente lite* made by a party to a suit is as fully applicable in the case of a registered as of an unregistered conveyance.

Bhikun v. *Bhaiji* (1 B.H.C.R. 19) and *Goverdhun* v. *Sakharam* (8 Harr. S.D.A. Rep. 189) commented upon.

[Diss., 23 C. 790 ; 27 C. 358=4 C.W.N. 490 ; 15 M. 268=2 M.L.J. 95 ; 13 C.P.L.R. 43 ; 7 C.W.N. 11 ; **F.**, 18 B. 444 ; 26 B. 538 ; 6 Bom. L.R. 1043 ; (1050) ; 12 Bom. L.R. 940 ; **R.**, 13 A. 28=10 A.W.N. 216 ; 6 B. 193 (200) ; 6 B. 490 (493) ; 9 B. 427 ; 10 B. 453 ; 12 B. 678 ; 13 B. 229 (233) ; 17 B. 741 (744) ; 18 B. 332 (335) ; 20 B. 290 ; 27 B. 452; 16 C.L.J. 394=17 Ind. Cas. 927 ; 1 C.P. L.R. 19 (22) ; U.B.R. (1897—1901) 573 ; **D.**, 22 C. 185 ; 13 M. 383 ; 16 Ind. Cas. 29=105 P.R. 1912=185 P.L.R. 1912=153 P.W.R. 1912.]

THIS was a second appeal from the decision of Rao Bahadur M. G. Ranade, First Class Subordinate Judge of Dhulia, with appellate powers, varying the decree of the Second Class Subordinate Judge of Yaval, in the district of Khandesh.

The facts of the case are briefly mentioned in the head-note above, and will be found fully stated at the commencement of the judgment of the High Court.

The case first came before Westropp, C.J., and F.D. Melvill, J., who referred it to a Full Bench on the 28th July, 1880.

The principal question argued before the Full Bench was, which of the rival mortgages was entitled to priority.

The arguments of the pleaders on both sides and the authorities cited in support of their respective contentions are mentioned in the judgment of the Court.

Shantaram Narayan, for the appellant.

Manekshah Jehangirshah, for the respondent.

JUDGMENT.

The following is the judgment of the Full Court delivered by

WESTROPP, C.J.—Motiram Khubchand, owner of a house and site (situate in the district of Khandesh), the subject of dispute in this suit, mortgaged those premises, on the 10th December, 1866, to the defendant, Dasrat Khubchand, for Rs. 95. That mortgage (Ex. 33) is unregistered and was without possession. The consideration being less than Rs. 100, the registration of the mortgage was optional under s. 18 of Act XX of 1866, which Act came into force on the 1st May, 1866, and was, accordingly, applicable to this mortgage.

On the 12th September, 1869, Motiram Khubchand executed a mortgage (Ex. 36) of the same premises to Kachru for [171] Rs. 200. That mortgage was registered on the 22nd September, 1869, but was unaccompanied by possession.

Early in 1876, a suit (No. 186 of that year) was instituted by Kachru against Motiram Khubchand on the mortgage of 1869. Dasrat was not a party to that suit. During its pendency—that is to say, on the 23rd February, 1876—Motiram Khubchand executed another mortgage (Ex. 34) of the same premises to the defendant, Dasrat, for Rs. 200, including therein the amount then due on the former mortgage of 1866 (Ex. 33) to Dasrat. This mortgage (Ex. 34) was registered, and purported to be a mortgage with possession. Dasrat did obtain possession under it; but, apparently, not until the 7th August, 1874, which is the date of a rent note (Ex. 35), whereby Motiram Khubchand (the mortgagor) attorned as tenant to Dasrat.

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In the above-mentioned suit of Kachru, a decree (Ex. 15) was pronounced in his favour on the 3rd of March, 1876, for Rs. 190, then remaining due to him on the mortgage of 1869, which decree authorized him to recover that amount as against the mortgaged premises. Those premises were sold by public auction under that decree to Kachru himself for Rs. 50, and a certificate of sale (Ex. 4) was given to him under date the 8th of March, 1877. That certificate has not been registered; but, the purchase-money being under Rs. 100, the registration was optional (Act XX of 1866, s. 18). Upon the 25th of July, 1877, Kachru sold the same premises to the plaintiff Lakshmandas Sarupchand for Rs. 75-4, as appears by an unregistered conveyance of that date (Ex. 32). The purchase-money being less than Rs. 100, the registration was optional (Act III of 1877, s. 18).

In 1878 the plaintiff brought this suit to recover possession of the premises from the defendant Dasrat, who was then in possession. The latter, in his written statement in defence, relied on his mortgages of 1866 and 1876.

The Subordinate Judge of Yaval decreed immediate possession to the plaintiff. On appeal by the defendant, that decree was varied by the First Class Subordinate Judge of Dhulia, Mr. Ranade, who decreed that the plaintiff, on paying to the defendant Rs. 190, being the sum then due to him on the mortgage of [172] 1866, might redeem that mortgage, and not until then recover possession of the premises.

The present (second) appeal, (which has been heard by a Full Bench), has been made by the plaintiff against that decree of Mr. Ranade.

The reasoning of the Courts below seems to have been this:—The Subordinate Judge of Yaval ruled that Dasrat's mortgage of 1876 for Rs. 200, notwithstanding its registration and the possession subsequently obtained under it by him, could not prevail against Kachru's registered mortgage of 1869 for Rs. 200; inasmuch as Dasrat's mortgage of 1876 was executed during the pendency of Kachru's suit upon his mortgage of 1869, and that Dasrat could not be permitted to rely upon his mortgage of 1866, because it was merged in, and superseded by his mortgage of 1876. While Mr. Ranade (the First Class Subordinate Judge with appellate powers) held that the mortgage to Dasrat of 1876 failing as against the mortgage to Kachru of 1869, Dasrat was entitled to fall back upon his mortgage of 1866.

As to the ruling of the Judge of first instance, that Dasrat's mortgage of 1876, having been executed during the pendency of the suit of Kachru on his mortgage of 1869, could not prevail against that mortgage and the decree and sale founded upon it, we would observe that, as decided in *Balaji* v. *Khushalji* (1) and other cases there cited, the doctrine of *lis pendens* is in force in British India; but in *Balaji* v. *Khushalji* neither of the competing mortgages was registered. In *Gulabchund* v. *Dhondi* (2) to the decision in which the Chief Justice was a party, the earlier deed, on which the *lis pendens* had been brought and to which priority was given, was unregistered and the later deed was registered. That case was decided on the principle of *lis pendens*. The

(1) 11 B.H.C.R. 24; and see *Tukaram* v. *Gopala*, Sp. App. 22 of 1872, Printed Judgments of 1872, 11th April. *Ganeshbhat* v. *Chimnajirav* (Printed Judgments of 1874, p. 189). *Manual* v. *Sanacapalli*, 7 M.H.C.R. 104; and see Hyde 160; and see Sec. App. 130 of 1879 (Printed Judgments of 1879, p. 362).

(2) 11 B.H.C.R. 64.

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Chief Justice has examined his note of the argument in that case, and finds that the remark of Sir William [173] Grant, M. R., in *Wyatt* v. *Barwell* (1)—that "even a *lis pendens* is not deemed notice" for the purpose of postponing a registered to an unregistered conveyance—was not mentioned by counsel, nor was it noticed by the Court in its judgment. The contest in *Wyatt* v. *Barwell* was between an unregistered deed of 1806 and two subsequent registered deeds of 1808 and 1812 respectively. There was not any *lis pendens* in the case; so Sir William Grant's remark was simply *obiter dictum*. Moreover, it proceeded upon the theory that *lis pendens*, when it operates, does so by way of notice. That theory has since been wholly exploded by the case of *Bellamy* v. *Sabine* (2)—now the leading authority on the subject of *lis pendens*. Lord Justice Turner there said: "The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a Court of Equity as to implied constructive notice. It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation, that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding." And the Lord Chancellor (Cranworth) said that it is immaterial whether the "alienees had or had not notice of the pending proceedings. If this were not so, there would be no certainty that the litigation would ever come to an end." The reason given for refusing recognition to an alienation *pendente lite* made by a party to a suit, seems to be as fully applicable and as true in the case of a registered as of an unregistered conveyance.

In *Raj Kishen Mookerjee* v. *Radha Madhub Holdar* (3)—before Couch, C.J., and Glover, J—it appeared that an attachment against M. D. was, on 7th November, 1871, laid upon his immoveable property under a common money decree against him. That property was then and previously had been subject to a mortgage by M. D to D. In December, 1871, D. instituted a [174] suit against M. D. on that mortgage, and obtained a decree by consent upon it against him in February, 1872, directing the realization of what was due on the mortgage by a sale of the mortgaged property. On the 18th of April, 1872, the property was sold to P. under the attachment of the 7th November 1871, on the common money decree; but, a few days previously, D. had, under the decree of February, 1872, in his mortgage suit caused the same property to be attached. Subsequently, that property was, under the execution upon D.'s mortgage decree, sold to D. The certificate of sale, on the 18th April, 1872, to P. was registered. The certificate of sale to D. was not registered, and, therefore, could not be used in evidence, but there was an order confirming the sale to D. in evidence. The Court held that, notwithstanding that P's certificate of sale was registered, and that D.'s certificate of sale was not registered, yet P. was bound by D.'s *lis pendens* on his mortgage, which *lis* had been commenced before the sale to P. Whether or not the High Court were right in deciding *Gulabchand* v. *Dhondi* (4) on the

(1) 19 Ves. 435, 439; see *Jennings* v. *Bond*, 2 Jo. & Lat. 720-744: *Buckley* v. *Lanauze*, Lloyd & Goold's Rep. *temp.* Plunket, 327, for a limitation of the decision in *Wyatt* v. *Barwell*.

(2) 1 De. G. & Jo. 565. (3) 21 W.R.C.R. 349. (4) 11 B.H.C.R. 64.

principle of *lis pendens* (as we think it was), the decree made in that case was, independently of that principle, sustainable on the last point glanced at in the judgment, but not decided (1), *viz.*, that the unregistered mortgage of 1866 to Gulabchand, being for Rs. 15 only, was optionally registrable under Act XX of 1866, whereas the mortgage of 1869 to Dhondi, being for Rs. 251, was compulsorily registrable under the same Act, and therefore, there was not any competition between them The same point recurs in this case. and we shall presently mention the authorities for that position. In the present case, if the *lis pendens* of Kachru be not (as we think it is) sufficient to bind Dasrat so far as his mortgage of 1876 is concerned, yet, although Kachru had not possession, his mortgage of 1869, being both prior in execution and registration to Dasrat's mortgage of 1876, has precedence over it. For that position we shall presently mention the authorities, as the same point recurs in another part of this case. Eventually, in the argument before this Court, it was admitted that Kachru's mortgage of 1869 must be preferred to Dasrat's mortgage of 1876. The question which remains is, whether **[175]** Dasrat's mortgage of 1866 is overridden by Kachru's mortgage of 1869.

Before this Court the value, according to the Hindu law as enforced in this Presidency, of possession under one of two competing conveyances of land or other immoveable property, has been dwelt upon on behalf of the plaintiff, and it has been argued for him that registration is here regarded as equivalent to possession, and, therefore, that Kachru's mortgage of 1869, which was registered, though without possession, must have precedence over Dasrat's mortgage of 1866, which was both unregistered and unaccompanied by possession. On these points cases have been cited. Those and others we shall now mention.

It is true that our Bombay Reports, from their commencement, contain cases from which, taken in the aggregate, it may safely be laid down as a general, but not an invariable, rule, that possession in the grantee or assignee is deemed essential amongst Hindus and Mahomedans to the complete transfer of immoveable property either by gift, sale or mortgage. Amongst those cases are *Tuljaram* v. *Meean Mahomed* (2); *Mahomed Khan* v. *Keerajee* (3); *Kundoojee* v. *Ballajee* (4); *Gopal* v. *Dinker* (5); *Dondee* v. *Santram* (6); *Hurry* v. *Pandoo* (7); *Dhondee* v. *Sukaram* (8); *Rutunbhartee* v. *Kisunbhartee* (9); *Antaji* v. *Kesho* (10); *Durga* v. *Hurta* (11); *Chuttrajee* v. *Krishna* (12); *Mulapa* v. *Rungapa* (13); *Raychand* v. *Ganesh* (14); *Kullo* v. *Ramji* (15); *Bank of Hindustan* v. *Premchand*

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(1) 11 B.H.C.R. 68. (2) 2 Bor., 147 (2nd ed.).
(3) Sel. Ca. S.D.A. Bom. 187 (reprint). (4) Bellasis R. 5.
(5) Bellasis R. 58. (6) Morris, Part I, 56. (7) Morris, Part I, 105.
(8) 2 Morris Rep. 247. (9) 4 Morris Rep. 44.
(10) 4 Morris Rep. 165.
(11) 7 Harr. (S.D.A. Bom.), 342. (12) 8 Harr. 193.
(13) 9 Harr. 499.

(14) 8 Harr., 246 (Sp. Ap. 75 of 1861). An examination, however, of the record in that case shows that it was unnecessary to rest the decision there made, in favour of the deed of sale of the 7th January, 1855, to Ganesh, on his possession under it and on the want of possession by Raychund under his mortgage of Chaitur Sud. 3rd, Shakh 1773 (A.D. 1851), inasmuch as the mortgage was unregistered, and the deed of sale was registered; and, consequently, the latter was, by virtue of Reg. IX of 1827, s. 6, cl. 1, entitled to preference.

(15) Sp. Ap. 73 of 1872, Printed Judgments of 1872, September 9, so far as it relates to possession only.

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[176] *Raichand* (1); *Balaram Nemchand* v. *Appa Dulu* (2) as explained in *Sambhubhai* v. *Shivlaldas* (3); *Kanu* v. *Krishna* (4); *Kachu* v. *Kachoba*(5); *Govinda* v. *Ravji* (6); and the comment thereon of West, J., in *Lalubhai* v. *Bai Amrit* (7); *Parmaya* v. *Sonde* (8); *Anant* v. *Arjun* (9), and especially *Lalubhai* v. *Bai Amrit* (10) where the Hindu law as to possession in the grantee or assignee is elaborately discussed by West, J., and *Hasha* v. *Ragho* (11), in which his decision was followed.

To that general rule, as to the necessity for possession, exceptions, which may be classified as follows, have, in many instances, been permitted, *viz.*:—

1*stly*. Cases of *san*-mortgages in Gujarat: *Jiwa* v. *Mobhut* (12); *Bhugwan* v. *Veerchund* (13); *Dulputram* v. *Umrutlal* (14); *Dulputram* v. *Kishore* (15); *Mathuradas* v. *Kalia* (16); *Itcharam* v. *Raiji* (17); *Ranchodas* v. *Ranchodas* (18); Special Appeal 618 of 1870 (19).

2*ndly*. Cases in which the only contending parties are: (*a*) the mortgagor (or volunteers claiming under him) and the mortgagee (or persons claiming under him); (*b*) or the vendor (or volunteers claiming under him) and the vendee (or person claiming under him): *Chintaman* v. *Shivram* (20); *Shaik Adam* v. [177] *Baba* (21). And see the observations of West, J., in *Lalubhai* v. *Bai Amrit* (10) upon the dicta in *Girdhur* v. *Daji* (22).

3*rdly*. Cases in which the subsequent mortgagee or purchaser became such with actual notice of the earlier mortgage or sale without possession —*Gopal* v. *Krishnappa*(23); *Waman Ramchandra* v. *Dhondiba*(24); Special Appeal No. 205 of 1870(25); *Shaik Adam* v. *Baba*(26); *Balaram Nemchand* v. *Appa Dula* (2). These were all cases subsequent to the repeal of Acts I and XIX of 1843 by Act XVI of 1864. In *Gopal* v. *Krishnappa* the earlier unregistered mortgage was executed in 1864 before Act XVI of 1864 came into force, but the registered deed of sale was executed in 1867; consequently, there was not any competition between those documents in respect of registration. See Indian Law Reports, 1 Bombay, 574; Indian Law Reports, 4 Bombay, 459; Indian Law Reports, 2 Madras, 108; 10 Calcutta Weekly Reporter, 65; 11 Calcutta Weekly Reporter, 559; 13 Calcutta Weekly Reporter, 446; 22 Calcutta Weekly Reporter, 3; *Vishnu*

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(1) 5 B.H.C.R.A.C.J. 33 (84). The case of *Hurjivan* v. *Naran* (4 B.H.C.R.A.C.J., 31, and see the remarks *per* West, J., 2 B. 325) referred to in *The Bank of Hindustan* v. *Premchand Raichand*, can scarcely be regarded as a proper instance of the application of the general rule; the defendant being only a tenant, his possession was that of the landlord, his donor, *Harjivan* v. *Naran* seems to be inconsistent with *Sakalchand* v. *Dayabhai* (4 B.H.C.R.A.C.J. 70) decided by the same Judges. The Court there directed an inquiry whether the defendant obtained possession by permission of the donors. If he did, his possession was merely that of his landlords, the donors, and could not prevent their right of gift or sale.

(2) 9 B.H.C.R. 121.
(3) 4 B. 89, (92).
(4) 5 B.H.C.R. A.C.J. 147.
(5) 10 B.H.C.R. 491.
(6) Printed Judgments of 1876, p. 274.
(7) Printed Judgments of 1880, p. 57.
(8) 4 B. 459.
(9) Printed Judgments of 1880, p. 293.
(10) 2 B. 299.
(11) *Vide supra*, 6 B. p. 165.
(12) Morris, Pt. II, 117.
(13) 8 Harr. 177.
(14) *Ibid*, 179.
(15) *Ibid*, 181.
(16) 7 B.H.C.R.A.C.J. 24.
(17) 11 B.H.C.R. 41.
(18) 1 B. 581.
(19) Printed Judgments of 1871, April 24th.
(20) 9 B.H.C.R. 304.
(21) Sp. Ap 286 of 1872, Printed Judgments of 1872, December 9th.
(22) 7 B. H.C. R. A.C.J. 4.
(23) 7 B. H.C. R. A.C.J. 60.
(24) 4 B. 126; and see *Nemai* v. *Kokil*, 6 C. 534.
(25) Printed Judgments of 1871, January 19th.
(26) Printed Judgments of 1872, Dec. 9th, Sp. Ap. 286 of 1872.

v. *Pandharav*, Printed Judgments of 1881, p. 146; *Virchand* v. *Purshotum*, Printed Judgments of 1881, p. 86; Indian Law Reports, 3 Allahabad, 488, 505; 6 Madras High Court Reports. 391.

4*thly*. If the mortgagee be in possession, the mortgagor, though out of possession, may charge or sell his equity of redemption (1).

5*thly*. Where the mortgagor had not put the mortgagee in possession, and, subsequently to the mortgage, had been wrongfully **[178]** dispossessed, it was held that the mortgagee might, within twelve years after the ouster of the mortgagor, bring a suit against the wrong-doers for possession of the mortgaged land—*Krishnaji* v. *Govind* (2). That case was followed in *Balkrishna* v. *Vyankatrav* (3), where, however, it is not quite clear in the judgment whether the mortgagor, Gajabai, had been in possession at the creation of the mortgage (4). See the comment on the former case in Indian Law Reports, 2 Bombay, 323.

6*thly*. It has been held that possession by a judgment-debtor having a good title, is not necessary to validate a judicial sale of his lands—Special Appeal, 519 of 1870 (5).

7*thly*. It appears to have been held that possession by the vendee, who became such at a judicial sale, is not necessary to validate the sale to him as against subsequent attaching creditors under money decrees or as against purchasers at the sales under such decrees—*Raghoo* v. *Vittoo*(6), [which case, however, might have been decided on the ground that the original vendee's (Vittoo's) deed was registered on the 12th November, 1858, and that such registration was equivalent to possession]; *Sunbussapa* v. *Moodkapa* (7), *Naroo* v. *Konheir* (8) [in which case the conditional sale deeds appear to have been unregistered]; *Bhakun* v. *Bhaiji* (9). An examination of the record in the last-mentioned case shows that the report omits some of the principal facts in that case. The mortgage to which preference over the judicial sale was given, was for Rs. 40, dated 21st May, 1860, and *registered* on the 16th January, 1861. The judicial sale (for Rs. 43) took place on the 19th February in the same year. The certificate of sale to the purchaser was dated the 1st March, 1861, and was *not registered*. Even if it had been registered, the priority of registration of the mortgage would, by virtue of Regulation IX of 1827, s. 6, cl. 1, which was in force at that time, have given it precedence over the sale, and rendered **[179]** the mortgage independent of the rule as to possession. That case is also open to Mr. Justice West's remarks upon it in Indian Law Reports, 2 Bombay, 321. Those four cases overruled *Hormusjee* v. *Pandurung* (10), which independently of the ground upon which it was overruled, seems to have been erroneous; inasmuch as Haroon, the mortgagor, having attorned as tenant to Hormusjee, the mortgagee, the possession of Haroon was the possession of Hormusjee, and, therefore, good as against an attaching creditor.

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(1) *Per* West, J., 10 B.H.C.R. 494 and in 2 B. 326. Notwithstanding *Venku* v *Jivu* (Sp. Ap. 509 of 1871), Printed Judgments of 1872, 11th March. And see 2 Macn. H. L. 303-N.; S.D.A. Dec. Beng. of 1848, 305. Macpherson on Mortgages, 92 (5th ed.); 9 W. R. 150—243; 10 W.R. 126; 22 W.R. 389, and numerous other cases. See, too, *Reg.* v. *Anaji*, 1 B.H C.R. 93.

(2) 9 B.H.C.R. 275. (3) Sp. Ap. 254 of 1874, Printed Judgments of 1876, p. 13.

(4) See *Girdhur* v. *Dzji*, 7 B.H.C.R.A.C.J. 4.

(5) Printed Judgments of 1871, March 13th.

(6) Sp. Ap. 52 of 1861, repd., 8 Harr. 229.

(7) Sp. Ap. 40 of 1861, repd., 578 Harr. 235.

(8) Sp. Ap. 27 of 1861, repd., 8 Harr. 289 (290). (9). 1 B.H.C.R. 19.

(10) 3 Morris Rep. 27.

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8*thly*. The purchaser at a judicial sale may re-sell without previously taking possession : *Govind* v. *Govinda* (1) ; *Nanabhai* v. *Tukaram* (2).

The effect of registration upon the general rule as to the necessity for the delivery of possession has next to be considered. For this purpose we must distinguish between the enactments as to registration previous to the year 1864 and the enactments in and subsequently to that year. The earlier decisions, by which registration has, in India, been permitted to supply the want of possession, may be attributed to the absolute preference accorded to priority of registration by the enactments in force previously to 1864. Bombay Regulation IX of 1827, s. 6, cl. 1, enacted that "every deed or other writing transferring or mortgaging immoveable property situated within the zilla, if registered in the register of title-deeds, shall, without regard to the date of execution, if proved to be valid, be preferred to, and satisfied before, any deed of the nature specified in s. 3, cl. 1, either subsequently registered or not registered at all." That enactment, however, contained a proviso, depriving a person, taking with notice of the unregistered deed, of the preference which otherwise would have been given to his registered deed. That proviso was repealed by Act I of 1843(3). Act XIX of 1843, s. 2, gave to registered deeds of sale or gift of such property absolute preference over unregistered deeds of sale or gift of the same, whether the latter be executed prior or subsequent to the registered deed, and **[180]** preference to registered deeds of mortgage of like property over unregistered deeds of mortgage of the same, whether the latter be executed prior or subsequent to the registered deed of mortgage, and excluded the operation of notice. It has been held by the Privy Council that a deed, registered under Act XIX of 1843 cannot be deprived of the priority given by it, except there be fraud on the part of the grantee(4). That Act created no competition between deeds of sale or gift on the one hand and deeds of mortgage on the other, but left the first part of Bombay Reg. IX of 1827 unrepealed which had that effect (5). The Middlesex Registry Act (6) and the Yorkshire Registry Acts (7), and still more distinctly and effectually the Irish Registry Act (8), like Bombay Reg. IX of 1827 and Act XIX of 1843, give the preference to priority of registration. The subsequent Indian Acts (9) proceed upon a different principle. Under them a registered instrument operates from the time at which it would have commenced to operate if no registration had been required or made, and not from the time of its registration —a rule which applies both to compulsorily and optionally registrable instruments. Compulsorily registrable instruments under Act XVI of 1864, if not registered cannot be received in evidence in any civil proceeding in any Court or acted on by any public officer (10). Under Act XX of 1866 such instruments, if unregistered, are inadmissible in evidence in any civil proceeding in any Court, cannot be acted on by any

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(1) 1 B. 500. (2) Printed Judgments of 1873, p. 186.

(3) Acts I and XIX of 1843 have been repealed by Act XVI of 1864 without re-enacting their provisions as to the inefficiency of notice.

(4) 10 M. I. A. 220.

(5) 1 B.H.C.R. 60 ; 4 B.H.C.R. A. C. J. 68, 69, 143.

(6) 7 Anne, c. 20. s. 1.

(7) 2 & 3 Anne, c. 4, s. 1 : 6 Anne, c. 35, s. 1 ; 8 Geo. II, c. 6, s. 1.

(8) 6 Anne, c. 2, s. 4, Ir. ; 4 B. 145, note.

(9) Act XIX of 1864, s. 67 ; Act XX of 1866, s. 47 ; Act VIII of 1871, s. 47 ; Act III of 1877, s. 47.

(10) Act XVI of 1864, s. 13.

public servant, and cannot affect any property comprised therein (1). Under Acts IX of 1871 (2) and III of 1877 (2), such instruments, if unregistered, cannot affect any immoveable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property. Under Act XVI of 1864 (3), Act XX of 1866 (4) and Act VIII of 1871(4), an optionally **[181]** registrable instrument, if duly registered, is preferred to another optionally registered instrument if unregistered and relating to the same property, whether such other instrument be of the same nature as the registered instrument or not (5).

We shall now mention some of the reported cases in which, under Reg IX of 1827, s. 6, cl. 1, or Act XIX of 1843, registration has been held to supply the place of possession.

Rambuggut v. *Sadanandrao*(6), decided in 1841—a Poona case—was a struggle between two mortgagees of a house. One mortgage (dated in 1832) was registered, but without possession. The other mortgage (dated in 1835) was unregistered, but was with possession. The Sadar Divani Adalat of Bombay on the ground of its registration gave priority to the mortgagee of 1832. That case turned upon Reg. IX of 1827, s. 6, and was between Hindus.

Govind v. *Ganeshram* (7) is a case in which a registered mortgage of land in the zilla of Ratnagiri was in 1853 preferred, by the Sadar Divani Adalat, under Act XIX of 1843, to an earlier, but unregistered, mortgage of the same land with possession which had been obtained under a decree upon that mortgage. The notice to the registered mortgagee, arising from the possession of the earlier, but unregistered, mortgagee, was rendered of no effect by the then existing enactments as to notice, *viz.*, Act I of 1843, s. 1, and Act XIX of 1843, s. 1—both since repealed.

Umaji v. *Hari* (8), decided in 1867 by the High Court—an Ahmednagar case—was a competition between rival mortgagees of a field. One mortgage was executed upon the 10th and registered on the 14th December, 1860, but was unaccompanied by possession. The other mortgage, dated 19th October, 1861, was unregistered, but the mortgagee obtained possession under a decree recovered upon it in 1863. The High Court (Tucker and Gibbs, JJ.) held that "registration made the defendant's mortgage **[182]** (*i.e.*, the mortgage of 1860) complete, though he did not obtain possession of the property mortgaged at the time the deed to him was executed, and any subsequent disposition of the equity of redemption by the mortgagor would be subject to the first mortgagee's lien." The mortgage of 1860 was, accordingly, preferred to that of 1861, notwithstanding the possession obtained under the latter. That case (as appears from the dates) turned upon Act XIX of 1843.

Sundar v. *Gopal* (9), decided by the High Court (Couch, C.J., and Warden, J.) in 1867, was a case from the Konkan. It was a struggle between a registered mortgagee, *without pessession* against a subsequent purchaser *with possession*. The dates show that it must have turned wholly upon the force of Reg. IX of 1827, s. 6 (10), and not upon any

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(1) S. 49; and see 8 B.H.C.R. A.C.J. 163 ; 4 B. 89.
(2) S. 49.
(3) S. 68.
(4) S. 50.
(5) 9 W.R. 547 ; *Panha* v. *Zulla*, Printed Judgments of 1875, p. 125 ; *Hari* v. *Ramji*, Printed Judgments of 1878, p. 122 ; see also *Fuzludeen* v. *Fakir Mahomed*, 5 C. 336.
(6) Bellasis Rep. 9 and see p. 70.
(7) Morris Rep. Pt. III, p. 13.
(8) 4 B.H.C.R., A.C.J. 143.
(9) 4 B.H.C.R. A.C.J. 68.
(10) See 1 B.H C.R, 60 ; 4 B.H.C.R. 69.

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theory as to registration being notice. The mortgage was dated 22nd March, 1851. The deed of purchase was dated 12th March, 1855. The mortgage was registered on the 19th October, 1859, and the deed of purchase (as an examination of the records shows) was registered on the 24th December, 1860 (1). The registration of the mortgage, being subsequent to the execution of the deed of purchase, could neither have afforded notice nor the means of obtaining notice of the mortgage to the purchaser before he made his purchase and obtained possession of the mortgaged premises; but the registration of the mortgage, being anterior to the registration of the deed of purchase, gave, by virtue of Reg. IX of 1827, s. 6, to the mortgagee priority over the purchaser notwithstanding his possession. The parties were Hindus.

But in *Goverdhun* v. *Sukharam* (2) a Mahomedan mortgaged land in the Konkan to a Hindu, and his (the Mahomedan's) son subsequently sold it to two other Hindus with his father's consent. Possession was given to the purchasers. and not to the mortgagee. The report being defective, we have examined the record, which shows that the mortgage (Ex. 27) was dated 21st November, 1852, and registered 17th December, 1852; and that the deed of **[183]** sale (Ex. 3) was dated the 10th November. 1854, and registered on the 3rd January, 1855. That deed is erroneously stated in the report of the judgment of the Court to be unregistered. The Mahomedan law officer gave it as his opinion in the Assistant Judge's Court that a mortgage without possession is, according to Mahomedan law, incomplete, and that as against a subsequent purchaser with possession the mortgagee would have no lien on the property (3), and so the Assistant Judge decided. The Sadar Divani Adalat, however, held that the defendant (the purchaser) being a Hindu, the Hindu and not the Mahomedan law was, by Bombay Reg. IV of 1827, s. 26, applicable; and that by "Hindu law, as it prevails in the Deccan" (and we presume in the Konkan also) "not in Gujarat, a mortgage without possession is invalid as against a purchaser with possession," and, therefore, and because Act XIX of 1843 created no competition between a mortgage and a deed of sale, the purchaser should be preferred to the mortgagee, although his mortgage was registered. The Sadar Divani Adalat, however, forgot that Bombay Reg. IX of 1827 was then unrepealed, and that it did create such a competition, and, independently of and above Hindu or Mahomedan law, gave priority to the document first registered, whether or not it was accompanied by possession. One of the Judges of the Sadar Divani Adalat who decided that case was, as a Judge of the High Court, a party to a subsequent decision in *Purshotam Jagjivan* (4), in which it was held that, with the exception of so much of Reg. IX of 1827 as recognizes the effect of notice of a prior sale or incumbrance, that Regulation is unrepealed by Acts I and XIX of 1843. With that case *Goverdhun* v. *Sukharam* (2) is inconsistent, and not only is unsustainable on the question as to the effect of registration under Reg. IX of 1827, but also seems to be open to doubt in respect of the view there entertained that the validity of a mortgage by a Mahomedan to a Hindu, if the latter be the defendant in a suit, should be tested by Hindu-law—a proposition which seems to involve a serious misapprehension and misapplication of Bombay

(1) The latter important fact is omitted in the report. (2) 8 Harr. S.D.A.R. 189.
(3) See Macn. M. L., ch. xi, pl. 15, pp. 74, 354; Hedaya, Vol. IV, Bk. XLVIII, ch. i, pp. 189; 190. *Mahomed Khan* v. *Keerojee*, Sel. Ca. S. D. A. Bom. 187.
(4) 1 B.H.C.R. 60.

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[184] Reg. IV of 1827, s. 26 (1). It could not have been intended by the Legislature that the power of a Mahomedan to convey should be measured by the Hindu law.

The registration law applicable to *Kanu* v. *Krishna* (2) was Reg. IX of 1827, s. 6, the mortgage bearing date in 1858 and the certificate of sale in 1862. Of these, the former was unregistered and without possession, but in 1859 a decree for possession was passed upon it. Possession, however, was not given, as the decree remained unexecuted until after the certificate of sale in 1862 had been granted, registered, and possession given under it to the vendee. The Court held the decree for possession not equivalent to possession, and, therefore, preferred the registered certificate of sale.

The dates of the mortgage and certificate of sale in competition in *Hari* v. *Madhavji* (3) are omitted in the report. An examination of the record enables us to say that the mortgage, there relied upon by the defendant, was dated the 10th December, 1862, and registered on the 16th December, 1862. The certificate of sale was dated the 28th of June, 1864, and was not registered. The absence of possession by the mortgagee was relied upon by the plaintiff, who claimed under the certificate of sale. The Court, however, held that the registration of the mortgage dispensed with the necessity of possession. Inasmuch as Act XVI of 1864 did not come into force until the 1st of January, 1865, that case must be regarded as dependent upon Reg. IX of 1827, s. 6.

Before noticing the cases falling under Act XVI of 1864 and subsequent Acts, we must admit that, neither in England nor in Ireland, is *mere* registration held to amount to notice to subsequent mortgagees or purchasers. The first reported case to that effect seems to be *Bedford* v. *Backhouse* (4), decided A. D. 1870 by Lord King, C., on the Middlesex Registry Act (5). The reason which he gave was: "Though the Statute avoids deeds, not registered **[185]** as against purchasers yet it gives no greater efficacy to deeds that are registered than they had before." There A lent money on a duly registered mortgage. Afterwards B lent money on the same lands upon a duly registered mortgage. Then A advanced a further sum on the same lands on a duly registered mortgage and without knowledge of B's mortgage. It was held that A might tack his second advance to his first advance, and recover both amounts in priority to B, as the registration of B's mortgage was not constructive notice to A of that mortgage. *Wrightson* v. *Hudson* (6), also a case of tacking, was decided in the same way by Sir Joseph Jekyll, M.R., in A.D. 1737, and on the same grounds (7). It was said by him that though Wrightson might have searched the register, yet he was not bound to do so. This view, although now established law in England, has not become so with perfect unanimity. In *Hine* v. *Dodd* (8), decided in 1741, Lord Hardwicke, C., said that the Middlesex Registry Act, 17 Anne, c. 20, is a notice and a notice to everybody. In *Morecock* v. *Dickins* (9), registration in Middlesex of an equitable mortgage was, in A. D. 1768, held not to be

(1) *Vide Sarkies* v. *Prosonomoyee Dassee*, 6 C. 794. (805, 808) as to the somewhat similar enactment 21 Geo. III, c. 70, s. 17.

(2) 5 B.H.C.R.A.C.J. 147.

(3) 8 B.H.C.R.A.C.J. 50.

(4) 2 Eq. Ca. Ab. 615. pl. 12; and see *Calor* v. *Cooley*, 1 Cox. 182 (A. D. 1785); *Wiseman* v. *Westland*, 1 Y. & Jer. 117; *Wyatt* v. *Barwell*, 19 Ves. 435.

(5) 7 Anne, c. 20.

(6) 2 Eq. Ca. Ab. 609, pl. 7.

(7) It is important to remember that tacking is not permitted in the Indian Mofussil. 2 B.L.R. Appx. 45=11 W. R. 310; 5 B.L.R. 463.

(8) 2 Atkins 275.

(9) Ambler 678.

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constructive notice of itself to a subsequent legal mortgagee so as to take from him his legal advantage. Lord Camden so decided with apparent reluctance. He said that it "becomes a serious point whether a Court of Equity should not say that in all cases of registry, which is a public depository for deeds, and to which any person may resort, a subsequent purchaser ought not to search, or be bound by notice of the registry, as he would of a decree in equity or judgment at law." Speaking of *Bedford* v. *Backhouse*, he said: "A thousand neglect to search have been occasioned by that determination, and, therefore, I cannot take upon me to alter it. If it was a new case, I should have my doubts: but the point has been closed by that determination, which has been acquiesced in ever since." In cases in Ireland coming within the Registry Act (6 Anne, c. 2, Ir.), tacking is not permitted (1). But Lord Redesdale **[186]** while adopting that rule, said in *Bushell* v. *Bushell* (2) "that the fourth clause of the Irish Statute, 6 Anne, c. 2, which clause has not any equivalent in the English Acts, gives to all deeds, registered as thereby directed, efficacy in law and equity according to the priority of the time of registry, except in case of fraud, as where the party has had notice *aliunde*" (3). He added: "It is true the registry is considered as notice to a certain extent; no person thinks of purchasing an estate without searching the registry, and, if he searches, he has notice (4); but I think it cannot be considered as notice to all intents, on account of the mischief that would arise from such a decision. For, if it to be taken as constructive notice, it must be taken as notice of everything that is contained in the memorial; if the memorial contains a recital of another instrument, it is notice of that instrument; if a fact, it is notice of that fact. It strikes me to be a better and safer way of considering it to let the words of the Act operate by their own force, and that the registry shall not be taken as notice more here than it is in England or in the Colonies, where it has been uniformly held that even enrolments are not considered as notice." He expressed himself nearly to the same effect in *Latouche* v. *Dunsany* (5) and in *Underwood* v. *Lord Courtown* (6).

The rule, however, is different in America. There the Courts hold that registration is, in itself, constructive notice to subsequent purchasers and mortgagees. Chancellor Kent (7), with reference to the observations of Lord Redesdale last quoted, says: "But Lord Camden was evidently of a different opinion, though he held himself bound by precedents to consider the registry not notice. In this country the registry of the deed is held to be constructive notice of it to subsequent purchasers and mortgagees, but we do not carry the rule to the extent apprehended by Lord **[187]** Redesdale." And Mr. Justice Story (8), after referring to the English doctrine—which, as we have seen, was not the result of unanimous opinion amongst the Judges who have dealt with the subject—says (para. 403): "In America, however, the doctrine has been differently settled; and it is

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(1) *Secus* in cases in Ireland not coming within the Registry Act.
(2) 1 Sch. & Lef. 90.
(3) 1 Sch. & Lef. 101, 102. For the Stat. 6 Anne, c. 2, Ir., see 4 B. 145, note (1).
(4) If a purchaser searches the registry he will, in England, be presumed to have notice, unless he rebuts the presumption by showing that the search was made for a period only in which the registered deeds are not included, *Hodgson* v. *Dean*, 2 Sim. & St. 221.
(5) 1 Sch. & Lef. 137, 157.
(6) 2 Sch. & Lef. 41, 64.
(7) 4 Comm. Part VI, s. 58, p. 203 (10th ed.).
(8) 1 Comm. Eq. Jur. (11th ed.), p. 420.

uniformly held that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property (1). The reasoning, upon which that doctrine is founded, is the obvious policy of the Registry Acts, the duty of the party purchasing under such circumstances to search for prior incumbrances, the means of which search are within his power, and the danger (so forcibly alluded to by Lord Hardwicke (2) of letting in parol proof of notice or want of notice of the actual existence of the conveyance. The American doctrine certainly has the advantage of certainty and universality of application; and it imposes upon subsequent purchasers a reasonable degree of diligence only in examining the titles to estates."

In *Wyatt* v. *Barwell* (3) Sir Willam Grant, M.R., in 1815, while following the English precedents, admitted that their policy had been much doubted.

It will presently appear that what Mr. Justice Story says has in America been deemed to be "the obvious policy of the Registry Acts" has, in this Court, been preferred to the less logical and more artificial doctrine which has been permitted to prevail in England.

Turning now to cases in which the conflict has been between instruments registrable under the modern Indian Acts relating to registration—*viz.*, Act XVI of 1864, Act XX of 1866, Act VIII of 1871 and Act III of 1877—which did not (as did the previous enactments) give priority of rank to priority of registration, we still find that registration has been treated as an equivalent for possession where the instrument *earlier in date* has been registered prior to the execution of the second instrument, but unaccompanied by possession. Possession has been deemed by Hindu and Mahomedan law, as interpreted in this Presidency, to amount [188] to notice of such title as the person in possession may have, and any other person who takes a mortgage or other charge upon, or purchases immoveable property without ascertaining the nature of the claim of him in possession, does so at his own risk. This is so in England also. See *Daniels* v. *Davison* (4) and the other cases, in which its authority has been recognised, collected in Sugden's Vendors and Purchaser (5) and 2 White and Tudor, 61, *et seq.* But here the Courts have gone a step further, and have held registration under Act XVI of 1864 and the subsequent Acts to amount to notice, and, therefore, to atone for the absence of, and to be a sufficient substitute for possession in the validation of, title. In *Motiram Hiraji* v. *Hari Raghunath* (6) the Court (Melvill and Kemball, JJ.), after observing that the mortgage held by the judgment-creditor (who put up the property for sale in the Civil Court in virtue of such mortgage) was registered, said: "We think that the registration must be considered to be a legal notice to intending purchasers of the existence of the mortgage." An examination, which we have made of the record in that case, shows that the mortgage in question was dated 24th January, 1868, and registered on the 27th January, 1868. It was from Kachari Bhikari to Vasudev Ganesh for Rs. 125 advanced by the latter to the former, and was subsequently assigned by Vasudev Ganesh to the plaintiff Hari Raghunath on the 6th February, 1872. In 1869 a house, part of the

(1) *Parkhurst* v. *Alexander*, 1 Johns, Chanc. 394; *Schutt* v. *Large*, 6 Barb. 373.
(2) *Hine* v. *Dodd*, 2 Atk. 275.
(3) 19 Ves. 435.
(4) 17 Ves. 433.
(5) 11th ed., p. 1052, ch. XIII, s. 1, pl. 50. V.C. Wigram, V.C., in Hare, 60 says: "Possession is *prima facie* evidence of a seisin in fee."
(6) Printed Judgments for 1877, p. 4.

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mortgaged property, was brought to judicial sale by Vasudev Ganesh in execution of a money decree, and he said nothing of his mortgage. An attempt was made to bring the case within the authority of *Tukaram* v. *Ramchandra* (1), where the concealed mortgage was unregistered; but the Court held that the registration of the mortgage of the 24th January, 1868, was sufficient notice.

In *Narsiv* v. *Kriparam* (2) it appears from the record that a house belonging to Mango Lohar was mortgaged by him on the 3rd September, 1867 (registered 10th September, 1867), for **[189]** Rs. 300 to Mansuram Devaji (first defendant), who on the 23rd January, 1872, made a sub-mortgage of it to the plaintiff Kriparam for Rs. 250. That sub-mortgage was registered on the 24th January, 1872, but was without possession. Mansuram Devaji on the 1st April, 1873, again sub-mortgaged the same house for Rs. 325 to Narsiv, the second defendant. That sub-mortgage was registered on the 2nd April, 1873. Narsiv, subsequently having sued Mansuram Devaji on the second sub-mortgage, obtained possession of the house through the Civil Court. Plaintiff Kriparam, the first sub-mortgagee, then sued Mansuram Devaji and Narsiv for possession of the house. It was held by the High Court that Kriparam's sub-mortgage having been both executed and registered before the execution or registration of the sub-mortgage to Narsiv, albeit that Kriparam's mortgage was not accompanied by possession, had priority over the latter under which Narsiv obtained possession, "inasmuch as the doctrine of this Court is, notwithstanding what was said in *Bushell* v. *Bushell* (1) Schoales and Lefroy, 103) by Lord Redesdale that registration operates as notice, the object of a Registration Act being to give intending purchasers and mortgagees notice of prior transactions affecting immoveable property." The observations of Melvill, J., to the same effect in *Icharam* v. *Raiji* (3), were there referred to, where he said that registration secures the same object which the Hindu Law wished to secure by requiring possession, *viz.*, notice to subsequent incumbrancers of the existence of a prior incumbrance. He also cited Story's Eq. Jur. (9th ed.), s. 395. In *Nanabhat* v. *Lakshman* (4), the mortgage was dated the 3rd January, 1868, and registered on the 25th January, 1868. The Court (Melvill and Kemball, JJ.) held that the registration of that mortgage was sufficient notice of it to a subsequent purchaser. So in *Balaji* v. *Ramchandra Ganesh Kelkar* (5) a mortgage of the 5th August, 1866, registered under Act XX of 1866 (which came into force on the 1st May, 1866), but unaccompained by possession, was preferred to a subsequent purchase at a Court sale apparently followed by possession; the Court observing that the plaintiff's mortgage being registered was valid, **[190]** without possession. A similar decision was made in *Radhabai* v. *Shamrav Vinayak* (6), where it was said "that the mortgage of Sitabai, being prior in date to that of Radhabai and being registered, is, under the rulings of this Court, equivalent to possession, as amounting to notice to subsequent incumbrancers or purchasers, Sitabai's claim against the land is prior to that of Radhabai."

Under Acts XVI of 1864, XX of 1866, and VIII of 1871 there is not any competition in respect of registration between a document compulsorily registrable and a document optionally registrable. This has been

(1) 1 B. 314.
(2) Sp. Ap. 119 of 1876, Printed Judgments of 1877, p. 26.
(3) 11 B. H. C.R. 41 (42).
(4) Printed Judgments of 1877, p. 83.
(5) 11 B.H. C.R. 37.
(6) Printed Judgments of 1881, p 218.

often so decided: *Cheniram* v. *Bunsiram* (1); *Hamed Bux* v. *Bundra Bux* (2); *Vithu* v. *Ramji* (3); *Oghra Singh* v. *Ablaki Kooer* (4). The unregistered bill of sale in the last mentioned case was dated the 27th January, 1876, and was in consideration of Rs. 95 The registered bill of sale was dated the 28th February, 1876, and was in consideration of Rs. 200. The former being optionally and the latter being compulsorily registrable, the Court gave priority to the former, being of opinion that there was not any competition between them under s. 50 of Act VIII of 1871.

In the present case, however, it has been contended that the registration, in 1869, of Kachru's mortgage (dated in the same year) for Rs. 200 was equivalent to possession, and, therefore, gave to it priority over Dasrat's unregistered mortgage for Rs. 95 of 1866. Inasmuch, however, as it was impossible that such registration in 1869 could have operated as notice to Dasrat when he was taking his mortgage in 1866, it is not such a registration, in relation to Dasrat's earlier mortgage, as to fall within the scope of the rule that registration is equivalent to possession. The High Court has more than once refused to extend that rule to cases where the second in time of two rival instruments is that which is registered. In *Radhabai* v. *Rama* (5) the plaintiff's mortgage, dated 7th August, 1872, for Rs. 82, and, therefore, **[191]** optionally registrable, was unregistered. The defendant Hari Prasad's mortgage, dated 21st March, 1873, for a sum exceeding Rs. 100, and, therefore, compulsorily registrable, was registered. Neither mortgagee was in possession. The Court (Melvill and Kemball, JJ.) refused to hold that registration by the second incumbrancer, Hari, was as against the earlier incumbrancer, the plaintiff, equivalent to possession, and rested its refusal on the ground that such registration could not have operated as notice to the plaintiff. In *Lalubhai Surchand* v. *Bai Amrit* (6), already referred to, there were two deeds of sale of the same house (each for a consideration exceeding Rs. 100) executed on the same day (July 2nd, 1868). Upon the first executed on that day the consideration was then in part paid, but possession was not given. Upon the second the whole of the consideration was paid on that day, and possession was given to the vendee; he had not any actual notice of the first deed. Both deeds were registered—the second on the 7th July, 1868; the first (as appears from the record but not in the report) was presented for registration on the 9th December, 1868, but, owing to a long litigation as to the right to register it was not actually registered until the 26th July, 1872. It was argued for the vendee under that deed that being registered it operated from the time of its execution, and that such registration was equivalent to possession. But the Court preferred the second deed, it being accompanied by actual possession; and it being impossible that the subsequent registration of the first deed should operate as notice to the vendee under the second. That decision was followed in *Hasha* v. *Ragho* (7), which was a contest between two deeds of sale—one being to the plaintiff Hasha and dated the 28th February, 1878, but, though lodged on that day for registration, not registered until the 29th April, 1878; the other deed of sale, dated 1st of April, 1878, was to the defendant Ragho, who lodged it for registration on the 2nd of April, 1878, but it was not registered until the 26th May, 1878. The delay in

(1) Printed Judgments of 1874, p. 49.
(2) 2 N.W.P. R. 37.
(3) Printed Judgments of 1875, p. 297.
(4) 4 C. 536.
(5) Sp. App. 320 of 1875, Printed Judgments of 1876, p. 83.
(6) 2 B. 299.
(7) *Supra*, 6 B. 165.

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registration of both deeds was solely caused by the misconduct of the Sub-Registrar. The Court being of opinion that the registration of the plaintiff's deed, not having been effected until after the execution of the defendant Ragho's deed, could **[192]** not possibly have operated as notice to Ragho of the plaintiff's deed, and, therefore, could not be equivalent to possession, and observing that Ragho was a purchaser for valuable consideration without notice (either actual or constructive) of the plaintiff's purchase, and had taken the precaution of obtaining possession, and that both purchasers were Hindus, held that it could not deprive Ragho of the benefit of his possession.

Lastly, it was contended that the new legislation, contained in s. 50 of Act III of 1877, was retrospective so far as to apply in case where the rival instruments were registrable under Acts XVI of 1864, XX of 1866 or VIII of 1871, and that it was not necessary, in order to render that section applicable, that one of the instruments should be registered under Act III of 1877. But we cannot yield to that argument, as in this respect also there have been two rulings of this Court hostile to such a contention—*Kanitkar* v. *Joshi* (1) and *Selat Icharam* v. *Deve Govindram* (2), in both of which the question was carefully considered. To the same effect is *Bhola Nath* v. *Baldeo* (3) decided by the High Court at Allahabad, which Court has held that it is otherwise where the second and compulsorily registrable instrument has been registered under Act III of 1877. And see *Gangaram* v. *Bansi* (4) *Lachmandas* v. *Dipchand* (5), as to which two last mentioned decisions it would be extra-judicial for us now to give any opinion—the point there dealt with not arising in the present case.

For these reasons we hold that Dasrat's unregistered mortgage of 1866 which was optionally registrable, is not overridden by Kachru's mortgage of 1869, which was compulsorily registrable, and, therefore, that the plaintiff, whose title is derived from Kachru, is not entitled to recover the property from Dasrat without redeeming the mortgage of 1866, as he is entitled to fall back on that mortgage according to the well-established practice of this Court (6). The decree of the First Class **[193]** Subordinate Judge, Mr. Ranade, is, accordingly, affirmed with costs of this appeal.

This judgment runs to a very great length, caused however, by the desire to collect and classify (for the use of the Courts subordinate to this Court), so far as may be, the authorities on the difficult subject of the relation in which the Hindu and Mahomedan rule as to possession stands to the Registration Acts which from time to time have been in force in this Presidency.

Decree affirmed.

(1) 5 B. 442. (2) Printed Judgments of 1881, 263; 5 B. 653.
(3) 2 A. 198. (4) 2 A. 431. (5) 2 A. 851.
(6) *Hirachand* v. *Bhaskar*, 2 B.H.C.R. 198.
NOTE.—See *Dinanath* v. *Auluck*, 7 C. 753 (765).

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APPELLATE CIVIL.—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill and Mr. Justice Kemball.

SOBHAGCHAND GULABCHAND AND ANOTHER (*Original plaintiffs*), *Appellants v.* BHAICHAND AND OTHERS (*Original defendants*), *Respondents.** [14th February, and 3rd March, 1882.]

Registration—Possession—Notice—San-*mortgage in Gujarat—Priority — Priority as between a purchaser at execution sale and prior mortgagee by unregistered* san-*mortgage—Plea of purchase without notice—At an execution sale the Court sells only what the judgment-debtor could honestly sell—Acts XX of* 1866 *and VIII of* 1871.

The general rule in the Presidency of Bombay is that, amongst Hindus, possession is necessary in order to perfect a transfer of immoveable property by mortgage or deed of sale as against subsequent incumbrancers or purchasers. The main ground of this rule is that possession is notice to all subsequent intending mortgees or purchasers of the title of the party in possession.

It is, however, the established and judicially recognized custom of Gujarat, that possession is not necessary in the case of a *san*-mortgage (1) to validate it as against subsequent mortgagees or purchasers. The necessity of possession being thus dispensed with, it seems to follow that *san*-mortgage, in other respects good, is valid as against a subsequent mortgagee or purchaser, whether or not such mortgagee or purchaser has notice of the *san* mortgage. To hold that a subsequent mortgagee or purchaser for valuable consideration, and without notice of a *san*-mortgage is entitled to priority over it, would be tantamount to depriving the *san*-mortgagee of the benefit of the custom that possession is unnecessary.

A buyer of property at an execution sale who registers his certificate of sale does not thereby acquire a title free from the obligation arising from a *san*-mortgage of **[194]** previous date. When the Court sells the right, title and interest of a judgment-debtor in property, it cannot be regarded as selling more than the judgment-debtor himself could honestly sell. He could honestly sell only subject to any equities existing against himself on the property; and if by concealment of a *san*-mortgage he sold property as free of that charge, he would commit a fraud. The Court cannot be deemed to do that which would be a fraud if done by the judgment-debtor. If, then, the Court sell only the right, title and interest of the judgment-debtor subject to all existing equities against the property sold the registration of the Court's conveyance (*viz.*,) certificate of sale) cannot enlarge the scope of that conveyance and discharge the property from any unregistered incumbrance which was binding on the judgment-debtor.

Per MELVILL, J.—Such perfect security is now afforded by registration that there appears to be hardly room for the plea of purchase without notice. Seeing that a purchaser may secure himself against all unregistered mortgages without possession by simply taking possession or registering his conveyance, he is, if he omit to do so, *in pari delicto* with the prior mortgagee, and it is difficult to see how he is entitled to any relief.

In the case of execution sales under s. 287 of the Civil Procedure Code (Act X of 1877), notice is given to purchasers that the sale only extends to the right, title and interest of the judgment-debtor and that the Court ordering the sale, does not warrant the title. This being so, it seems clear that a person who buys an avowedly doubtful title, and pays for it on that understanding, cannot claim to be a purchaser without notice.

The provision of the Registration Act, that a registered document shall take effect as regards the property comprised therein against every unregistered document relating to the same property, only applies where the two documents are antagonistic, not where effect can be given to each without infringement of the other: *e g.*, if A mortgages or sells to B, and afterwards C purchases at a Court's sale the then existing right, title and interest of A, he (C) buys in the first case the equity of redemption and in the second nothing at all.

* Special Appeal, No. 540 of 1873.

(1) In Gujarat a *san*-mortgage or *sankhat* means mortgage without possession.

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Registration, therefore, cannot help him, for on the very face of his certificate of sale the property comprised therein is not the property previously conveyed to B, but only the residue of A's estate after such conveyance.

Sirdhar v. *Hakamchand* (1) referred to.

Mukandas v. *Shankardas* (2) dissented from.

Lakhmichand v. *Kastur* (3) approved.

[F., 6 B. 538 (540) (F.B.) ; 10 A.L.J. 114 = 16 Ind. Cas. 625 ; 6 Bom. L.R. 1013 (1015) ; 62 P.R. 1908 = 7 P.W.R. 1908 ; Appr., 11 B. 588 (590) ; R., 9 A. 97 ; 13 A. 28 = 10 A.W.N. 216 ; 34 A. 651 = 10 A.L.J. 222 = 17 Ind. Cas. 19 ; 6 B. 490 (493) ; 6 B. 495 (497) ; 8 B. 489 (492) ; 9 B. 10 (15) ; 10 B. 453 ; 17 B. 375 (380) ; 20 B. 158 (163) ; 21 B. 205 (219) ; 22 B. 945 ; 27 B. 452 ; 29 B. 234 = 7 Bom. L.R. 200 ; 7 M. 248 ; 9 M. 495 ; 1 N.L.R. 125 ; 142 P.R. 1908 (F.B.) ; 1 S.L.R. 104 ; U.B.R. (1897—1901) 573 ; D., 16 B. 91 (110) ; 8 Ind. Cas. 846 = 9 M.L.T. 207.]

THIS was a special appeal from the decision of H. Birdwood, District Judge of Surat, affirming, with a slight variation, the decree of the Second Class Subordinate Judge of Vagra.

Sobhagchand and his brother sued to recover Rs. 149, being principal and interest due on a *san*-mortgage, executed to their father, Gulabchand (deceased) by Udesing and Bhavabhai (defendants [195] 1 and 2), on the 1st July, 1870, for Rs. 99-4-0. The plaint was filed on the 23rd November, 1872. The plaintiffs prayed for a decree against the mortgaged property.

Defendants 1 and 2 did not appear. Rupchand, defendant No. 3 answered (*inter alia*) that on the 24th July, 1872, he purchased the property at a Court sale for Rs. 77, without notice of the plaintiffs' mortgage; that he had obtained a certificate of sale dated the 23rd November, 1872; that it was registered on the 5th February, 1873 ; that the plaintiffs' mortgage was neither registered nor accompanied with possession; that he was not, therefore liable for their mortgage.

The Subordinate Judge allowed the plaintiff's claim as against defendants Nos. 1 and 2 personally, but disallowed it as against the mortgaged property. On appeal the District Judge affirmed that decree in appeal, with a slight variation as to costs. The plaintiffs thereupon specially appealed to the High Court.

The case was first heard by WEST and PINHEY, JJ., who referred it to a Full Bench with the following remarks:—

WEST, J.—The plaintiffs' mortgage in this case is dated 1st July, 1870. The property mortgaged was sold in execution of a money decree on the 24th July, 1872. The certificate of sale was not taken out until 29th January, 1873. It was registered on the 5th February, 1873. In the meantime the plaintiffs, on the 23rd November, 1872, had instituted a suit against the defendants and the judgment-debtor to enforce their mortgage. Upon this state of facts, the District Judge has decided that, as the mortgage-deed was and is unregistered, it cannot prevail against the sale which has been registered. The contention for the plaintiffs now is that the defendants purchased the property subject to their claim, that the registration of their mortgage was optional, its amount being under Rs. 100, and that their suit having been instituted before the certificate of sale was obtained, that certificate conveyed no right that was not subject to such a right as they might be able to establish against the judgment-debtor and the mortgaged property.

(1) 8 B.H.C.R. A.C.J. 75. (2) 12 B.H.C.R. 241. (3) 9 B.H.C.R. 60.

It was said in the case of *Mathuradas* v. *Kalia Khushal* (1) by Sir R. Couch that there is an essential difference between a sale [196] in execution and a private sale by the judgment-debtor and that a purchaser at an execution sale buys the right of the judgment-debtor burdened with all valid liens created by him. This decision was followed in the case of *Chintaman* v. *Shivram* (2) and in Special Appeal 289 of 1873, decided 15th September, 1873. In the case of *Mathuradas* v. *Kalia Khushal* neither the mortgage nor the certificate of sale was registered : in *Chintaman* v. *Shivram* both were registered. The registration of the mortgage in the latter case might perhaps have afforded a sufficient basis for the decision, but the learned Judges prefer to adopt the principle that charges valid against the judgment-debtor are valid against the auction-purchaser with or without notice. On the other hand, the Privy Council, in *Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee* (3), say: "Their Lordships think that the title of a judgment-creditor or a purchaser under a judgment (and) decree cannot be put on the same footing as the title of a mortgagor..... The possession of a purchaser under such circumstances is really not the possession of a person holding in privity with the mortgagor, or holding so as to be an acknowledgment of the title of the mortgagee..... Their Lordships are assuming that no notice was proved of the mortgage title given to or acquired by the purchaser." In the recent case, again, of *Brojendro Coomar Roy* v. *The Chairman of the Dacca Municipality* (4), Sir R. Couch says: "It cannot be laid down that a person who purchased at a sale by auction in execution of a decree.....is not to be considered in the position of a purchaser for value."

These judgments seem hard to reconcile with the view hitherto taken by this Court which has rested on the judgment of Sir R. Couch already referred to and those delivered in *Dhondu* v. *Ramji* (5) by Tucker and Gibbs, JJ.

The District Judge has considered that the question of notice was immaterial in this case ; but if the position of a purchaser in execution is to be put on the same footing as that of an ordinary purchaser for value, the question of notice at once becomes important. The ordinary doctrine of the English Courts, as indicated [197] by the language of the Privy Council already quoted, and the case of *Le Neve* v. *Le Neve* and those collected under it in White and Tudor's Leading Cases, seems to be that notice, actual or constructive, of an equitable right in property must be brought home to the purchaser in order to infect his title. There must, at least, have been something to put him on inquiry, and something, as the Privy council say in *Ramcoomar* v. *McQueen* (6), of a specific character suggesting a particular inquiry. But with respect to the case of a *san*-mortgage, such as that which the plaintiff here set up, Sir M. Westropp, C. J., in *Girdhar* v. *Hakamchand* (7) says that the *onus* of proving he had no notice of an existing *sankhat* ; lies on the purchaser of the mortgaged property by a private contract. This may imply that the special position of mortgagee under a *san*-mortgage is such as to shift the *onus* as to proof of notice from him to the purchaser. The contention in the present case is that, even if the vendees at an execution sale are to be deemed purchasers for value, it still rests on them to prove that they brought without notice of the plaintiffs' mortgage.

(1) 7 B. H. C. R. 24. (2) 9 B.H.C.R. 304. (3) 14 M. I. A. 101.
(4) 20 W.R. 223. (5) 4 B. H. C. R. A. C. J. 114.
(6) 11 B.L. R. 46. (7) 8 B. H. C. R. 75.

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The District Judge considered that this case was to be distinguished from that of *Mathuradas* v. *Kalia* (1) by the circumstance that here the certificate of sale was registered, while in the earlier case it was not. Section 50 of the Registration Act XX of 1866, he says, provides that the registered sale shall take effect against the unregistered prior mortgage, though the registration of both was optional. Against this it is argued that no right was fully acquired by the defendants until the certificate was issued to them (Special Appeal 255 of 1873), and, before that occurred, the plaintiffs had instituted their suit to enforce their mortgage-lien. Hence it is contended that the final transfer to the defendants of the judgment-debtor's rights was encumbered with any charge which in their then pending suit the plaintiffs could establish against the property, which suit could proceed as well upon an unregistered as on a registered mortgage. If the purchase by the defendants had been a transaction wholly subsequent to the institution of the plaintiffs' suit, this contention would apparently **[198]** be unanswerable. The result of the *lis pendens*, according to the decision in Special Appeal 406 of 1872 and the decisions in the *Land Mortgage Bank* v. *Ram Rutton Neogy* (2) and *Raj Kishen Mookerjee* v. *Radha Madhub Holdar* (3) would bind the property in the hands of its purchasers, the defendants. But here the case is somewhat different. The defendants had agreed to buy and had paid for the property before the present suit was instituted. All that remained to do was to take out the certificate of sale. Equity would, in such circumstances, regard the purchasers as the real owners, although a conveyance had not been made to them; so, to some extent, did the plaintiffs by suing them; and mere notice intermediately acquired by them of some prior dealing with the property, which, as against the judgment-debtor, would have affected the good faith of his sale to them, would not, according to the case of *Blackwood* v. *London Chd. Bank of Australia* (4) prevent the purchasers from getting a complete legal title if they could. According to this analogy, the defendants here might complete their inchoate title, if *bona fide* acquired, notwithstanding the institution of the suit, supposing the institution of the suit operated only as notice of the plaintiffs' claim. But if the suit would ordinarily operate on the property itself so as to bind it prospectively with any right which might be established in that litigation, then a somewhat nice question arises. The Roman law (Mackeldey, s. 200) regards property in suit as *res litigiosa* incapable, during the pendency of the litigation, of alienation or of longer possession in good faith. This, however, is not inconsistent with rights, already equitably acquired, being formally completed during the litigation. The English maxim is merely *pendente lite nihil innovetur*, and its purpose to prevent proceedings being made abortive by conveyances made in order to evade decrees. It cannot, I think, be reasonably said that the completion of the inchoate sale by taking the certicate is an innovation—a right newly created or attempted to be created, the recognition of which would enable a defendant to cheat a plaintiff of the fruits of his proceedings. Whatever rights the sale, the certificate, and the registration of the certificate could convey to the defendants in this case, apart from the institution of the suit **[199]** on the mortgage, are not, therefore, in my view, any the less conveyed through its institution.

We are thus brought back to the questions—(1) whether a purchase in execution, without notice, of property mortgaged by a *sankhat* optionally

(1) 7 B.H. C.R. A.C. J. 24.
(2) 21 W.R. 270.
(3) 21 W.R. 349.
(4) L.R. 5 P.C. 92.

registrable, unregistered and without possession, is subject to the mortgage.

If not subject, (2) whether the burden rests on the auction-purchaser of proving that he had not notice of the mortgage, or on the mortgagee, of proving actual or constructive notice.

If otherwise subject, (3) whether the purchaser, who registers his certificate of sale, thus acquires a title free from obligation arising from the mortgage.

These questions are of great practical importance; and, as different views have been expressed as to the principles on which their solution depends, I think it desirable that they should be referred to Full Bench.

PINHEY, J.—I concur in this reference.

The authorities cited before the Full Bench are mentioned in their judgments.

Shantaram Narayan, for the appellants.

Nakindas Tulsidas, for the respondents.

The following are the judgments of the Full Bench :—

JUDGMENTS.

WESTROPP, C.J.—The plaintiffs sue to enforce an unregistered *san*- mortgage of the 1st July, 1870, for Rs. 99-4-0 against the lands thereby mortgaged by the first and second defendants to Gulabchand, the deceased father of the plaintiffs. That mortgage being for a sum less than Rs. 100, was, under Act XX of 1866, s. 18, optionally registrable, and being a *san*- mortgage was without possession. The third defendant Rupchand resisted the enforcement of the plaintiff's mortgage against the lands, on the ground that he (Rupchand) was a purchaser of those lands for valuable consideration and without notice of the mortgage. His purchase was made at a judicial sale of the right, title and interest of the mortgagors in the lands on the 24th July, 1872. The purchase-money was Rs. 77. The certificate of sale was not prepared or furnished to Rupchand until subsequently to the **[200]** 23rd November, 1872, on which day the plaintiffs commenced their present suit. The registration of the certificate was upon the 5th of February, 1873. A question arose in the Division Court (West and Pinhey, JJ.) as to whether the issuing and registration of the certificate, being subsequent to the commencement of this suit, could affect it (1), but that question is not amongst those submitted to this Full Bench. For the purpose, however, only of answering the questions which are submitted to us by the Division Bench, the view which we take of the case admits of our assuming that the date of the certificate of sale and its registration are not open to objection in point of time.

Those questions are: (1) " whether a purchase in execution, without notice, of property mortgaged by a *sankhat* optionally registrable, unregistered and without possession, is subject to the mortgage. If not subject, (2) whether the burden rests on the auction-purchaser of proving that he had not notice of the mortgage, or on the mortgagee of proving actual or constructive notice. If otherwise subject, (3) whether the purchaser, who registers his certificate of sale, thus acquires a title free from obligation arising from the mortgage.

In the recently decided Full Bench case, *Lakshmandas* v. *Dasrat* (2), the general rule in this Presidency, that, amongst Hindus, possession is

(1) See *Carlisle* v. *Whaley*, L. R. 2 Eng. and Ir. Appeals, 391.
(2) 6 B. 168 *supra*.

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necessary to perfect a transfer of immoveable property by mortgage or deed of sale as against subsequent incumbrancers or purchasers, is discussed. Many, if not all, of the exceptions to that rule are there mentioned —the first of those exceptions being *san*-mortgages in the province of Gujarat; and the following cases are mentioned in illustration of that exception:—*Jiva* v. *Mobhut* (1); *Bhagvan* v. *Virchand* (2); *Dulpatram* v. *Amritlal* (3) *Dulpatram* v. *Kishore* (4); *Mathuradas* v. *Kalia* (5), *Itcharam* v. *Raiji* (6): *Ranchoddas* v. *Ranchoddas* (7); Special Appeal 618 of 1870 (8). It must be regarded as the established and judicially recognized custom of Gujarat that possession **[201]** is not necessary in the case of a *san*-mortgage to validate it as against subsequent mortgagees or purchasers. This being so, it must be remembered, that the main ground of the general rule, as to the necessity of possession is that it is notice to all subsequent intending mortgagees or purchasers of the title of the party in possession; and whereas in the case of *san*-mortgages the necessity of possession is dispensed with, it seems to follow that *san*-mortgage, in other respects good, is valid as against a subsequent mortgagee or purchaser, whether or not such mortgagee or purchaser has notice of the *san*-mortgage. To hold that a subsequent mortgagee or purchaser, for valuable consideration and without notice of a *san*-mortgage is entitled to priority over it, would be tantamount to depriving the *san*-mortgagee of the benefit of the custom that possession is not necessary to validate such a mortgage against subsequent mortgagees or purchasers. We, therefore, think that the first question referred to this Full Bench, *viz.*, "whether a purchase in execution, without notice, of property mortgaged by a *sankhat* optionally registrable, unregistered and without possession, is subject to the mortgage," must be answered in the affirmative. So far as the case of *Girdhar* v. *Hakamchand* (9) implies the contrary, we think that it cannot be sustained.

The answer to the first question being in the affirmative, the second question relating to the onus of proof as to notice does not arise.

The third question is, "whether the purchaser, who registers his certificate of sale, thus acquires a title free from obligation arising from the mortgage." The impression that the Registration Acts were intended as much for the benefit of purchasers at judicial sales as for mortgagees or private purchasers, and that it was advantageous that this should be so, not only for the protection of purchasers at judicial sales, but also to judgment-creditors and judgment-debtors, as being conducive to the production of a fair price for the property, led me to concur in the judgment in *Makandas* v. *Shankardas* (10). But on reconsideration I do not think that the registered deed of sale to Shankardas Dadabhai in that case, which rested on a previous judicial sale to **[202]** Kalidas under a mere money decree, was rightly preferred to the unregistered *san*-mortgage to Shankardas Haribhai, which bore date before the judicial sale to Kalidas. Kalidas could not convey to Shankardas Dadabhai more than the Court had conveyed to Kalidas. When the Court sells the right, title and interest of a judgment-debtor in property, we think that it cannot be regarded as selling more than the judgment-debtor could himself honestly sell. He could honestly sell only subject to any equities existing

(1) Morris, Part II, 117. (2) 8 Har. 177. (3) 8 Har. 179.
(4) 8 Har. 181. (5) 7 B.H.C.R. A.C.J. 24.
(6) 11 B.H.C.R. 41. (7) 1 B. 581.
(8) Printed Judgments of 1871, April 24th.
(9) 8 B. H. C. R. A. C. J. 75. (10) 12 B.H.C.R. 241.

against himself on the property; and if, by concealment of a *san*-mortgage, or other mortgage, he sold property as free of that charge, he would commit a fraud. The Court cannot be deemed to do that which would be a fraud if done by the judgment-debtor. If, then the Court sell only the right, title and interest of the judgment-debtor subject to all existing equities against the property sold, the registration of the Court's conveyance (the certificate of sale) cannot enlarge the scope of that conveyance, and thus discharge the property from any unregistered incumbrance which was binding on the judgment-debtor. The case of *Mathuradas* v. *Kalia* (1), is not in point here, neither the mortgage nor the certificate of sale there having been registered. Nor is *Chintaman* v. *Shivram* (2), both the mortgage and the subsequent certificate of sale in that case being registered, and the registration of the mortgage being sufficient to uphold the preference shown to it over the certificate of sale. *Lakhmichand* v. *Kastur* (3) is in point; the deed of private sale there being unregistered, and the subsequent certificate of judicial sale being registered. The deed of private sale was nevertheless preferred; the Court being of opinion that the purchaser at the judicial sale purchased subject to all existing equities which would bind the judgment-debtor. That decision seems to us to be strongly supported by the somewhat analogous cases decided on the English Statute 1 and 2 Vic., c. 110, s. 13, and the similar Irish Statute 3 and 4 Vic., c. 105, s. 22. Of these cases, *Whitworth* v. *Gaugain* (4) deserves particular attention. There Wigram, V.C., held that, notwithstanding the Statute 1 and 2 Vic., c. 110, s. 13, an equitable mortgagee retains his right in equity to enforce his security against [203] the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an elegit without notice of the mortgage. The judgment of Lord Lyndhurst on appeal (when the decision of Wigram, V.C., was affirmed) is especially instructive (5). After mentioning that an equitable mortgage gives a special lien on the property, he says: "A judgment has relation to the time when it is entered up. It will not affect any *bona-fide* conveyance for value before that time, for it only attaches upon that which is then, or afterwards becomes the property of the debtor. But the rule is not confined to his property at law. If it is charged in equity before the entry of the judgment, the judgment will not affect such charge." It can only attach upon the interest which remains in the debtor, *viz.*, the legal estate subject to the equitable charge. After mentioning some cases in equity he continued: "If such, then, be the effect of the judgment, how does the elegit operate? By Statute 13, Edw. I, c. 18 'when a debt is recovered, the Sheriff shall, at the election of the plaintiff, deliver to him all the chattels of the debtor, and a moiety of the land, until the debt be levied by a reasonable extent.' The land of which a moiety is to be delivered is the land that is bound by the judgment. The judgment and the writ are in this respect co-extensive. If that is so in law, it is equally so in equity. The equitable interests which prevail against the judgment, prevail equally against the writ." After pointing out that the same rule holds in the case of an extent against the goods of a debtor to the Crown, he proceeded to say that "in the argument on the part of the defendant, the case was put upon the footing of a purchaser for value without notice, who would be preferred to a prior equitable mortgagee. But a distinction in this respect has always been made between a

(1) 7 B.H.C.R. A.C.J. 24.
(2) 9 B.H.C.R. 304.
(3) 9 B.H.C.R. 60.
(4) 3 Hare 416=1 Phillips, 728.
(5) 1 Phillips, 728.

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judgment obtained without notice of a previous charge and a purchase on mortgage." He refers (*inter alia*) to the following passage in the *Forum Romanum* : " In the case of a judgment-creditor the original security was only personal, and a Court of Equity will not suffer the person that originally lent upon the security of land to have the security destroyed by one who did not lend upon that security." He next referred to the Statute 1 and 2 **[204]** Vic., c. 110, which enables the Sheriff to deliver to the judgment-creditor the whole instead of a moiety of the land of the debtor, and observes : " But though the operation of the writ (of elegit) is rendered more extensive against the property of the debtor, it does not appear that the equitable interests in the property, so taken in execution, are affected by the Act, or that the law in this respect has been varied." Referring to the 13th section as enacting that a judgment shall operate as a charge on lands, &c , to which the debtor shall at the time of entering up the judgment or at any time afterwards be entitled for any estate or interest whatever in law or equity, or over which he shall have an unfettered power of disposing for his own benefit, and that the judgment-creditor shall have the same remedy in a Court of Equity against the property so charged as if the charge had been made by an agreement in writing. Lord Lyndhurst says : " The effect of this Statute is not only to make the judgment attach upon the property which was not before bound by it, but also to give it the force of an express charge. With respect to the former proviso, although the judgment may affect a greater extent of property belonging to the debtor, there is nothing to vary the rule as to the equities to which the property may be liable. The whole beneficial interest of the debtor is bound, not the beneficial interest which a stranger may have in the property " In *Abbott* v. *Stratten* (1), Sir Edward Sugden also expressed his approval of Vice-Chancellor Wigram's decision in *Whitworth* v. *Gaugain*. The case of *Watts* v. *Porter* (2), so far as the opinion of the majority of the Court of Queen's Bench was concerned, (Erle, J., *dissentiente*) looked in the opposite direction, but it has been overruled — *Pickering* v. *Ilfracombe Railway Co.*(3) ; *Robinson* v. *Nesbitt* (4) ; *Beavan* v. *Lord Oxford* (5); *Kinderley* v. *Jervis* (6). In *Eyre* v. *McDowell* (7), an important and well-argued case, it was held by the House of Lords that a registered judgment under the provisions of the Statute 3 and 4 Vic., c. 105, and the Statute 13 and 14 Vic., c. 29 only affects such property as the debtor at the time **[205]** of the judgment lawfully possessed as of his own right, and over which he had the power of disposition, and, therefore, does not displace a previous mortgage which is unregistered. And in *Evans* v. *Evans* (8), it was held by Lord Chancellor Blackburne in the Court of Chancery in Ireland that a judgment is not, as against the lands of the judgment-debtor, entitled, under the Statutes 10, Car. I, Sess. 2, c. 3 Ir. and 3 and 4 Vic., c. 105, to priority over a voluntary conveyance of anterior date executed by the judgment-debtor when not in embarrassed circumstances.

For these reasons we think that the third question must be answered in the negative.

Reverting to the first question, we should observe that two Privy Council cases were relied upon at the Bar as showing that there is no distinction between a private purchaser and a purchaser at a judicial sale.

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(1) 3 Jo. & Lat. 603 (614, 615). See also *Meghji* v. *Ramji*, 8 B.H.C.R. A.C.J. 169.

(2) 3 E. & B. 743. (3) L.R. 3 C.P. 235. (4) L.R. 3 C.P. 264.
(5) 6 D. M & G. 492. (6) 22 Beavan, 1. (7) 9 Ho. of Lords Ca. 619 (620).
(8) 2 Ir. Ch. Rep. 232.

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Of these *Raja Enayet Hossain* v. *Girdhari Lall*(1) was one. There the question was one of limitation: and what their Lordships said was that there was as to limitation no distinction *in favour of* the purchaser at a judicial sale between his right and that of a private purchaser, and in this remark they were simply expressing their disapproval of the view of the High Court of Calcutta, that, although the suit of a private purchaser might have been barred by lapse of time, the suit of a purchaser at a judicial sale was not so barred. In the second case, *Anundo Moyee* v. *Dhonendro* (2), the Privy Council held that the possession of a person who purchased at a Court sale in execution of a decree against a mortgagor is an adverse possession, inasmuch as such purchaser claims to be the owner of the whole estate whether he be so or not, and that, consequently, a suit against such a purchaser is barred after twelve years. Neither of these cases seems to us to bear upon the present question.

On the other hand, the view taken by the Privy Council in *Rathanath Doss* v. *Gisborne* (3) as to who is a *bona fide* purchaser for valuable consideration within s. 5 of Act XIV of 1859, and the remarks there of Lord Cairns as to what **[206]** are the indispensable averments in a plea of purchase for valuable consideration without notice tend strongly to show that their Lordships would hold that a purchaser at an ordinary judicial sale under Act VIII of 1859 under a mere money decree could not be regarded as a *bona fide* purchaser of an absolute interest without notice, and could not truly make the averments requisite for a plea that he was so.

With the answers which we have given to the questions of the Division Bench, this case must stand remitted to that Court for final disposal.

KEMBALL, J.—I concur.

MELVILL, J.—I concur in this judgment, and wish only to add a very few words.

It is clear that the plea of purchase for valuable consideration without notice will not prevail against a *san*-mortgage in Gujarat. But, in saying this, I wish to guard myself against the inference that the same plea will prevail against a prior mortgage elsewhere. It is not necessary to decide that question now; and I will, therefore, only say that such perfect security is now afforded by registration that there appears to be hardly room for the plea of purchase without notice. If relief is to be given upon that ground in this country, it must be given, not on account of any distinction between a legal and equitable estate (see Phear, J.'s observations at p. 408, Vol. VIII, Calcutta Weekly Reporter), but because the innocent purchaser is supposed to have been the victim of fraud on the part of the vendor, and of laches on the part of the prior incumbrancer, who might have taken possession or registered his mortgage-deed, and so have given notice of his incumbrance. But, seeing that the purchaser may secure himself against all unregistered mortgages without possession by simply taking possession or registering his conveyance, he is, if he omit to do so, *in pari delicto* with the prior mortgagee, and it is difficult to see how he is entitled to any relief.

I have been a party to several decisions in which it has been held that, whatever may be the case with a private purchaser, a purchaser at a Court sale takes the estate subject to all existing liens, whether he has had notice of them or not. A Court sale is only a **[207]** process by which a Court does for a debtor what he is bound to do for himself,—*i.e.*, to sell

(1) 12 M.I.A. 366. (2) 14 M.I.A. 101. (3) 14 M.I.A. 1.

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his property in order to pay his debts. If he did this for himself, he would be bound to protect the rights of prior incumbrancers; and the Court, which acts for him, is equally bound to do the same. Under the former Civil Procedure Code, Act VIII of 1859, there was no inquiry into title, and the law expressly ordered warning to be given to the purchaser that he purchased nothing more than the right, title, and interest of the judgment-debtor, whatever it might be at the time. Under the present Code, Act X of 1877, there is some investigation of title; but, while this investigation may enable the Court to give some information to purchasers, it is not of such a character as to render it possible for the Court to guarantee the title, and, consequently, the High Court has, in the rules made by it under s. 287 of Act X of 1877, provided for notice being given to purchasers that the sale only extends to the right, title, and interest of the judgment-debtor, and that the Court ordering the sale does not warrant the title. This being so, it seems perfectly clear that a person who buys an avowedly doubtful title, and pays for it on that understanding, cannot claim to be a purchaser for value without notice. As was said by Lord Cairns in *Radanath Doss* v. *Gisborne*(1): "An allegation or a plea of a purchase for value is perfectly well known and understood, and the averments in such a plea are not matters of technicality; they are matters of substance. In pleading a purchase for valuable consideration in this country, the very first averment in the plea is that the *person selling either was seized, or alleged that he was seized, for an absolute title*: and then the plea goes on to say that, being so seized, or alleging that he was so seized, *he contracted to sell and did sell and convey that absolute title, asserting it to be such*, to the purchaser *who paid his money for that which was thus sold.*"

I may add that, if an execution purchaser was treated as a purchaser for value without notice, a person who had created a mortgage on his estate, and who could not, therefore, sell his estate, as unincumbered, without exposing himself to a prosecution for cheating under the Penal Code, might, by confessing **[208]** judgment and having the estate sold by the Court, be able to get rid of the mortgage, and obtain the full price of an unincumbered estate.

I am glad that my decision in *Lakhmichand* v. *Kastur* (2), which was dissented from in *Makandas and another* v. *Shankardas* (3), has been rehabilitated by the judgment which has been just delivered. The Registration Acts provide that a registered document shall take effect, as regards the property comprised therein, against every unregistered document relating to the same property. It seems clear that this provision can only apply to cases in which the property conveyed by the two documents is the same, or in which the property conveyed by one document includes the property conveyed by the other. In other words, it applies where the two documents are antagonistic, but not where effect can be given to each, without infringement of the other. Thus, if A mortgage his estate to B, and afterwards sell the same estate to C, C may, by registering his conveyance, get rid of the unregistered mortgage; but he cannot do so if his conveyance is, in terms, only a conveyance of the equity of redemption; for then the estate given to B and the estate given C are separate and distinct, and can exist together. So, if A mortgages or sells to B, and afterwards C purchases at a Court sale the then existing right, title,

(1) 14 M.I.A. 1 (17) of the Report.
(2) 9 B.H.C.R. 60.
(3) 12 B.H.C.R. 241.

and interest of A, C buys in the one case the equity of redemption, and in the other case nothing at all. Registration, therefore, cannot help him; for, on the very face of his certificate of sale, the property comprised therein is not the property previously conveyed to B, but only the residue of A's estate after such conveyance.

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On the return of the case, the Division Bench (Melvill and Pinhey, JJ.) on the 3rd March, 1882, reversed the decrees of the Courts below, and made a decree in favour of the plaintiffs for the amount claimed, to be recovered from defendants 1 and 2 personally and from the mortgaged property, with interest at 6 per cent. from the date of suit until payment, and directed defendant No. 3 to bear all the plaintiff's costs throughout.

Decrees reversed.

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6 B. 209.

[209] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

NARO DAMODAR GHUGRI (*Original Plaintiff*), *Appellant v.* THE COLLECTOR OF POONA AND ANOTHER (*Original Defendants*), *Respondents.** [9th July, 1877.]

Pensions Act XXIII of 1871, *ss.* 3 *and* 4—*Jurisdiction of Civil Court—Deshmukh.*

A suit in a Civil Court by a hereditary *desmukh* relating to a grant of land revenue is prohibited by the Pensions Act XXIII of 1871.

[R., 6 B. 211 (214); 29 B. 480=7 Bom. L.R. 497.]

THE plaintiff Naro sued for Rs. 78-9-0 on account of certain *sirpatilki haks* for two years, 1869 and 1870. He alleged that the said *haks* had belonged to one Madhavrav Kunjir; that he (plaintiff had purchased them at a Court sale in September, 1868, in execution of a decree against the said Madhavrav; that Madhavrav died on the 22nd October, 1872; and that the Collector of Poona (defendant No. 1) paid the amount of the *haks* to his son Ravji. The suit was instituted in 1874.

The Collector (defendant No. 1) answered (*inter alia*) that the suit was barred under Act XXIII of 1871; that the plaintiff only purchased the life-interest of Madhavrav in the *vatan*; and that the property was inalienable under Reg. XVI of 1827, s. 20. The answer of Ravji (defendant No. 2) was similar.

The Assistant Judge of Poona (Mr. W. H. Crowe), who tried the suit, held that the suit was not barred under the Pensions' Act XXIII of 1871, and that Madhavrav's interest in the property continued beyond his lifetime. He allowed the plaintiff's claim to the amount of Rs 50, and held the rest of it barred by limitation. In appeal, the District Judge (Baron Larpent) reversed that decree, on the ground that Madhavrav had only a life-interest in the *vatan*.

The plaintiff, therefore, specially appealed to the High Court.

The principal question argued in special appeal was whether or not the suit was barred under Act XXIII of 1871.

The Hon. *V. N. Mandlik*, appeared for the appellant.

Shamrav Vithal, appeared for the Collector (defendant No. 1).

Shantaram Narayan appeared for Ravji (defendant No. 2).

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* Special Appeal No. 184 of 1876.

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JUDGMENT.

[210] The following is the judgment of the Court delivered by

WESTROPP, C.J.—On reading the grant, A.D. 1699, of the *haks* (of which those in dispute in this suit form a part) together with 1,355 villages by Rajaram, son of the celebrated Sivaji, to Khundoji Yesaji Dabhare as the *sirpatilki vatan* of Junar, which document was not before Baron Larpent, the District Judge, but has, by consent of the parties, in order to avoid a remand, been produced for our inspection by the Collector, we at once perceive that this suit relates to a grant of land revenue conferred by the Maratha Government of that day, and, therefore, falls within ss. 3 and 4 of Act XXIII of 1871. Yeshvantrav Dabhare, a descendant of the donee of 1699, by a sub-grant of the 8th November 1798 (Shak 1720 1 Kartik Sud), alienated a portion of the *haks* above mentioned to Baloji bin Subanji Kunjir, an ancestor of Madhavrav Kunjir, under whom the plaintiff claims. Those *haks*, in whosoever's hands they may be, still retain their original character (whether or not the service to be rendered for them as *sirpatil* has been dispensed with) sufficiently to bring them within the sections of the enactment already referred to. The circumstance that they were levied in the form of grain directly from the villagers, does not efface the fact that they originated in a grant from the Maratha Government, and are still payable in virtue of that creation. We think, therefore, that this case comes within the authority of *Vasudev Sadashiv Modak* v. *The Collector of Ratnagiri* (1), in which Her Majesty's Privy Council affirmed, on the 2nd March, 1877, the decree of this Court, which held that a suit in a Civil Court, by a hereditary *deskmukh*, for a percentage on the cash revenue and percentage on the grain revenue, was prohibited by the Pensions Act of 1871. On these grounds we affirm the decree of the District Judge with costs.

Decree affirmed.

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6 B. 211.

[211] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

JAGJIVANDAS JAVERDAS (*Original Plaintiff*), *Appellant* v. IMDAD ALI, BY HIS SON AND HEIR, GULAM ZILANI (*Original Defendant*), *Respondent.** [20th February, 1882.]

Regulation XVI of 1827—*Mortgage of ratan property—Mortgagor's life-interest—Bombay Act III of* 1874.

On the 3rd December, 1856, certain *ratan* property was mortgaged by the deceased defendant to the plaintiff, who obtained a decree on the mortgage in 1861, and attached the rents and profits of the *ratan* on the 6th October of the same year. On his (defendant's) death in 1869 his son succeeded to the estate, and obtained a removal of the attachment before 1874. The plaintiff thereon applied for a fresh attachment of the property.

Held that the mortgagor, having only life-interest, the *ratan* came into the hands of his son free of the mortgage.

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* Extraordinary Civil Application, No. 13 of 1878.

(1) 2 B. 99.

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THIS was an application, under the extraordinary jurisdiction of the High Court, against the decision of H. Batty, Acting Assistant Judge of Thana, reversing the order of Cursetji Rustomji, Second Class Subordinate Judge of Kalyan.

In 1856 one Imdad Ali mortgaged certain *vatan* property to Jagjivandas Javerdas, who in 1861 sued and obtained a decree upon the mortgage, and issued an attachment against the property. In 1869, Imdad Ali died, and his son and heir, Gulam Zilani, succeeded to the estate, and subsequently obtained the removal of the attachment. In 1876, on the application of Jagjivandas, the Subordinate Judge issued a fresh order for the attachment of the rents and profits of the *vatan* as having been the property of Imdad Ali. In appeal, the District Judge of Thana reversed this order, on the ground that the mortgagor, Imdad Ali, had only a life-interest in the *vatan*, and that the property came into his son's hands free of the charge.

On the 17th December, 1877, the High Court (Westropp, C.J., and Melvill, J.) granted a rule *nisi*, on the application of Hon. Rao Saheb *V. N. Mandlik* on behalf of the plaintiff, calling upon the respondent to show cause why the order of the District Judge should not be set aside.

[212] On the 19th June, 1878, *Branson* (with him *Manekshah Jehangirshah*), appeared to show cause before WESTROPP, C.J., and KEMBALL, J.

JUDGMENT.

The following is the judgment of the Court delivered by

KEMBALL, J.—This is an application to this Court, in the exercise of its extraordinary jurisdiction, to set aside an order made, in appeal, by the Assistant Judge for the removal of an attachment placed by the Subordinate Judge of Kalyan at the suit of one Jagjivandas Javerdas.

The property in dispute is a *chaudari sardeshmukhi* and *kulkarni vatan* which was mortgaged on the 3rd December, 1856, by the then incumbent, Imdad Ali, to Jagjivandas. Jagjivandas Javerdas filed a suit against Imdad Ali in 1861, and obtained a decree on which attachment issued against the aforesaid *vatan* property on the 6th October, 1861. Imdad Ali died about the year 1869: on his death, his son, who is now showing cause and who had been no party to the suit or subsequent proceedings, succeeded to the estate, and sometime subsequently—*i.e.*, before the year 1876—obtained the removal of the attachment. A fresh application was thereafter made by Jagjivan for the attachment of the rents and profits of the said *vatan* as having been the property of Imdad Ali, and the Subordinate Judge made the order prayed for on the 5th July, 1876. Against this order an appeal was made to the District Court of Thana, when the Assistant Judge, before whom the matter came, reversed the order of attachment, on the ground that the late incumbent, the mortgagor, having only a life-interest, the *vatan* came into the son's hands free of the charge.

That such estates were not, under Reg. XVI of 1827, liable for the debts of the last holder, is too clear to admit of question: and, indeed, the Subordinate Judge's order in directing the attachment to issue, proceeded on the ground that Bombay Act III of 1874 had effected a change in the character of such tenures. No provision, however, of the Act has been pointed to us as supporting this proposition, though we find,

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on reference to the Assistant Judge's proceedings, that s. 15 of the Act was relied on before him, it being contended that that section [213] ratifying, as it did, settlements made by Collectors with the holders, operated to convert the life-interest into heritable and transferable property. No single authority has been shown to us in support of this view; in fact, the right of the decree-holder to have the attachment restored, was rested in argument here entirely on the wording of the decree: whereas, on the other hand, the learned counsel, who appeared to show cause against the rule, has cited a number of decisions, some by the Judicial Committee of the Privy Council and others by the High Courts of Bombay and Calcutta, which, in principle, seem conclusively to support the view taken by the Assistant Judge. In a suit to recover possession of an estate by virtue of an alleged family custom under which the estate was descendible to the eldest son to the exclusion of the other sons, and was impartible and inalienable, it was uncertain what the nature or origin of the tenure of the estate was, but there had been admittedly a settlement of it by Government at the time of the perpetual settlement. It was held by the Privy Council that, assuming the custom to have existed, although by such settlement any incidents of the old tenure of the estate were impliedly at an end, yet the settlement did not of itself operate to destroy the family usage, even though the origin of it could not be shown: *Rajkishen Singh* v. *Ramjoy Soorma Mozoomdar and others*(1). Again, where the *raj* of a particular place, being an ancestral ancient tributary principality, was confiscated for rebellion by the Government, and after a lapse of twenty years was bestowed on a younger brother of the expelled rajah, it was held by the Privy Council that although the *raj* was to be treated as the self-acquired estate of the said younger brother, yet that the grant, being from the ruling power, in the absence of evidence of the intention of the grantors to the contrary, carried the incidents of the family tenure as a *raj*, as the Government's intention must be taken to have been to restore the estate as it existed before its confiscation with no change other than that as affected the expelled rajah and his descendants, and was not, therefore, the creation of a new tenure but simply a change of tenant by the exercise of a *vis major*: *Baboo Beer Pertab Sahee* v. *Maharaja Rajender Pertab Sahee* (2), [214] And in a third case where lands had been granted for the performance of certain services, it was held by the Privy Council that the circumstance that there was no longer occasion for the performance of the particular services, did not justify the resumption of the lands: *Alexander John Forbes* v. *Meer Mahomed Tuquee and others*.(3) In connection with this last point, it will be sufficient to note the following cases: *Baboo Kooloodeep Narain Singh* v. *Mahadev Singh* (4); *Savitri* v. *Anandarav*(5); *Keval Kuber* v. *The Talukdari Settlemeni Officer* (6); and *Naro Damodar Ghugri* v. *Collector of Poona*(7).

Our attention has not been drawn to any conduct on the part of the Collector, under s. 15 of Bombay Act III of 1874, which can have brought that section into operation with respect to the *vatan* in the present case; and, even if there had been such conduct, we do not see how such a circumstance could act retrospectively so as to give a previous mortgage a greater degree of efficacy than it had under the law (Reg. XVI of

(1) 1 C. 186.
(2) 12 M.I.A. 1=9 W R. P.C. 15.
(3) 13 M.I.A. 438= 14 W.R. P.C. 28.
(4) 6 W.R. (Civ. Rul.) 199.
(5) 12 B.H.C.R. 224.
(6) 1 B. 586.
(7) 6 B. 209.

1827, s. 20) in existence when that mortgage was created. The rule *nisi* must be discharged, with costs to be paid by the applicant Jagjivandas Javerdas.

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6 B. 211.

Rule discharged.

NOTE.—The above case was followed in Miscellaneous Appeal No. 1 of 1878 (*Jagjivandas Javerdas* v. *Imdad Ali Khan, deceased*,) which was between the same parties, and decided by Westropp, C.J., and Kemball, J.

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6 B. 215 (F.B.) = 6 Ind. Jur. 416.

[215] APPELLATE CIVIL--FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Kemball, and Mr. Justice West.

PEMRAJ BHAVANIRAM (*Original Defendant*), *Appellant v.* NARAYAN SHIVARAM KHISTI (*Original Plaintiff*), *Respondent.** [7th February, 1882.]

Title by possession—Decree—Attachment and sale under a decree of property claimed by a third person—Suit by a third person to establish his title—Evidence—Burden of proof—Civ. Pro. Code—(Act VIII of 1859), *ss.* 230—246—*Ejectment.*

S obtained a money decree against the sons and heirs of A, and under that decree attached a shop as part of A's state. N (father of A) applied to have the attachment removed under s. 246 of the Civil Procedure Code (Act VIII of 1859), alleging that the shop was his. The application was rejected, and the shop was sold in execution, and bought by P, the defendant. N then brought this suit against P (the purchaser) to establish his title. The Subordinate Judge dismissed the suit. In appeal, the District Judge reversed that decree, holding that the plaintiff had been in possession of the shop, and had proved his title. The defendant appealed to the High Court.

Held that the plaintiff having proved his possession at the date of the execution sale, it lay upon the defendant (P), who claimed the property, to prove a title in himself or in the judgment-debtor A, and that, he having failed to do this, the plaintiff was entitled to a decree declaratory of his right to the property as against the defendant.

Possession is a good title against all persons except the rightful owner, and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses him.

The above rule held to be applicable where the plaintiff alleged title by conveyance, and also relied upon possession, but failed to prove his title while his possession was held proved.

When a dispossessed party proceeds, under s. 230 of Act VIII of 1859, to vindicate the possession of which he has been deprived, although he may give evidence of his title, he is not bound to do so, but may rest his right to recover on his possession, and cast upon the decree-holder the burden of proving his title,—*i.e.*, his right to dispossess the applicant.

Per WEST, J.—A person in possession of property which is sold in execution as that of another, is not called upon, when suing to establish his title, to prove his proprietorship as by an action *in rem* against all the world. It is enough if he establishes a good title as against the judgment-debtor whose right has been sold; and as he is in possession, that possession in itself affords a ground for an assertion of full proprietorship for the purpose of the suit except so far as the right vested in [216] the judgment-debtor can be shown affirmatively to contradict or qualify it. Possession constitutes an interest requiring affirmative proof of a superior title on the part of any one who seeks to disturb it, and, therefore, where a person in possession of property which has been sold in execution as being the property of another, sues to establish his title to such property, the burden of proof lies, not upon him, but upon the person who claims as purchaser at the execution sale.

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* Special Appeal No. 213 of 1874.

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[Diss., 17 C. 256; F., 1 Bom.L.R. 45 (48); Appr., 1 S.L.R. 107 (108); R., 13 A. 537 = 11 A.W.N. 196: 8 B. 371; 16 B. 722; 20 B. 270; 25 B. 287 = 2 Bom. L.R. 1121; 2 Bom. L.R. 628 (631); 3 Bom. L.R 246; 5 Bom. L.R. 225; 9 Bom.L.R. 1801; 10 Bom. L.R. 571; 13 C.L.J. 649 = 10 Ind. Cas. 469; 1 C.P.L.R. 3; 7 C.P.L.R. 3; 12 C.P.L.R 59; 14 C.W.N. 141 = 2 Ind. Cas. 202; L B.R. (1893—1900) 32; 2 L.B.R. 152 (156); 3 L.B.R. 27; 2 O.C. 3 (5); 78 P.R. 1902 = 137 P.L.R. 1902; U.B.R. (1892—1896), 619; U.B.R. (1897—1901), 270.]

THIS was a special appeal from the decision of A. Bosanquet, Judge of the District Court of Ahmednagar, reversing the decree of P.S. Binivale, First Class Subordinate Judge at the same place.

One Anant Narayan died indebted to Sahebram Bhagvant. After Anant's death, Sahebram obtained a money decree against the sons and heirs of Anant, and under that decree attached a certain shop as being the property of Anant Narayan. On September 16th, 1871, the plaintiff, who was Anant Narayan's father, alleging that he was in possession of the shop and that it was his property and not the property of his son Anant, applied to the Subordinate Judge, under s. 246 of the Civil Procedure Code (Act VIII) of 1859, for removal of the attachment. That application was rejected, and the shop was sold in execution and bought by Pemraj, the defendant. The plaintiff then brought this suit to establish his title. The Subordinate Judge held that the shop was not the property of the plaintiff, but belonged to his son, Anant Narayan, and he made a decree for the defendant. In appeal the District Judge reversed that decree, holding that the plaintiff had possession of the shop as proprietor, and had in virtue of such possession proved his title. The defendant thereupon appealed to the High Court.

The special appeal came in the first instance before West and Nanabhai, JJ., who referred it to a Full Bench with the following remarks:—

"The District Judge in this case has found that the plaintiff Narayan was in possession of the property in dispute as proprietor at a time when it was attached in execution of a decree against Narayan's son, Anant. Narayan applied to raise the attachment, but his application was dismissed as not having been presented within a reasonable time. The sale of the property was proceeded with, and it was purchased by Pemraj, the present defendant.

[217] "Upon this, Narayan filed the present suit to have his proprietorship established, and the sale declared void. The Subordinate Judge found that Anant was owner of the property. The District Judge found that the plaintiff Narayan "had possession of this shop as proprietor," and decreed for the claim set up by him.

"It is now contended, in appeal, that Narayan, coming into Court for a declaration of his proprietary title, was bound to prove that title affirmatively, and, in support of this argument, the decision of Sargent, C. J., and Melvill, J., in *Rajkrishna* v. *Bai Itcha* (1) has been relied on. The circumstances of that case seem to have agreed in essentials with those of the present one: and the learned Judges, holding that the plaintiffs were bound to prove their title affirmatively, reversed the decree of the Assistant Judge in the plaintiff's favour and remanded the cause for retrial.

"To us it appears that a person in possession of property which is sold as that of another, ought, in the regular suit which he institutes to establish his title, to be in the same position as to the burden of proof as if he had made an application under s. 246, or as if he had waited until an attempt was made to take possession, his resistance to

(1) See note *infra*, 6 B. 224.

which had led to proceedings under s. 269 of the Code. He is not called on by a sale of the property as that of a stranger to come in and prove his proprietorship as by an action *in rem* against all the world. It would be unjust that proceedings between strangers should thus have the effect of depriving him of all the advantages of his possession. It is enough, in our view, if he establishes a good title as against the judgment-debtor, whose right has been sold: and as he is in possession, that possession in itself affords a ground for an assertion of full proprietorship for the purposes of the suit, except so far as the right vested in the judgment-debtor can be shown affirmatively to contradict or qualify it. A declaratory suit seems admissible in such a case, because the right of the possessor is directly assailed, and as against an assailant he may, we think, though plaintiff, rely on his possession, just as he would if he waited for the attempt at dispossession which his proceedings are taken to avert. The case of *Asher* v. *Whitlock* (1) shows that mere possession constitutes a devisable interest, and it should **[218]** apparently constitute an interest requiring affirmative proof of a superior title on the part of any one who seeks to disturb it. If that be so, the burden of proof lies necessarily, in a case like this, on the execution purchaser: but as a different view seems to have been taken by a Division of this Court, we refer the question for the decision of a Full Bench."

Shivashankar Govindram appeared for the appellant.

Rao Saheb *V. N. Mandlik* appeared for the respondent.

JUDGMENT.

The following is the judgment of the Full Bench delivered by

WESTROPP, C. J.—Sahebram Bhagvant having obtained a money decree against the sons and heirs of Anant Narayan, deceased, in respect of a debt due to Sahebram Bhagvant by Anant Narayan, caused the shop to be attached under that decree as the property of Anant Narayan. The present plaintiff, Narayan Shivram Khisti, the father of Anant Narayan, by *darkhast* (No. 754 of 1871), dated September 16th, 1871, applied to the Subordinate Judge, under s. 246 of Act VIII of 1859, for a removal of that attachment, and on the same day the Subordinate Judge directed that notice of that application should be given to the judgment-creditor, Sahebram Bhagvant. The *batta* for that notice was reported on the 18th October, 1871, as paid, and the Subordinate Judge was then informed that the 8th of November, 1871, was fixed for the sale. It is extraordinary that no further step seems to have been taken by the Subordinate Judge until the 6th of December, 1871, when he rejected the application on the ground that the sale had taken place on the 8th November, 1871, and there was, therefore, no longer any attachment in the suit to be removed. He, accordingly, declined to consider the application on its merits. The ground, on which the application had been made, was that the shop belonged to Narayan Shivram Khisti and not to his son, Anant Narayan, the deceased judgment-debtor, and was in the possession of Narayan Shivram Khisti.

Narayan Shivram Khisti then brought the present suit to establish his title.

As observed by the Subordinate Judge in his judgment in this suit, no evidence of the confirmation of the sale of the 8th November **[219]** 1871, to Pemraj, nor any such certificate, as is required by s. 259

(1) L.R. 1 Q.B. 1.

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of Act VIII of 1859, of that sale has been produced in this Court, and none appears to have been produced in the Court of the District Judge. A memorandum (Ex. 3, dated 8th November, 1871) by the Court *karkun*, reporting to the Subordinate Judge's Court the fact of the sale, has been given in evidence in that Court, whence it appears that the price, at which the shop was knocked down to Pemraj, was Rs. 13-4.

In the present suit of Narayan Shivram Khisti, the plaintiff, to establish his title, the Subordinate Judge—holding that the shop was not that of the plaintiff but belonged to his son Anant Narayan—made a decree for the defendant Pemraj with costs. The District Judge reversed that decree, and made a decree for the plaintiff with costs of suit and appeal. The defendant has made a special appeal to this Court.

The facts appear to be these. The plaintiff and defendant concur in claiming title to the shop from Varanshabai, the widow of Gopal Pandya, sister of the plaintiff Narayan and paternal aunt of Anant, his son, the judgment-debtor. If the allegation in the defendant's written statement be true, the shop had belonged to her husband Gopal Pandya. A document (Ex. 27), dated 22nd March, 1857, was produced on behalf of the plaintiff Narayan. It recited that Varanshabai's husband was dead, and that she and her co-widow had spent all of their moveable property, and had no one to support them except Babaji Shivram, and that, for the purpose of such support by him and of the performance of their funeral ceremonies, Varanshabai gave over to him part of a house and part of a shop. The District Judge appears to have doubted the genuineness of Ex. 27. It being unstamped, and he, not being satisfied that the omission to have it stamped did not arise from an intention to evade payment of the stamp duty, declined to accept that duty and the penalty, under Act XVIII of 1869, s. 20, and accordingly, excluded it from evidence. The plaintiff also produced a deed of sale (Ex. 25, dated 13th August, 1870, and registered 14th September, 1870) of the shop and other property by Babaji Shivram to his brother the plaintiff, Narayan Shivram, for Rs. 1,499. As to the *bona fides* of this deed, also, the District Judge appears to have entertained misgivings ; **[220]** inasmuch as in a deed of release (Ex. 19), dated 24th September, 1867, (unregistered) executed by Anant Narayan to his father, the plaintiff, reciting that the plaintiff had no property, Anant Narayan, in consideration of Rs. 50, released Narayan, the plaintiff, from any claim of Anant on Narayan's estate. The District Judge found it difficult to reconcile the allegations in Ex. 25—that Narayan gave Rs. 1,499 in September, 1870, for the shop —with the recital in Ex. 19 that he had not in September, 1867, any property. It did, however, appear that in November, 1870, Narayan, by mortgage of the shop in dispute, borrowed Rs. 700 from Murlidar Vithaldas (Ex. 54). That mortgage was registered. The District Judge has not arrived at any positive finding as to the validity of Ex. 25.

The defendant Pemraj alleged that Varanshabai executed a deed of gift to Anant Narayan, but the defendant did not produce or prove any such deed, on account for its non-production.

The District Judge, after so stating, added : "It is a remarkable fact that Anant Narayan's right in the shop fetched only Rs. 13-4 at the auction sale. It is difficult to imagine that, if the shop had been occupied by him as proprietor, it would not have fetched more."

The defendant Pemraj endeavoured, but failed, to prove that Anant Narayan had occupied the shop until his death. And, on the other hand, the District Judge held that Babaji Shivram and, after him, his

brother, the plaintiff Narayan Shivram, have held the shop. To this conclusion the District Judge was led by two rent notes given by a tenant to Babaji Shivram, Exs. 29 and 30 respectively, dated 9th November, 1861, and 17th March, 1863, and by a rent note, Ex. 26, dated 15th September, 1870, executed by another tenant to the plaintiff Narayan, and by oral evidence, more especially an admission made by one of the defendant's witnesses, Lakshmandas Hindumul (No. 47), that he had seen Rupchand, the tenant who had executed the rent notes (Exs. 29 and 30) to Babaji Shivram, in occupation of the shop many years before he (Lakshmandas) gave his evidence. His deposition bears date the 19th July, 1873. Under these circumstances, the District Judge, while excluding Ex. 27 **[221]** from evidence, found that the plaintiff had possession of the shop as proprietor, and had proved his title; and, as already stated, the District Judge reversed the decree of the Subordinate Judge, and made a decree for the plaintiff with costs.

In the Division Court (West and Nanabhai Haridas, JJ.) which heard this special appeal it was contended on behalf of the appellant (the purchaser Pemraj) that the plaintiff Narayan, seeking, as he was, by this suit, a declaration of his title as proprietor, ought to have proved it "affirmatively" and that mere proof of possession of the shop previously to and at the time of the judicial sale to the appellant was not sufficient to entitle him to a decree establishing his title. In support of that contention the decision in *Rajkrishna* v. *Bai Itcha* (1) was referred to; West and Nanabhai, JJ., seem to have regarded that case as in point, but, not being disposed to concur in it, referred the question to a Full Bench.

The decision in *Rajkrishna* v. *Bai Itcha* (1) seems to be in accordance with *Rassonada* v. *Sitharama* (2) and, to some extent, with *Tirumalasami* v. *Ramasami* (3). There does not appear to have been any authority cited in either of those cases. The first of them was cited and followed in *Rajkrishna* v. *Bai Itcha* (1). We should have been disposed to attribute more weight to the Madras cases, if the true value and legal import of possession had been considered in them, than we now find ourselves able to assign them.

Serjeant Adams in his well-known Treatise on Ejectment writes thus:—

"Let us now consider the proofs to be adduced by a claimant in ejectment when his title to the lands can be controverted.

"And, first, when he claims by descent, he must prove that the ancestor, from whom he derives his title, was the person last seized of the lands in fee simple, and that he, the claimant, is his heir.

"This seisin of the ancestor may be proved by showing that he was either in the actual possession of the premises at the time **[222]** of his death, or in the receipt of rent from the terre-tenant; *for possession is presumptive evidence of a seisin in fee until the contrary be shown* (4). But if it is probable that the defendant will rebut this presumption, the lessor (plaintiff) should be prepared with other proofs of his ancestors' title" (5).

Vice-Chancellor Wigram in *Jones* v. *Smith* (6), in considering a question of notice, says: "Possession is *prima facie* evidence of a seisin in fee."

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(1) See note *infra*, 6 B. 224.
(2) 2 M.H.C.R. 171.
(3) 7 M.H.C.R. 420.
(4) Buller's Nisi Prius, 103.
(5) Adams on Ejectment, 281.
(6) 1 Hare, 60.

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Doe d. Hughes v. *Dyeball* (1) was an ejectment brought to recover possession of a room in a house. The defendant had forcibly taken possession of the room. The plaintiff proved a lease to him of the house and a year's possession. Chitty, for the defendant, objected that no title was proved in the demising parties to the lease; but Lord Tenderdon, C. J., said: "That does not signify; there is ample proof: the plaintiff is in possession, and you come and turn him out; you must show your title." There was a verdict for the plaintiff.

In *Asher* v. *Whitlock* (2), mentioned by the referring Judges it was held that a person in possession of land, without other title, has a devisable interest; and the heir of his devisee can maintain ejectment against a person who has entered upon the land, and cannot show title or possession in any one prior to the testator. Cockburn, C.J., said: "I take it as clearly established that possession is good against all the world except the person who can show a good title; and it would be mischievous to change this established doctrine." And again he said: "It is too clear to admit of doubt, that if the devisor had been turned out of possession, he could have maintained ejectment. What is the position of the devisee? There can be no doubt that a man has a right to devise that estate which the law gives him against all of the world, but the true owner" and again: "We know to what extent encroachments on waste lands have taken place; and **[223]** if the lord has acquiesced, and does not interfere, can it be at the mere will of any stranger to disturb the person in possession." Finally he said: "On the simple ground that possession is good title against all but the true owner, I think the plaintiff is entitled to succeed." Mr. Justice Mellor, after saying that "the fact of possession is *prima facie* evidence of seisin in fee," added: "In the common case of proving a claim to landed estate under a will, proof of the will and of possession or receipt of rents by the testator is always *prima facie* sufficient, without going on to show possession for more than twenty years. I agree with the Lord Chief Justice in the importance of maintaining that possession is good against all but the rightful owner." In that case it is manifest that the devisor was neither more nor less than a squatter. Yet it was laid down as to him, and no doubt correctly so, that if he had been turned out of possession by any person other than the true owner, he (the devisor) could have maintained ejectment, and the heir of his devisee was held entitled to maintain that action.

It is true that the plaintiff in the present case did allege title by conveyance, and that the District Court has not found that title to be proved; but the plaintiff by his plaint also relied upon his possession, and the District Court has found that possession to be proved. We have seen that possession is a good title against all persons except the rightful owner and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses him. The plaintiff does not ask the Court to declare that he had a good title against the world. He merely asks for a declaration that he has a good title against the defendant Pemraj who has purchased the premises (whereof the plaintiff is in possession) as the property of Anant Narayan, but is unable to show that Anant Narayan had either title to or possession of those premises. Nay more, we

(1) My. & Mal. 346; and see the notes to *Armory* v. *Delamriie*, 1 Sm. L. C., (8th ed.), 375, *et seq.*

(2) L. R. 1 Q. B. 1. See *Smith* v. *Oxenden*, Chan. Ca., 25, where it is said by Clarendon, C.: "He that hath possession hath right against all but him that hath the very right." S.P. 16 Vin. Abr. 457; *sed vide Borr* v. *Vandall*, Chan. Ca. 30.

understand the District Judge as substantially finding that the plaintiffs have shown that Anant Narayan had not any such possession. There cannot be any doubt that, under those circumstances, if Pemraj had caused the plaintiff to be evicted, the plaintiff would, within the time limited by law, have been entitled to maintain ejectment against Pemraj, because the plaintiff's possession was a good title [224] against every body except the true owner. This being so, we fail to perceive any good reason for requiring the plaintiff to wait until he is evicted, or for preventing him from obtaining a declaration, of that which is, beyond all doubt, his right, viz., that his title as possessor is good against a person who is seeking to disturb that possession, and who has not a colour of title to the land in dispute and has never had possession of it. The law (1) indeed gives to the possessor a still earlier opportunity of defending his possession by permitting him to apply to have the attachment of the judgment-creditor raised, and of that advantage the plaintiff has been deprived by the unexplained supineness of the Subordinate Judge above described. It seems to be the better opinion that where a dispossessed party proceeds, under s. 230 of Act VIII of 1859, to vindicate the possession of which he has been deprived, although he may, if he please, give evidence of his title, he is not bound to do so, but may rest his right to recover on his possession, and cast upon the decree-holder the burden of proof of title,—*i.e.*, his right to dispossess the applicant. This appears to have been so held in the Full Bench Calcutta Case—*Radha Pyari* v. *Nabin Chandra* (2), and is quite in accord with the value and import of possession as laid down in the English authorities to which we have referred, as well as in the Indian Evidence Act I of 1872, s. 110 (3).

We think that the plaintiff having proved his possession, and the defendant having failed to prove any title in himself or in the judgment-debtor, Anant Narayan, or any possession by either of them, a decree should be made declaratory of the title of the plaintiff as against the defendant.

Decree reversed.

NOTE.—In *Rajkrishna Harikrishna* v. *Bai Itcha and another* (Sp. Ap. No. 119 of 1872) above referred to, the plaintiffs (Bai Itcha and Bai Janak) sued for a declaration of their title to certain land, of which, it was admitted by the defendants, the plaintiffs and their ancestors had been in possession for nearly 30 years. The plaintiffs alleged that it had been wrongfully sold under a decree obtained by the defendant, Rajkrishna, against a third party and purchased by defendant No. 2. The defendants answered (*inter alia*) that the plaintiffs, although in possession, were not the owners of the land, but only the mortgagees [225] of it. The Subordinate Judge dismissed the suit, holding that the plaintiffs had no right of ownership in the land, but that they were only mortgagees. In appeal, the Assistant Judge reversed that decree, and allowed the plaintiff's claim, principally on the ground that the defendants failed to prove the plaintiffs to be mortgagees of the land, as alleged by them. In special appeal (which was preferred by the defendants), it was contended on their behalf that the Assistant Judge had wrongly placed the burden of proof on them.

The following is the judgment of the High Court (Sargent, C.J., and Melvill, J.)—

Per Curiam.—We think that there is ground for the appellants' objection that the Assistant Judge has placed the *onus probandi* on the wrong party. The plaintiff in such cases is bound to prove his title affirmatively (see 2 M. H. C. R. 171). But the Assistant Judge seems to have made the declaratory decree asked for, not on the ground that the plaintiffs have proved that they are owners, but because the defendants have failed to prove that the plaintiffs are mortgagees. We, therefore, reverse the Assistant Judge's decree and remand the case, in order that the Court below may find whether the plaintiffs have proved their title, and may pass a new decree, awarding costs (16th July 1872).

(1) Act VIII of 1859, s. 246.
(2) 5 B.L.R. 708 (712).
(3) See also Sp. Ap. 94 of 1875, Printed Judgments of 1875, p. 368.

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APPEL-
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369.

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APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

LAKSHMAN MAYARAM (*Original Plaintiff*), *Appellant v.* JAMNABAI, WIDOW OF DAYARAM MAYARAM (*Original Defendant*), *Respondent.**
[7th February, 1881.]

Hindu law—Gains of science—Self-acquired property—Partition.

The acquisition of a distinct property by a member of an undivided Hindu family without the aid of joint funds is his self acquired property, and is not subject to partition; but the improvement or augmentation of the family property by the exertions of one of the members is subject to division.

Hindu law texts regarding gains of science establish it as a rule of Hindu law that the ordinary gains of science are divisible, when such science has been imparted at the family expense, and acquired while receiving a family maintenance; but that it is otherwise when the science has been imparted at the expense of persons who are not members of the acquirer's family.

When the Hindu texts speak of the gains of science, they intend the special training for a particular profession which is the immediate source of the gains, and not the general elementary education which is the stepping stone to the acquisition of all science. Consequently, the property acquired by a Subordinate Judge who had received elementary education at the family expense, but a knowledge of law and judicial practice without such aid, is impartible.

The ruling of the Privy Council in *Luximon Rao Sudasew* v. *Mullar Rao Bajee* (1) interpreted to mean no more than the law as now settled, *viz.*, that when there is [226] ancestral property by means of which other property may have been acquired, then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate.

Case of *Bai Mancha* v. *Narotamdas* (2) distinguished.

Dictum of Mitter, J., in *Dhunookdharee* v. *Gunpat Lall* (3)—that the Hindu law nowhere sanctions the contention that the acquisition of a member of a Hindu family who has received education from the joint estate is liable to partition—commented on as not strictly correct.

[F., 15 B. 32; R., 29 A. 244; 33 A. 677=8 A.L.J. 723=10 Ind. Cas. 543; 8 B. 154; 10 B. 1 (16); 22 A.W.N. 20; 8 Ind. Cas. 930=4 S.L.R. 161.]

THIS was an appeal from the decision of A. M. Cantem, Subordinate Judge (First Class) at Belgaum.

The facts of the cases and the authorities cited fully appear from the judgment of the High Court.

Ghanasham Nilkanth Nadkarni, for the appellant.

The following texts were cited by him:—

Manu by Grady, ch. ix, ss. 204, 205, 206, 207 and 208, pp. 214 and 215; Mitakshara, ch. i, ss. 1, 6, 15, 29, 30 and 31; Stokes' Hindu Law Books, pp. 384, 385, 387 and 390; Daya Bhag by Jimut Vahan, ch. vi, s. 1, paras. 3, 4, 5, 6, 15 and 18; Stokes' Hindu Law Books, pp. 266, 267, 268 and 269; Daya Bhag by Jimut Vahan, ch. vi., s. 2, para 1; Stokes' Hindu Law Books, p. 280; Daya Krama Sangraha by Shri Krishna Tarkalankara, ch. iv, s. 1, paras. 3, 4, 7 and 8; Stokes' Hindu Law Books, pp. 501 and 502; Jaganath's Digest by Colebrooke in two vols. (3rd ed.), Vol. 2, pp. 444 *et seq*; Vivad Chintamani by Vachaspati Mishra, translated by Prossono Coomar Tagore, pp. 249 to 253; Vyavahar Mayukha by Nilkantha, ch. iv, s. vi, paras. 1 to 10; Stokes' Hindu Law Books,

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(1) 2 Knapp. 60. (2) 6 B.H.C.R.A.C.J. 1. (3) 10 W.R. 122.

pp. 73, 74 and 75; Smriti Chandrika by Devanna Bhat, translated by T. Krishnasawmy Iyer, ch. vii, paras. 2, 4, 5, 6, 7, 8, 9 and 29, pp. 77 to 85.

K. T. Telang, with him *G. R. Kirloskar*, appeared for the respondent.

JUDGMENT.

The following judgment of the Court was delivered by

MELVILL, J.—There is little or no dispute as to the following facts, though there may be some doubt as to the accuracy of the earlier dates.

The plaintiff's father, Mayaram, came to Dharwar about fifty years ago. He is said to have been at first a jamadar of peons **[227]** in the Collector's office. He was then appointed deputy jailor on Rs. 20 or Rs. 30, and subsequently jailor on Rs. 50 a month. He lost this situation about the year 1843, but was shortly afterwards appointed kotval of Belgaum, in which post he received a salary, at first of Rs. 15, and afterwards Rs. 30 a month. In 1846 he retired on a small pension of about Rs. 11 a month. Whether he had any other means, does not clearly appear; but he acquired some land and two or three small houses at Dharwar, as well as two houses at Belgaum,—one of which, however, he sold, and the other he mortgaged during his life-time. He had two wives, by one of whom he had a son, Dayaram, the husband of the respondent in this case; and by the other, two sons, *viz.*, Lokanath, and the appellant Lakshman. Dayaram's mother died while he was still young. Mayaram's family was with him in Belgaum, but appears to have returned to Dharwar at some time before the year 1855. In 1849, Mayaram took his eldest son, Dayaram, to Bombay, and introduced him to Mr. LeGeyt, who was then a Judge of the Sadar Adalat. Dayaram seems to have found some employment in a barrister's office, and is also said to have supported himself by writing petitions; but after a while he obtained an appointment in the Sadar Adalat, and in 1856 he was made Munsif at Ron, in the Belgaum District. From this time down to his death on the 1st May, 1875, Dayaram was Munsif and Subordinate Judge at Belgaum and other places in the Southern Maratha Country, and for six years before his death was First Class Subordinate Judge at Belgaum on a salary of Rs. 500 a month. Shortly after his death, the elder of his two wives, Bhagirthibai *alias* Krishnabai, adopted Bhowaniram, son of Mayaram's second son, Lokanath, and she was appointed by the District Court administratrix of the minor's estate, although the minor remained in his natural father's house. Bhagirthi died on the 4th August, 1876, and the minor's estate was then placed under the administration of the nazir, while the boy remained in Lokanath's charge. Lokanath died on the 10th January 1877, and on the 11th May, 1879, the minor, Bhowaniram, also died. The appellant Lakshman then applied to the District Court to be put in possession of the estate in the nazir's hands; but the Court considered that Dayaram's **[228]** surviving widow, Jamnabai, had a preferable title, and the estate was ordered to be delivered over to her. Thereupon the appellant, Lakshman, brought the present suit in which he claims two houses in Belgaum, a house and two fields at Inchal in the Belgaum District, and moveable property valued at Rs. 9,693-1-3. The moveable property consists almost entirely of Government promissory notes, and other securities and money deposited in a bank.

The appellant bases his claim upon three grounds, namely, first, that he and Lokanath formed with Dayaram, (and, of course, with Bhowaniram after Dayaram's death), an undivided family, and that, as the only

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surviving male member of that family, he is now entitled to the whole estate; second, that any property which Dayaram may have acquired, has the character of joint, property because it was acquired by means of ancestral property, or was so blended by Dayaram with ancestral property in his hands that it cannot be distinguished from such ancestral property; and, third, that, even if this were not the case, Dayaram's acquisitions had been obtained by means of an education which had been imparted at the family expense, and, as such, were subject to partition.

The burden of proving either that the family was divided, or that, the family remaining undivided, the property in dispute was Dayaram's separate estate, lies upon the respondent. We proceed to consider whether she has discharged herself from this burden in respect to one or both of the propositions just stated. We may say at once that the oral evidence on both sides appears to us of little value. There is hardly a point on which the witnesses on the one side are not contradicted by those on the other; and many of the statements made on both sides are too improbable to receive ready credence. We feel bound to draw our conclusions chiefly from the conduct of the parties, and from certain letters (Exs. 57 to 72) written by Dayaram to his father, his step-mother, and his brother Lokanath, between the years 1849 and 1861.

The learned counsel for the respondent has very fairly admitted that the evidence falls somewhat short of what is necessary to establish a partition between Dayaram and his brothers. The [229] statements made by some of the witnesses for the respondent—that Dayaram left Dharwar and came to Belgaum, because he could not endure the misconduct of his step-mother, and that, while at school at Belgaum, Dayaram lived and messed separately from his father,—are quite unworthy of credit. The correspondence, to which we have referred, shows clearly enough that Dayaram was on excellent terms with his father Mayaram down to the death of the latter in 1858, and that, after Mayaram's death, the relations between Dayaram and his step-mother were of a very friendly nature. The letters leave no doubt in our minds that Dayaram was united with his father down to the latter's death, and that there was no partition between Dayaram and his brothers, at all events down to 1861. Indeed, down to that date, or nearly so, the brothers were minors, and, therefore, not capable of consenting to a partition. Whether between 1861 and 1875, the date of Dayaram's death, there was anything in the nature of a partition between the three brothers, is rather more doubtful. There is certainly no direct evidence of anything of the kind having taken place; and it might be expected that a man of Dayaram's position and legal knowledge would have tāken good care that there should be direct evidence of such a transaction, if it had taken place. On the other hand, it is certainly very strange that the correspondence between Dayaram and his brothers should have ceased so abruptly in 1861. The only explanation which the appellant's pleader can offer on this point, is that, after Dayaram went to Belgaum, it was no longer necessary for him to write to his brothers, because Belgaum and Dharwar are in such close proximity to one another. But the distance is nearly 50 miles; and, besides, Dayaram was not continuously Munsif or Subordinate Judge at Belgaum from 1861 to 1875. The explanation, therefore, which is offered is not satisfactory; and in the absence of satisfactory explanation, the sudden break in the correspondence certainly suggests a suspicion that some change must have occurred in the relations between Dayaram and his brothers after the latter attained to man's estate. There is no doubt that the property at Dharwar

was, with Dayaram's consent, entered in Lokanath's name, and that Lokanath lived there and looked after it. The oral evidence, that Dayaram took part in the management of it, is weak **[230]** in the extreme; and there is no documentary evidence that he in any way interfered with his brother Lokanath's management after the latter came of age. It is, moreover, stated by the witnesses on both sides—and there appears to be no doubt of the fact—that, about 1868, Lokanath sold his father Mayaram's house in Belgaum, and that the conveyance was executed in Lokanath's name; and this although Dayaram was at the time Munsif of Belgaum, and might, therefore, have been expected to join in the sale, if he had retained any interest in the ancestral property. The explanation offered by one of the plaintiff's witnesses (No. 45), *viz.*, that Dayaram did not wish to appear in the transaction, because he was a public servant, and, as such, forbidden to hold immoveable property in the place where he was employed, is, on the face of it, absurd. The prohibition in question, if it then existed, could not have suggested to Dayaram's mind that there was any impropriety in selling his father's house; and the supposition that he had any scruples of the nature is contradicted by the circumstances that he bought other houses, or, at all events, continued to hold other houses, while he was Munsif and Subordinate Judge of Belgaum. These considerations certainly create a suspicion that there must have been something like a partition between Dayaram and his brothers, or, at all events, a tacit understanding between them that Dayaram should abandon his claim to Mayaram's property, and that his brothers should rest satisfied with the exclusive enjoyment of that property, and such further assistance as Dayaram might see fit to afford to them. As we shall presently see, it is difficult to explain the conduct of Lokanath and the plaintiff after Dayaram's death, except on the supposition that some such understanding existed, or, at all events, that Dayaram's brothers recognized the justice of such a division of the estate. As, however, the respondent's counsel does not insist that there was any partition, and prefers to rest the defence on the ground of self-acquisition, we will go on to consider whether the respondent has proved that the property in suit was acquired by Dayaram in such a manner as to exempt it from the ordinary rule of partition among the members of a united Hindu family.

The case mainly relied upon by the appellant, as bearing upon that division of this question which relates to the existence **[231]** of a *nucleus* of ancestral property, is the case of *Luximon Rao Sudasew* v. *Mullar Rao Bajee* (1). That was a suit brought by the nephew of Sudasew Punt Bhow, the Prime Minister of the Peshwa, to recover from the Bhow's adopted son a share in the very large property left by the Bhow at his death. The grounds on which the claim was founded, were that there had been no division of the ancestral property between the Bhow and his brothers, and that by the Hindu law, until a division of a joint property or inheritance is effected between the members of a family, the acquired fortune of each member falls into and belongs to the common stock, and is divisible accordingly. The defence was that the property did not belong to the common stock, and ought not to be divided, because the Bhow had acquired it by means of his own skill and capacity, without any assistance from the family property. The dispute had been referred to arbitrators, who, after taking the opinions of the different members of the Panchait and also of the shastris employed in the judicial establishments of

(1) 2 Knapp, 60.

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the Deccan, made an award in the plaintiff's favour. An appeal was made from this award to the Governor in Council in Bombay (the Governor being Mr. Mountstuart Elphinstone), who made a decision in conformity with the award. The case went in appeal before the Privy Council, and in 1831 judgment was delivered by the Lord Chancellor. The judgment is brief, and the material portion of it is as follows. After discussing the question of the *onus* of proof, Lord Brougham said: "Now it appears here very doubtful, and indeed (although we may suspect it) there is no proof in the cause that shows how this property was acquired; but it is perfectly clear, as it appears to their Lordships, that there was some, although not a large, family property in which the Bhow shared, and which was never abandoned by him while he was enjoying his more splendid fortunes in the Darbar at Poona; and it appears, too, from the correspondence that he left his brother in some sort of charge of this property, and always appeared to take an interest in it, and to receive reports respecting the management of it, though his agent complains of not having received any orders from him * * * * * * *. It cannot, therefore, be said that there was no property, **[232]** though it was very small; nor can it be said that he gave it up, for he maintained a more immediate connection with it than would be supposed natural to a man placed in a much higher situation than the rest of his family, and separated from it by local circumstances. Upon the whole, viewing this as a question of Hindu law, (upon which it is impossible to speak with any great confidence,) and the question appearing to their Lordships to have been decided upon proper grounds, throwing the proof upon the right party, and that proof not having been given, it is their opinion that the decree appealed against must be affirmed."

It is contended, and certainly not without some show of reason, that the circumstances of the case just cited are on all fours with those of the present suit. Here, as there, we have a small amount of ancestral property, to which it is not shown that Dayaram ever formally abandoned his claim, though there is, as we have said, strong reason to suspect that he did so. Here, as there, we have a brother left in charge, while Dayaram was enjoying his more splendid fortunes elsewhere; and we have a correspondence showing that, at all events down to 1861, Dayaram took an interest in, and received reports regarding the management of the ancestral property. But, after a very careful and respectful consideration of the observations of the Privy Council in the case cited, we do not think that it gives any very strong support to the plaintiff's case. It is impossible not to perceive that Lord Brougham's judgment gives forth an uncertain sound. The Hindu law had not at that time been studied with that attention which has since been devoted to it; and Lord Brougham found it impossible to speak with any great confidence upon a question of Hindu law which has since been settled as clearly as such questions can be settled. If full effect be given to the words of the judgment which we have quoted, it would come to this, that so long as there is any ancestral property, however small, and so long as any member of the family shares in such property, and has not abandoned it, all acquisitions of such member are subject to partition. That would be equivalent to saying that no member of a united family, who shares in an ancestral property, can acquire any separate property. Their Lordships cannot have meant this; for, if they had, they would not have troubled themselves to **[233]** consider whether the defendant had proved that the property in dispute had been acquired by the Bhow. The judgment is probably not very well reported; but,

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taking it as a whole, we have no doubt that what their Lordships intended was this : that, when there is ancestral property by means of which other property may have been acquired, then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate. This proposition, so stated, is, no doubt, strictly in accordance with the law as now settled. In *Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah* (1) the Judicial Committee say : "It is allowed that this was a family who lived in commensality, eating together, and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances, the presumption of law is that all the property they were in possession of, was joint property until it was shown by evidence that one member of the family was possessed of separate property. Such evidence may be received, but their Lordships are of opinion, that such evidence has not been given in this case with regard to any part of the property. Now, what has been relied upon with regard to a portion of the property, has been chiefly that it was purchased in the name of one member of the family, and that there are receipts in his name respecting it; but all that is perfectly consistent with the notion of its having been joint property; and, even if it had been joint property, it still would have been treated exactly in the same manner. We have heard from the highest authority, from the authority of Sir Edward East and Sir Edward Ryan, whose most valuable assistance we have in this case, (and it gives me a confidence that I should not otherwise have felt) that the criterion in these cases in India is to consider from what source the purchase-money is paid. Here there has been no evidence given that the appellant had any separate property, or that it was from his funds that any part of the purchase-money was paid ; therefore, I think, that, so far on this point of the case, no difficulty can be entertained, and that the whole of the property must be considered as joint property."

We may also refer to a case decided by the Supreme Court at **[234]** Calcutta in 1843, which has been much relied on by the appellant, as showing that, when the earnings of one member of a family have been blended with the family property, the whole must be considered as joint estate. That is the case of *Guruchurn Doss* v. *Golukmoney Dossee* (2). The bill showed that Ram Mohan Doss whose property was the subject of dispute, died, leaving two sons, Ramkistno Doss and Doorgapersaud Doss. Ramkistno Doss was blind, and consequently Doorgapersaud was manager of the joint property, and in consequence of his brother's blindness treated the whole property as his own, and made his will on that supposition. In the trial of the cause it became material to determine whether Doorgapersaud Doss had any separate estate and property at the time of his death ; and on that issue the Court found the following special verdict :—' That there was ancestral property which descended from Rammohan, the father of Doorgapersaud, at the death of the said Rammohan. That Doorgapersaud, by his own industry as clerk in several offices and by mercantile dealings, greatly increased the property and died possessed of the said family property and of such addition thereto. That there is no evidence of any origin of the property of which he so died possessed, except such ancestorial property and such his industry. That he lived and died in the same house with the other members of the family as a member of an undivided Hindu family.' " To the state of facts so found the

(1) 3 M.I.A. 229.

(2) 1 Fulton 165.

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Court had to apply the law. Peel, C.J., observed: "If the fact had been that the earnings of Doorgapersaud, which were in their own nature his separate property, had not been blended with the ancestorial property and its augmentations, proof of that fact would have entitled the plaintiff to a verdict on the trial of the issue." * * * * * * "Upon an attentive perusal of the words of the finding, they appear to me to exclude the existence of any acquisition unblended with the joint fund, to show that the property was at the death of Doorgapersaud the same fund, but augmented by the two distinct sources and origins of increase specified in the verdict." * * * * * "The unity of the fund being established, whether the additions thereto be termed an increment, or augmentation, or improvement, [235] and whether they be derived in the one mode or the other of the modes of increase above referred to, the division must, according to the authorities, be made by an equal partition." Grant, J., said: "Doorgapersaud's industry was employed in two ways: first, as a clerk; second, in mercantile dealings with the common stock, *i.e.*, 'the improving and augmenting the common stock (or patrimony descended) through commerce,' in the very words of the Mitaksbara. The only part of the accumulated wealth he died possessed of, which could have accrued by any other than the dealing with the ancestorial property, was such savings as might have been made from his salary as a clerk. But if his salary was mixed up with the proceeds of the inheritance, it must be taken as blended with them for the common benefit of the family, as such admixture has in all cases been taken. As, on the one hand, an inconsiderable benefit derived to the acquirer from inherited property shall not convert into an *improvement* of that property what is, in fact, a new *acquirement by separate industry*, so, on the other hand, an inconsiderable contribution by separate industry to the general stock, or to the maintenance of the family, should not convert what is substantially the *improvement and augmentation of the inheritance* into a *new acquirement* by separate industry." The whole of the judgments in this case will well repay a careful study; but it is unnecessary for us to quote further from them. The distinction drawn by the Court was between the acquisition of a distinct property without the aid of the joint funds, and the mere improvement or augmentation of the family property by the exertions of one of the members. In the one case it was held that the acquired property would be impartible: in the other, that the accretions to the original estate would be subject to division.

In the present case, then, the question which we have now to decide is, whether the respondent has proved that the purchase money of the estate in dispute came from Dayaram's separate funds, or whether, on the contrary, there is any sufficient ground for holding it to be a mere augmentation of the common stock.

Now the property left by Mayaram was undoubtedly of very small value. There was a house at Belgaum, but it was heavily mortgaged, and, as we have already said, it was ultimately sold [236] by Lokanath, and it is not proved that Dayaram received any of the purchase money. The land at Dharwar is said to have yielded about Rs. 200 *per annum*, and some small sum may perhaps have been obtained from the houses at the same place. It is alleged by the appellant that these rents were received by Dayaram. The evidence on this point is very weak. Witness No. 42 says that he held the land for seven or eight years, that he gave it up ten years ago, and that during the term of his tenancy he

paid rent to Dayaram. He has, however, no receipts, and it is remarkable that no tenant should be forthcoming who can say that he has paid rent to Dayaram within the last ten years. There are some witnesses who state vaguely that Dayaram used to come to Dharwar during the Court vacations, and receive the rents; but it is impossible to hold that there is any satisfactory proof that, at all events subsequently to 1861, Dayaram received anything from the Dharwar property. Assuming, however, that he did receive the rents, it is quite certain that none of the money remained in his pocket. It is in evidence that the marriage expenses of Lokanath and the appellant were defrayed by Dayaram; and it is also admitted by the appellant's pleader that the amount uniformly allowed by Dayaram for the maintenance of his brother and step-mother at Dharwar exceeded the amount which appears to have been realized from the rents of the property. Witness No. 43 says that Dayaram sent from Rs. 10 to Rs. 30 monthly, and witness No. 27 states that from 1863 to 1875 Dayaram sent regularly every month from Re. 1 to Rs. 15, and occasionally from Rs. 50 to Rs. 100. The appellant's pleader puts the amount at Rs. 30 *per mensem* on an average. The correspondence also shows that sums were from time to time paid by Dayaram on account of repairs to the Dharwar property. It follows conclusively that from this source Dayaram could not have derived any part of the purchase-money of the property in dispute. On the other hand, his salary appears to have been amply sufficient to have furnished the funds for the purchase. We are told that in 1863 he bought land at Inchal worth Rs. 500. In 1864 he bought a house at Belgaum worth Rs. 3,000. In 1866 he bought a house at Inchal worth Rs. 1,000. In 1872 he purchased another house at Belgaum **[237]** worth Rs. 1,000. These are the valuations now put upon the property by the appellant, though they were stated at a less amount in his plaint, and the estimate is alleged by the respondent to be in excess of the true value. We have no means of saying what Dayaram actually gave for the houses and land; but, supposing the amounts to have been as stated above, it is impossible to say that Dayaram's income was not sufficient to provide funds for the purchase, not only of the immoveable property, but also of the promissory notes and other securities left by him at his death. We do not know what his salary was when he was in the Sadar Adalat; but after the year 1856, when he became a Munsif, he could never have received less than Rs. 100 a month. Several civil lists have been produced by the appellant's pleader in Court which show, as we are told, that, at all events from 1866, Dayaram drew Rs. 200 a month, in 1869 Rs. 400, and from that time till his death in 1875 Rs. 500 a month. His letters show that he was very careful, if not penurious, in money matters; and there can be little doubt that he saved a very large portion of his salary.

An attempt has been made by the appellant to show, by direct evidence, that Dayaram received a considerable amount of family property after Mayaram's death. The story is that Mayaram, just before his death, locked up in a box jewels of the value of Rs. 2,000, and Rs. 4,000 in cash, and gave the box to the witness Venkatsingh for delivery to Dayaram. About three months after Mayaram's death, Dayaram went to Dharwar, and received the box from Venkatsingh. The Subordinate Judge has held the evidence produced in support of this story to be entirely false; and we see no sufficient reason to dissent from his conclusion. The witness Lakshmansingh stated in Court on a former occasion that the box was delivered by Venkatsingh to a peon sent by Dayaram; while in his present

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deposition he says that he saw it delivered by Venkatsingh to Dayaram himself. This witness, therefore, can hardly be regarded as reliable; and no other member of the "panch," in whose presence the delivery of the box is alleged to have taken place, has been called to support the story. But the most serious objection to the story is the apparent impossibility that Mayaram at this death could [238] have been possessed of Rs. 2,000 in ornaments and Rs. 4,000 in cash. Mayaram never received a very large salary. He retired in 1846 on a pension of only Rs. 11 a month. Subsequently to that date, he had no means of raising money except by mortgaging his house—for the purpose, we are told, of paying the expense of taking Dayaram to Bombay. If, then, Mayaram had no money, and was obliged to run into debt in 1849, how are we to suppose that between that date and 1858 he was able to accumulate Rs. 4,000 out of his pension and the very small rents of his Dharwar property.

But, after all, the best proof that the property in dispute was the acquisition of Dayaram is furnished by the conduct of the members of the family.

They had the best means of knowing the fact, and the appellant and Lokanath had the best reason for disputing it, if it was not a fact. But it is quite clear that, during Dayaram's life, they never dreamed of setting up a claim to any of the property in his hands, nor does it appear that Dayaram ever rendered to his brothers any account of his savings or his investments. It is true that he sent them money; but the amount was quite insignificant in comparison with what they were entitled to, if Dayaram's salary was liable to partition. And, in sending the money, it is apparent that Dayaram did not do so, because he recognized any right on the part of his brothers to demand it. To take a single example, we find in the last letter to Lokanath (Ex. 72) the following passage: "You and Lakshman should take pains, and continue to earn so much, at least, as is required for your expenses. You are no longer quite young. If you should want any assistance, you may occasionally ask for it. But if you sit idle, and continue to trouble me frequently, I will not listen to it." We have already mentioned that, after Dayaram's death, his widow, Bhagirthibai, entered upon the administration of the whole of Dayaram's estate on behalf of the adopted son. There appears to have been no opposition on the part of Dayaram's brothers. Bhagirthibai administered the estate till her death without any remonstrance or complaint, although the District Judge says (Ex. 9) that she was an imprudent manager and wasted the estate. Neither Lokanath nor the plaintiff [239] objected to the administration of the nazir after Bhagirthibai's death, and we find Lokanath speaking of the allowance made to his mother by Dayaram and Bhagirthibai as if it had been an act of bounty on their part. When Lokanath died, the appellant made an application (Ex. 54) to the Court, in which he certainly stated that he, Lokanath, and Dayaram, had been a united family, and that there had been no partition of the ancestral and self-acquired property; but even then he made no claim on his own account, but simply asked that a different arrangement might be made for the maintenance of the minor. The proceedings throughout show that, just as Dayaram's administrators never thought of taking charge of the Dharwar property, so neither Lokanath nor the appellant ever dreamed of setting up any claim to the property in dispute until after Bhowaniram's death. It is suggested that Lokanath may have forborne to do so, because Bhowaniram was his natural son. This is not

likely : but, at any rate, there is no explanation of the appellant's long acquiescence in the continuance of a state of affairs so inconsistent with the rights which he now alleges. Since 1865 he has been employed in the police ;—not so lucrative a profession, we may suppose, as to render him indifferent to the acquisition of Rs. 3,000 in ready money, which, if his present contention be true, he has been in a position to claim at any moment since Dayaram's death in 1875. The only possible inference from his conduct appears to us to be that until Bhowaniram's death he always regarded the property in dispute as the acquisition of Dayaram, and, consequently, as the exclusive property of Dayaram, and, after Dayaram's death, of his adopted son; and the fact that he so regarded it and acquiesced in its being dealt with accordingly, affords the strongest proof that the property was so acquired.

For these reasons we are of opinion that the respondent has proved that the property was acquired by Dayaram solely by means of his own exertions, and not by the aid of the ancestral estate.

It remains to consider the argument that, even on the assumption that Dayaram acquired the property out of the salary earned by him as Munsif and Subordinate Judge, yet the property is none the less subject to partition, inasmuch as Dayaram's education was imparted to him at the family expense.

[240] The evidence as to Dayaram's education is very conflicting, and none of it appears very reliable. For the appellant it is alleged that he was educated in Marathi, Kanarese, and English, by a private tutor, whom Mayaram retained on a salary of Rs. 4 *per mensem*. If this be so, the education so cheaply obtained is not likely to have been very extensive. The respondent's case is that Dayaram was educated in the Mission School at Belgaum, which is probably the case. But, by way of improving the story, the witnesses add that Dayaram was supported by a charitable allowance from the missionaries. As Mayaram held a respectable and fairly well-paid appointment in Belgaum, this is unlikely ; but it is likely enough that Dayaram received a free education in the Mission School, in which case it could not be maintained that he received his education at the family expense, merely because he was maintained at the family expense while he was receiving his education. We will, however, for the sake of argument, assume that Mayaram did pay something for such education as Dayaram received before he went to Bombay. When we proceed to consider what this education amounted to, we see no reason to believe that it consisted of any thing more than the ordinary elementary education—reading, writing and arithmetic—which is likely to have been imparted at a Mission School in Belgaum thirty or forty years ago. The question to be decided is, whether the circumstance, that Dayaram acquired such an ordinary education, while a boy, at the family expense, rendered him incapable of calling his salary his own, when he rose by his learning and merits to the position of a Judge.

We do not think it necessary to enter upon a disquisition regarding the numerous texts of Hindu law which have been cited to us by the learned pleader for the appellant. Those texts, or most of them, have been set out and discussed in the case of *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (1), which has long been a leading authority on the subject. That was a case in which the adoptive mother of a dancing girl claimed her property, on the ground that it had been acquired by skill imparted at

(1) 2 M. H. C. R. 56.

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the mother's expense. The High Court of Madras, overruling a very elaborate judgment of the Civil, Judge decided that, if those [241] gains were to be considered as the gains of science, they were joint property of the acquirer and her mother. The authority of this case was recognized in general terms by Couch, C.J., in *Bai Mancha* v. *Narotamdas* (1), in which the question was whether the earnings of a vakil were partible. It is to be observed, however, that the vakil united the business of money-lender with that of pleader, and that there was joint property of which he had the use: so that perhaps this case can hardly be regarded as of any great authority on the point. On the other hand, in *Dhunnookdharee Lall* v. *Ganpat* (2), Mitter, J., said: "The plaintiff's case in the Court below was that the defendant received his education from the joint estate, and that he is consequently entitled to participate in every property that has been acquired by the defendant by the aid of such education. But this contention is nowhere sanctioned by the Hindu law, and I see nothing in justice to recommend it. This last case was, in a measure, approved and some doubt thrown on the authority of the Madras and Bombay cases by the Judicial Committee in *Pauliem* v. *Pauliem* (3) in which the following passage occurs:—"This being their Lordships' view, it does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant—which, stated in plain terms, amounts to this: that if a member of a joint Hindu family receives *any education whatever* from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property—is or is not maintainable. Very strong and clear authority would be required to support such a proposition. For the reasons that they have given, it does not appear to them necessary to review the text books or the authorities which have been cited on this subject. It may be enough to say that, according to their Lordships' view, no texts which have been cited, go to the full extent of the proposition which has been contended for. It appears to them, further, that the case reported in the tenth volume of Sutherland's Weekly Reporter—*Dhunookdharee Lall* v. *Ganpat* (2) in which a judgment was given by Mr. Justice Jackson and Mr. Justice Mitter, both very high authorities—lays down the law bearing upon this [242] subject by no means so broadly as it is laid down in the two cases which have been quoted as decided in Madras; the first being to the effect that a woman adopting a dancing girl, and supplying her with *some* means of carrying on her profession, was entitled to share in her gains (*Chalakonda Alasani* v. *Chalakonda Ratnachalam* (4); and the second to the effect that the gains of a vakil who has received no *special education* for his profession are to be shared in by the joint family of which he was a member (*Durvasala Gangadhurudu* v. *Darvasala Narosamma* (5); decisions which have been to a certain extent also acted upon in Bombay (*Bai Mancha* v. *Naratomdas* (1).) It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of the law upon this subject of the Courts of Bengal is not more correct than what appears to be the doctrine of the Courts of Madras."

It certainly appears to us that the dictum of Mitter, J. that the proposition which we are considering "is nowhere sanctioned by Hindu law," is not strictly accurate. The texts which have been cited to us

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(1) 6 B.H.C.R. A.C.J. 1. (2) 10 W.R. 122. (3) 1 M. 252 = 4 I.A. 109.
(4) 2 M.H.C.R. 56. (5) 7 M.H.C.R. 47.

do, in our opinion, establish it as a rule of Hindu law that the ordinary gains of science are divisible, when such science has been imparted at the family expense, and acquired while receiving a family maintenance, but that it is otherwise when the science has been imparted at the expense of persons who are not members of the student's family. But the question still remains, whether the term "science," as used in the texts, is, in modern days, to be construed as meaning a mere general education, and not rather a special training for a particular profession. The words which we have italicised in the judgment of the Judicial Committee in *Pauliem* v. *Pauliem*, as well as an observation of one of their Lordships, in the course of the argument, that the Madras case of the dancing girl was a case of a special training, and not necessarily applicable to a case of general training, may seem to indicate that, if the question comes again before their Lordships, it will be considered chiefly with regard to the nature and extent of the education imparted at the family expense. Mr. Mayne, in his valuable work on Hindu law, discusses **[243]** this question with his usual ability. "It is difficult," he says (s. 256), "to see why a person who has made gains by science, after having been educated or maintained at the family expense, should be in a worse position than any other person who has been so educated or maintained, and who has afterwards made self-acquisitions. Jimuta Vahana lays it down that, where it is attempted to reduce a separate acquisition into common property on the ground that it was obtained with the aid of common property, it must be shown that the joint stock was used for the express purpose of gain. 'It becomes not common merely because property may have been used for food or other necessaries, since that is similar to the sucking of the mother's breast.' This seems to be good sense. If a member of joint Hindu family were sent to England, at the joint expense, to be educated for the Bar or the Civil Service, it seems fair enough that his extra gains should fall into the common stock, 'as a recompense for the extra outlay incurred. It might be assumed that, when the outlay was incurred, the reimbursement was contemplated. But it is different where all start on exactly the same level, with nothing but the ordinary maintenance and education which is common to persons of that class of life."

We think that we shall be doing no violence to the Hindu texts, but shall be only adapting them to the condition of modern Hindu society, if we hold that, when they speak of the gains of science which has been imparted at the family expense, they intend the special branch of science which is the immediate source of the gains, and not the elementary education which is the necessary stepping stone to the acquisition of all science. Adopting this principle, and applying it to the present case, we find, as we have said, that there is no reason to suppose that Dayaram acquired at Dharwar and Belgaum anything more than a rudimentary education. We see no reason to doubt that the knowledge of law and judicial practice which qualified him for the post of a Judge was acquired by him in a lawyer's office in Bombay and in the Sadar Adalat. Assuming that the burden of proving that this knowledge was acquired without any aid from the family estate lies upon the respondent, (though the observations of the Privy Council in *Luximon Rao Sudasew* v. **[244]** *Mullar Rao Bajee* (1) tend to the opposite conclusion,) we find sufficient in the evidence, and especially in the earlier letters written by Dayaram

(1) 2 Knapp. 60.

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6 B. 225=6 Ind. Jur. 369.

from Bombay, to show that Dayaram was not receiving pecuniary aid from his father, but on the contrary was supplying his father with such money as he could spare.

We are, therefore, of opinion that the appellant's case fails on all the grounds on which it has been rested; and we, accordingly, affirm the decree of the Subordinate Judge with costs.

Decree affirmed.

6 B. 244=6 Ind. Jur. 421.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice Kemball.

NAWAB MIR KAMALUDIN HUSENKHAN (*Original Plaintiff*), *Appellant v.* PARTAP MOTA (*Original Defendant*), *Respondent.* *

[13th September, 1880.]

The Summary Settlement (Bombay) Act VII of 1863, *ss.* 2, 6, 9—*Jaghirdar—Inamdar—Suit for contribution—The Indian Contract Act, IX of* 1872, *ss.* 69 *and* 70.

The plaintiff was the *jaghirdar* of a village in which the defendant held certain land as *inamdar* on the annual payment of a certain quit-rent. The plaintiff's *jaghir* was, in point of time, subsequent to the defendant's *inam*. Ever since the time of the *jaghir*, the ancestors of the defendant, (and, after them, the defendant himself) paid the quit-rent to the ancestors of the plaintiff, and, after them, to the plaintiff himself. In 1869 the summary settlement was introduced into the village under Bombay Act VII of 1863. Under s. 9 of that Act, a notice was served upon the plaintiff by the Collector in respect of the village, and he accepted the settlement provided in ss. 2 and 6 of the Act. Government, accordingly, granted the village to him at the summary settlement of two annas in the rupee of the full assessment. No notice was served upon the defendant under the Act, nor did the plaintiff inform the defendant of the notice which the plaintiff had received in respect of the village. The certificate issued by the Collector to the plaintiff, previously to the grant of the *sanad* regarding the settlement, contained the following passage :—" Before the village (Vesu and Sanya) were granted in *jaghir*, lands were held by *peta-inamdars* over which the *jaghirdars* has no right. They are entered in the *sanad* only for the purpose of receiving the settlement and paying it over to the Sarkar." In 1877 the plaintiff sued the defendant for the amount of three years' summary settlement which he (plaintiff) had paid to Government on account of the defendant's land.

[245] *Held* that the defendant was not liable to pay, whether regarded as an independent *inamdar* holding directly under Government or as a tenant of the plaintiff.

Held, also, that ss. 69 and 70 of the Indian Contract Act IX of 1872 did not apply to the case.

Jaisingbhai v. *Hataji* (1) referred to and approved.

THIS was a second appeal from the decision of H. Birdwood, District Judge of Surat, reversing the decree of Chandulal Mathuradas, Second Class Subordinate Judge at the same place.

The Subordinate Judge allowed the plaintiff's claim, but his decree was reversed, in appeal, by the District Judge. The facts of the case are fully stated in the judgment of the High Court.

The principal question argued in the second appeal was whether the defendant was liable to pay the amount of the summary settlement claimed by the plaintiff.

* Second Appeal No. 150 of 1880.

(1) 4 B. 79.

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6 B. 244 = 6 Ind. Jur. 421.

Shantaram Narayan, appeared for the appellant.

Pandurang Balibhadra, appeared for the respondent.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C.J.—This is a suit to recover Rs. 7, being the amount of summary settlement assessment for three years which the plaintiff alleges that he has paid to Government in respect of certain lands in the village of Vesu held by the defendant.

The summary settlement under Bombay Act VII of 1863, appears to have been introduced into that village in 1869. The plaintiff is the *jaghirdar* of the village, which is said to have been granted to his ancestor by the Government of the Gaekwar when the village formed part of the territory of that prince.

The defendant is a *girasia*, and holds in *inam*, in the same village, thirteen bighas of *giras*-land, for which he pays a *khandni* (quit-rent) of Rs. 13-13 annually and no other Government land assessment. It is admitted on both sides that the ancestors of the defendant have held that *inam* from a period anterior to the grant of the village in *jaghir* to the plaintiff's ancestor, and ever since that grant have paid the Rs. 13-13 to the ancestors of the plaintiff or the plaintiff. It does not appear whether that payment was made to the plaintiff and his ancestors for their own benefit, or as the agents of Government for the benefit of the State, save so far as Ex. 16 leads to the inference that **[246]** the latter was the case. If the thirteen bighas were subjected to a full assessment, it has been proved that it would be Rs. 2-8 *per* bigha, *i.e.*, Rs. 32-8 annually for the whole of his *inam*. So it appears that the defendant, inasmuch as he has uniformly paid only Rs. 13-13, holds the lands "partially exempt from the payment of land revenue"—the words used in the preamble and text of Bombay Act VII of 1863.

Notice under s. 9 of that Act was served upon the plaintiff in respect, apparently, of the whole village, but he [on the ground that the grant, to his ancestor, of the village was made by the Gaekwar, and, therefore, as the plaintiff argued, that he (the plaintiff) was not liable to be served with notice under the Act], declined to receive the notice. But he did not, as required by cl. 8 of s. 9, send any answer in writing to the Collector, demanding an inquiry into his (plaintiff's) title to hold the village in *jaghir* wholly or partially exempt from payment of land revenue, and he accordingly was deemed to have accepted the settlement as provided in ss. 2 and 6 of the Act, and he appears to have acquiesced therein. And Government purported to grant the village to him at the summary settlement of 2 annas in the rupee of the full assessment. It is not pretended either that the Collector sent any notice under the Act to the defendant or to any of the other minor *inamdars* of the village, or that the plaintiff communicated to the defendant or to other minor *inamdars* the fact of such a notice having been sent to him in respect of the village of Vesu.

A document, numbered as Ex. 16 in the Regular Appeal, has been produced by witness (No. 17) and given in evidence on behalf of the plaintiff. It is an extract from the Collector's Outward Register, and is a copy of a certificate issued on the 28th August, 1869, by the Collector to

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the plaintiff, and runs thus:—"Before the villages (Vesu and Sanya) were granted in *jaghir*, lands were held by *peta-inamdars* over which the *jaghirdar* has no right. They are entered in the *sanad* only for the purpose of receiving the settlement, and paying it over to the Sarkar. In this manner the *sanads* have been prepared. But as these villages have not been surveyed, the measurements have not been put in the *sanad*; consequently the *sanads* are retained **[247]** here pending the survey, and this certificate has been given (to the *jaghirdar*). When the survey is held, this certificate should be produced, and the *sanads* will be granted to you (the *jaghirdar*) after the measurements have been inserted, and you should give to the registrar a fee of 1 anna for each *sanad*, 25th August, 1869." This arrangement made by Government (the Collector) with the plaintiff (the *jaghirdar*) is not alleged or proved to have been entered into with the privity or consent of the defendant or other minor *inamdars*. The defendant must be regarded either as an independent *inamdar* holding directly under Government, or as a tenant of the plaintiff.

The Collector, by issuing the notice under s. 9 to the plaintiff only, treated him as holder of the whole village. Neither the Collector nor the plaintiff gave to the defendant any opportunity of standing upon his rights as an independent *inamdar* (if such he were), and demanding an inquiry into his title.

Section 7, no doubt, provides that "any settlement made with the holder of land, held wholly or partially exempt from payment of land revenue, in accordance with s. 6 and the rules annexed thereto, shall, so far as the right of Government to levy the annual quit-rent mentioned in the said section is concerned, not only be binding upon such holder, his heirs and assigns, but also on the rightful owner, his heirs and assigns whosoever such rightful owner may be."

The portion of that section now quoted was intended to protect Government in the event of any mistake having been made in ascertaining the rightful owner to be served with the notice, but was not intended to authorize the Collector deliberately to overlook the rights of holders known by him to be such. Exhibit 16 shows that the Collector believed the *peta-inamdars* (of whom the defendant was one) to be holders perfectly independent of the plaintiff, and nevertheless the Collector ignored them as persons entitled to demand an inquiry into their title under the Act. We do not say whether or not they were so; as, whether they were so or were tenants of the plaintiff, it seems to us that the result of this suit must be the same. If the defendant were, in 1869, an independent holder in possession of his thirteen bighas, **[248]** we cannot regard the plaintiff as a holder of the lands within the meaning of cl. (*f*) of s. 32, the glossarial portion of the Act. In this view there has not been service of notice upon any holder of the thirteen bighas; and, if we are to regard the plaintiff as the agent of Government under Ex. 16 to collect assessment from the defendant any other *peta-inamdars*, he is suing for that to which Government is not entitled, for there has not been any summary settlement in respect of the defendant's thirteen bighas either with any *de facto* or any *de jure* holder thereof. The fact that the defendant held thirteen bighas, and that the plaintiff held other lands in the village, does not constitute the plaintiff and defendant joint holders under cl. 5 of s. 9 of the Act. For in the view that the defendant was an independent holder of those thirteen bighas, he was neither a joint holder nor a holder in common with the plaintiff. Their holdings were in that view separate.

If we take the other view, and regard the defendant as a tenant of the plaintiff, we find no provision in the Act which enables a landlord or superior holder to distribute the summary settlement assessment amongst his tenants or sub-holders, such as there is in the Bombay Local Fund Cess Act (III of 1869, s. 8) with respect to the recovery of local cess by superior holders from their tenants. There is nothing in the Bombay Act VII of 1863 which indicates any general intention on the part of the Bombay Legislature to enable the holders, from Government, of lands wholly or partially exempt from payment of land revenue to alter existing contracts as to rent between those holders and their sub-tenants. The preamble of Act VII of 1863 only speaks of an intention to deal with "the relative rights of Government and the holders"—evidently by the expression "holders" meaning those who hold directly from Government. And in s. 4, where the Legislature outsteps that intention by treating of "any special or extra cess, fine or tax" customarily levied from the holders, *occupants* or *cultivators* of land, and enacts that Government may, in lieu of such extra cess, fine or tax, impose on the land "any sum, which may be deemed a fair equivalent, as an annual assessment to be paid under all circumstances," the second clause provides that "whenever, under the preceding clause, any such cess **[249]** fine or tax, hitherto payable by the occupant, cultivator, or other person not being the owner, shall be made leviable from the owner, it shall be lawful for such owner to recover from such occupant, cultivator, or other person, so long as the said occupation, cultivation or other tenure of the land shall endure, the amount of the commuted assessment fixed in lieu of such cess, fine or tax." This section shows clearly that it was the intention of the Bombay Legislature to confine the right of the owner (that is, superior holder) to recoup himself, as against his sub-tenants, in respect of annual assessment by way of summary settlement to be levied from him by Government under the Act, to cases in which such annual assessment was substituted for a special or extra cess, fine or tax previously payable by such sub-tenants. It is easy to understand why the Bombay Legislature should not empower the landlords to recoup themselves as against their tenants in other instances than those in which a burden, theretofore directly borne by the latter, was rendered payable in the first instance by the former.

The immunity to be gained by the landlord under the Act from inquiry into his title to total or partial exemption from payment of land revenue, and for which immunity he was to pay a quit-rent of two annas in the rupee of what would be a full assessment, was not necessarily any benefit to his sub-tenants, many of whom were, no doubt, already paying to him rack-rents, and could not in fairness be subjected to any additional burden. Nor, in such a case as the present, does there appear to be any just reason why the summary settlement assessment, payable under the Act by the plaintiff, should, so far as it respects the lands held by the defendant, be ultimately chargeable on him. His title is admitted to be older than that of the plaintiff. When "the village of Vesu" was granted by the Gaekwari Government to the ancestor of the plaintiff, it must be taken as so granted subject to rights which were good as against that Government, which could not lawfully grant more than belonged to itself. We cannot presume that it intended to confiscate such rights in favour of its grantee, and no evidence of any such intention in this case has been brought to our notice. That the State cannot, by its grants, destroy rights in the land which are good against itself, is very **[250]** clearly expressed by Professor H. H. Wilson in his observations quoted in 12 Bombay

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High Court Reports, Appendix, p. 34, and in those of Mr. Mountstuart Elphinstone quoted in the same volume, Appendix, p. 39; and see *R. N. Mandlik* v. *Dadaji Bapuji Desai* (1), *Desai Himatsingji* v. *Shivsang Bhavabhai* (2). It matters not whether the *sanad* or grant contains a reservation of such rights. The State cannot grant what does not belong to it. And whether the defendant is to be regarded as the immediate tenant of Government or as the tenant of the plaintiff, we do not see how the defendant's elder title could justly be made to bear the annual charge, or any part of it, incurred by the plaintiff as the price of evading an inquiry into his junior title, or how the circumstance that the plaintiff has so escaped, can benefit the defendant. If the defendant's rights were good against the Gaekwari Government, which granted the village to the plaintiff, those rights would be equally good against the present Government, if it resumed the village, or if it caused the village to be sold for non-payment, by the plaintiff, of the summary settlement assessment so long as the defendant paid regularly to the person who, or the Government which, might at the time be entitled to receive it, the annual *khandni* of Rs. 13-13, with which only his thirteen bighas were chargeable.

Section 4 of Bombay Act VII of 1863 has been repealed by s. 2 and sch. A of Bombay Act V of 1879, but is re-enacted in ss. 49 and 50 of the same Act.

We see no reason for holding that, under the circumstances above detailed, ss. 69 and 70 of the Indian Contract Act could be properly applied in this case.

The decision of a Division Bench of this Court in *Jaisingbhai* v. *Hataji*(3) seems to be in accordance with that at which we have arrived in this case.

For the foregoing reasons only we affirm the decree of the District Judge with costs.

Decree affirmed.

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6 B. 251.

[251] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice.

BRITO AND ANOTHER (*Plaintiffs*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*).* [13th August, 1881.]

Salt (Bombay) Act VII of 1873—*Act XVIII of* 1877—*Duty paid under former Act—Effect of new Act by which duty increased coming into operation before removal of salt—Increased duty paid under protest—Suit to recover excess—Set-off—Excise duty—Customs.*

Prior to the 28th December, 1877, the excise duty on salt manufactured in Bombay was Rs. 1-13-0 per maund, and the Act which regulated the importation and transport of salt in the Presidency of Bombay was the Bombay Salt Act VII of 1873. The plaintiffs, who were salt merchants, were desirous of exporting salt from the salt-works at Uran and Panvel, and accordingly, under the provisions of Act VII of 1873, made four several applications in writing to the Assistant Collector of Salt Revenue for the necessary permits on the following dates, *viz.*, 27th November, 1877; 17th December, 1877; 17th December, 1877; and 24th December 1877. Each application stated the amount of salt which it was proposed to export, and at the time of sending in such applications the duty payable in respect of the

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* Suit No. 606 of 1878.

(1) 1 B. 523 (528).
(2) Printed Judgments of 1880, pp. 185, 187.
(3) 4 B. 79.

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amount of salt therein mentioned was paid. Receipts for the duty so paid were given to the plaintiffs, and all four applications were duly registered before the 28th December, 1877. The salt comprised in the first three applications amounted, in all, to maunds 20,972 ; and the whole of this quantity, with the exception of maunds 2,748, had been removed by the plaintiffs before the 28th December, 1877 ; but at that date no part of the salt which was the subject-matter of the last application (24th December, 1877) and which consisted of maunds 10,483, had yet been removed. On the 28th December, 1877, Act XVIII of 1877 came into force, by which Act the excise duty on salt manufactured in Bombay was raised from Rs. 1-13-0 to Rs. 2-8-0 per maund, and on that day the sarkarkun refused to allow the plaintiffs to remove the balance of the first three lots (*viz.*, 2,748 maunds) or the last lot of maunds 10,483, unless an additional duty, at the rate of eleven annas per maund, was paid in respect thereof, alleging that the same was leviable under Act XVIII of 1877. The plaintiffs paid under protest the additional duty demanded, amounting to Rs. 9,096-5-0, and exported the salt to British Malabar, having previously obtained certificates from the Collector that excise duty, at the full rate of Rs. 2-8-0 per maund, had been paid upon the said salt. On production of these certificates at the ports of British Malabar, the salt was admitted free of customs duty. The plaintiffs subsequently brought this suit to recover the said sum of Rs. 9,096-5-0 together with a sum of Rs. 1,000 damages alleged to have been sustained by reason of the delay in removing the salt caused by the conduct of the sarkarkun. The plaintiffs contended that having paid the duty in respect of the salt comprised in the four applications, and the said duty having been received by the Collector before Act XVIII came into force, they were not liable to pay any further duty, and that Act XVIII of 1877 did not apply to the said salt. The **[252]** defendant contended that the additional duty was rightly levied on the salt and further claimed to set-off against the plaintiffs' claims the sum of Rs. 9,096-5-0 which the plaintiffs would have been obliged to pay in importing the salt into British Malabar if they had not already paid it to the authorities in Bombay, but from payment of which they had been exempted on production of the certificates above mentioned.

Held that on the 28th December, 1877, the plaintiffs had acquired the right to remove the salt, whenever they might think proper, by simply complying with the usual forms required by Act VII of 1873, and that Act XVIII of 1877 did not operate retrospectively so as to destroy that right and to impose on the plaintiffs a heavier burden as a condition of their removing the salt.

Held, also, however, that as the salt was allowed to pass free into British Malabar on the strength of its having already paid the duty of Rs. 2-8-0 per maund at Bombay, the sum of Rs. 9,096-5-0 must be deemed to have been appropriated by the plaintiffs to the payment of the customs duty payable on the importation of the salt into the ports of British Malabar, and was, therefore, no longer recoverable from the defendant. The plaintiffs, by applying to the Collector of Customs at Bombay for certificates that the duty had been paid, by presenting them at the Malabar ports, and claiming, in virtue of such certificates, that the salt should be admitted free of customs duty, virtually appropriated the Rs. 9,096-5-0 excess of excise duty (which remained in the hands of the customs authorities as money had and received to the use of the plaintiffs) to the payment of the enhanced customs duties at such ports.

THE plaintiffs were salt merchants, carrying on business in Bombay.

Prior to the 28th December, 1877, the Act which regulated the manufacture, storage, possession and transport of salt in the Presidency of Bombay was the Bombay Salt Act (VII of 1873). Until the said 28th December, 1877, it was the practice in the office of the Collector of Salt Revenue in Bombay to require merchants who were desirous of exporting salt from the Bombay Presidency, to apply to the Assistant Collector of Salt Revenue in the following form :—" Please permit me to export salt, as per margin, to * * * on payment of the full excise duty." In the margin was stated the number of maunds which it was proposed to export. When making such an application the merchant paid the amount of excise duty payable in respect of the quantity of salt mentioned in his application, and received a receipt with an endorsement signed by the Assistant Collector, and addressed to the sarkarkun of the place where the salt was

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lying, requiring him to permit the removal of the salt on which such duty had been paid.

[253] In accordance with the usual practice, the plaintiffs made four several applications, in the above stated form, for the removal of salt belonging to them, which was then lying at Panvel and Uran. The applications were made on the following dates, *viz.*, 27th November, 1877; 17th December, 1877; 17th December, 1877; and the 24th December, 1877; and at the time of such applications the respective amounts of duty payable in respect of salt therein mentioned was duly paid. Receipts for the duty so paid were given to the plaintiffs by the Collector of Salt Revenue, and all four applications were duly registered at the office of the sarkarkun before the 28th December, 1877.

The salt comprised in the first three applications amounted, in all, to maunds 20,972. The whole of this quantity, except maunds 2,748, had been removed by the plaintiffs before the 28th December, 1877; but at that date no part of the salt, which was the subject-matter of the last application (24th December, 1877), and which consisted of maunds 10,483 had yet been removed. The plaintiffs complained that they had made arrangements for the removal of the balance of the three first lots (2,748 maunds) and of the last lot of maunds 10,483; but on the 28th December, 1877, the sarkarkun refused to allow any of the said salt to be removed, unless an additional duty, at the rate of eleven annas per maund, was paid in respect thereof, alleging that the same was leviable under Act XVIII of 1877, which came into force on the 28th December, 1877.

The plaintiffs, ultimately, paid under protest the additional duty demanded, amounting to Rs. 9,096-5-0, and filed this suit to recover such payment together with a sum of Rs. 1,000 damages, alleged to have been sustained by reason of the delay in removing the said salt caused by the conduct of the sarkarkun. The plaintiffs contended that, having paid the duty in respect of the salt comprised in the four applications and the same having been received by the Collector before Act XVIII of 1877 came into force, they were not liable to pay any further duty, and that the Act XVIII of 1877 did not apply to the said salt.

In his written statement the defendant alleged that no application, under s. 26 of Bombay Act VII of 1873, for a permit [254] for the removal of the salt on which the increased duty had been levied, was made by the plaintiffs before Act XVIII of 1877 came into force on the 28th December, 1877. By that Act the excise duty on salt manufactured in the Presidency of Bombay was raised from Re. 1-13 per maund to Rs. 2-8 per maund.

In the following paragraphs of his written statement the defendant sought to establish a set-off against the plaintiffs' claim:—

6. "The defendant further says that the plaintiffs' said applications were for leave to export the said salt to British Malabar within the Presidency of Madras, and that the plaintiffs, for the purposes of such export, obtained from the authorities at the ports of export, on the 30th day of January and 9th and 16th days of February, 1878, five certificates that excise duty at the full rate of rupees two and annas eight per maund had been paid by the plaintiffs on the said balance of such salt.

7. "The plaintiffs thereafter imported the said balance of salt by sea into British Malabar. At the time of such import a customs duty of rupees two and annas eight per maund was, under and by virtue of the

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provisions of the said Act XVIII of 1877, leviable on all salt imported by sea into British Malabar or any other port of British India.

8. "The plaintiffs were, however, allowed to import their said salt into British Malabar without payment of any customs duty whatever thereon, on production of the said certificates, showing that an excise duty of rupees two and annas eight per maund had been paid thereon. The plaintiffs were allowed such exemption from customs duty under and by virtue of the notification of the Government of India dated the 5th of August, 1875.

9. "If the plaintiffs had paid excise duty on the said salt at the rate of rupee one and annas thirteen only per maund, they would have had to pay a further duty thereon at the rate of eleven annas per maund at the port of import to make up the full customs duty of rupees two and annas eight per maund.

10. "The defendant will, if necessary, claim to set off against the claim of the plaintiffs in this suit the sum of Rs. 9,096 and annas five, being the amount of the customs duty which the plaintiffs would have had to pay upon the said salt at the port of import if **[255]** they had paid an excise duty thereon at the rate of rupee one and annas thirteen only per maund."

At the hearing, counsel for the plaintiffs admitted that they could not prove damages beyond the sum of Rs. 50.

Inverarity and *Jardine*, for plaintiffs.

Marriott (Advocate-General) and *Lang*, for defendant.

The following Acts and authorities were cited in the argument:—Act XXIV of 1869; Government (Bombay) Notification of 12th August, 1874; Bombay Act VII of 1873; Indian Tariff Act XVI of 1875, sch. A, art. 49; General Clauses Act I of 1868, s. 6; *In re Ratansi Kalianji* (1); Notification of Governor-General in Council, 5th August, 1875; *Dullabh Shivlal* v. *T.C. Hope* (2).

JUDGMENT.

SARGENT, J.—The plaintiffs, who are merchants dealing in salt, seek to recover from the Secretary of State the sum of Rs. 9,096-5-0 and interest at 9 per cent. *per annum* from 16th January, 1878, under the following circumstances. By Act XXIV of 1869 an excise duty of Re. 1-13-0 per maund was imposed on salt manufactured in the Presidency of Bombay. The Bombay Salt Act VII of 1873 regulates the manufacture, storage, possession and transport of salt in the Presidency of Bombay with a view to the better protection of the salt revenue. Sections 25 to 30 of that Act, both inclusive, provide especially for the mode of obtaining a permit for the removal of salt from salt works in Bombay; but the actual practice adopted by the salt authorities, as stated by the plaintiffs and not denied on behalf of the defendant, would appear to be somewhat different, at least in form. In accordance with that practice, the plaintiff applied to the Assistant Collector of Salt Revenue in the form set out in (Ex. A) in this suit, on 27th November, 17th December and 24th December, respectively, in the year 1877 for permission to remove salt from the salt works at Uran and Panvel for exportation, and having paid the duty then leviable, had received from the Assistant Collector the usual receipts for the same. These receipts had been duly lodged, according to the practice, **[256]** in the office of the sarkarkun at Uran, and the authority to allow the salt to be removed had also been

(1) 2 B. 148.

(2) 8 B.H.C.R. A.C.J. 213.

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duly notified to the same officer not later than the 26th December. On the 28th December, however, 2,748 maunds comprised in the three earlier applications as well as 10,483 maunds, the subject of the latest application made on the 24th December, still remained to be removed, and it was admitted by counsel for the plaintiffs that no formal application for the removal of this salt was made to, and received by, the sarkarkun as contemplated by s. 26 of the Bombay Act VII of 1873 until after the 28th December. On that day the Act XVIII of 1877 came into force, by the sixth section of which the excise duty on salt manufactured in Bombay was raised to Rs. 2-8-0- per maund. The formal application to the sarkarkun to be allowed to remove the above salt was subsequently made by the plaintiffs, when they were informed that they must pay the higher duty,—no formal application for removal, as contemplated by the Act, having been made before. The plaintiffs ultimately on the 16th January, 1878, paid to the salt authorities, under protest, the difference between the higher and lower duty, amounting to Rs. 9,096-5-0, on 16th January, 1878.

Now, when Act XVIII of 1877 became law on the 28th December, the excise duty of Re. 1-13-0 had been already paid on the salt in question; and although such duty may, according to the practice of the department, have been credited only to the account of the taluka and not of the revenue, the plaintiffs had acquired the right to remove the salt, whenever they might think proper, by simply complying with the usual forms required by Act VII of 1873; and it would be contrary alike to principle and authority to construe Act XVIII of 1877 as operating retrospectively so as to destroy that right and to impose a heavier burden on the plaintiffs as a condition of their removing the salt. Indeed, I do not think that the Advocate-General ventured to dispute that the increased excise duty had been improperly levied from the plaintiff by the salt authorities.

It was admitted, however, by counsel for the plaintiff that the salt in question had been subsequently imported into Madras ports under the authority of the certificates. The customs import duty at the above ports had been raised, by s. 4 of Act [257] XVIII of 1877, from Re. 1-13-0 as fixed by art. 49 of the Indian Tariff Act of 1875 to Rs. 2-8-0 per maund, and it was admitted by Mr. Macpherson for the plaintiffs that the salt in question was allowed to pass free on the strength of its having already paid the duty of Rs. 2-8-0 per maund at Bombay, as stated in the above certificates. Under these circumstances it was contended for the Secretary of State that the Rs. 9,096-5-0 which had been paid to the salt authorities in respect of the duty at Rs. 2-8-0 per maund must be deemed to have been already appropriated by the plaintiffs to the payment of the customs duty payable on the importation of the salt into the Madras ports, and was therefore no longer recoverable from the defendant. I think this construction must prevail. The customs duty on the salt in question was not levied on importation into the ports of Madras on its being shown by a proper certificate issued by the Collector of Customs at the port of Bombay that the excise duty had been duly paid on its removal. That being so, the plaintiffs, by applying to the Collector of Customs at Bombay for such a certificate, by presenting it at the Madras ports, and claiming on the strength of it that the salt should be admitted free of customs duty, virtually appropriated the Rs. 9,096-5-0 excess of excise duty which remained in the hands of the customs authorities as money had and received to the use of the plaintiffs to the payment of the enhanced customs

duty at such ports. As to interest on the Rs. 9,096-5-0, it may be that the appropriation of the Rs. 9,096-5-0 was not complete until the plaintiffs made use of the certificates at the ports of import: but interest does not run at law on money had and received and no notice was given to the Government in the interval, such as is required by Act XXXII of 1839, to enable the plaintiff to recover interest as damages. I think, however, that there is no sufficient reason for doubting the plaintiff's statement that he incurred a loss of Rs. 50 by his having to compensate native craft which had come to Uran by his directions to bring away the salt in question, and was afterwards obliged to leave without cargo. This claim was asserted very early in the correspondence between his solicitors and the Government authorities, and the smallness of the sum claimed is in favour of the *bona fides* of the plaintiffs.

[258] Judgment must pass for the plaintiffs for Rs. 50. Parties to pay their own costs.

Attorneys for the plaintiffs.—Messrs. *Craigie, Lynch and Owen.*

Attorneys for the defendant.—Messrs. *Hearn, Cleveland and Little.*

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ORIGINAL CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

MAYABHAI PREMBHAI (*Original Defendant*), *Appellant v.* TRIBHUVANDAS JAGJIVANDAS, BY HIS ASSIGNEE, MOTILAL TRIBHUVANDAS (*Original Plaintiff*), *Respondent.** [6th August, 1881.]

Decree—Execution—Limitation Act XV of 1877, sch. II, cl. 180—Civil Procedure Code, Act X of 1877, s. 230.

The plaintiffs obtained a decree of the High Court of Bombay against the defendant on 22nd February, 1867. The defendant, after the passing of the decree against him, resided in Ahmedabad. In July, plaintiff assigned his decree to L., who in 1876 assigned it to M. From time to time M. obtained orders for the execution of the said decree, but was always unable to proceed to execution. The last order for execution made by the High Court was on the 4th February, 1879. In April, 1879, the decree was transmitted to the Court at Ahmedabad for execution, and that Court in September, 1879, issued a warrant of arrest against the defendant against the order for which the defendant appealed. The said order was confirmed by the High Court on 10th February, 1880. In April, 1881, the defendant was in Bombay, and M., the decree-holder, obtained a summons calling on defendant to show cause why the decree should not be executed against him. On 3rd May the summons was made absolute. The defendant appealed, and contended that the application for execution was barred by limitation under s. 230 of the Civil Procedure Code (Act X of 1877), which was to be read with cl. 180 of sch. II of Limitation Act, XV of 1877.

Held, that the application was not barred. Clause 180 of the second schedule of the Limitation Act, XV of 1877, was intended to be independent of s. 230 of the Civil Procedure Code, and not to be in any way controlled by it. Section 230 does not apply to decrees made by the High Court.

[F., 36 C. 543=9 C.L.J. 271=1 Ind. Cas. 168; **Appr.**, 20 C. 551; **R.**, 7 M. 540.]

APPEAL from an order made in chamber by Bayley, J., on 3rd May, 1881, making absolute the summons calling on defendant to show cause why the decree dated 23rd February, 1867, should not be executed against him.

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* Suit No. 605 of 1866.

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In this suit the plaintiff Tribhuvandas Jagjivandas had obtained a decree against the defendant on 22nd February, 1867, for Rs. 15,582-8-0 and costs.

[259] On the 6th July, 1872, the plaintiff, Tribhuvandas Jagjivandas assigned the above judgment-debt to Lallubhai Balmukundas, his executors, administrators and assigns, for Rs. 6,000.

On 5th October, 1876, Lallubhai Balmukundas assigned the judgment-debt to Motilal Tribhuvandas, his executors, administrators and assigns, for Rs. 5,000.

After the passing of the decree, the defendant resided at Ahmedabad. At the date of the application for execution he was in Bombay.

Motilal Tribhuvandas from time to time obtained from the High Court orders for the execution of the said decree, but was unable to execute the same. The last order was made on the 4th February, 1879.

On 15th April, 1879, an order was made by the High Court that the decree should be transmitted to the Court of the Subordinate Judge of Ahmedabad for execution.

On 28th August, 1879, an application was made to the Court at Ahmedabad for execution of the decree, and on 10th September, 1879, a warrant of arrest was issued against the defendant, returnable on 25th October, 1879, but the defendant could not be found. The defendant appealed to the Appellate Side of the High Court against the order of the Court at Ahmedabad by which the warrant of arrest was issued; but the High Court, on 10th February, 1880, confirmed the order.

On 27th February, 1880, the Court at Ahmedabad extended the time for the defendant's arrest to 12th April, 1880. On the 9th April, 1880, a further extension to 12th August, 1880, was granted.

On the 30th April, 1881, a summons was granted, calling on defendant to show cause why the decree should not be executed against him, and on 3rd May, 1881, that summons was made absolute by Bayley, J.

The defendant appealed.

Starling (with *Marriott*, Advocate-General) for appellant contended that the application was barred by s. 230 of the Civil Procedure Code, (Act X of 1877), which was to be read with cl. [260] 180 of sch. II of the Limitation Act, XV of 1877. He referred to *Ashootosh Dutt* v. *Doorga Churn* (1); *Anandrav Chimaji* v. *Thakarchand* (2); *Ramkishen* v. *Sedhu* (3); *Byraddi Subbareddi* v. *Dasappa Ran* (4).

Lang, for respondent, was not called upon.

JUDGMENT.

WESTROPP, C. J.—We think the order of Bayley, J., must be affirmed with costs. Clauses 178 and 179 of the second schedule of the Limitation Act show that cl. 180 of that schedule was intended to be independent of s. 230 of the Civil Procedure Code, and not to be in any way controlled by it. We think that s. 230 does not apply to decrees made by the High Courts; see *Unnoda Persaud* v. *Kristo Coomar* (5); *Thorpe* v. *Adams* (6); *The Queen* v. *Champneys* (7).

Order affirmed.

Attorney for appellant.—Mr. *Shamrav Pandurang.*
Attorney for respondent.—Mr. *J. Macfarlane.*

(1) 6 C. 504.
(2) 5 B. 245.
(3) 2 A. 275.
(4) 1 M. 403.
(5) 15 B.L.R.60 (note) = 19 W.R. C. R. 5.
(6) L.R. 6 C.P. 125.
(7) L.R.6 C.P.384.

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Before Sir Charles Sargent, Kt., Justice, and Mr. Justice Melvill.

ABEN SHA SABIT ALI AND ANOTHER (*Plaintiffs*) *v.* CASSIRAO BABA SAHEB HOLKAR AND OTHERS (*Defendants*).*

[17th March, 1882.]

Privy Council, appeal to—Certificate as to value of subject-matter of the suit—Final decree or order, what is a —Interlocutory order—Civil Procedure Code (Act X of 1877), ss. 595, 600.

An order in a partnership suit for account refusing to allow the plaintiffs to have their accounts taken in a particular manner suggested by themselves, unless they would consent to give certain credit in their accounts to the defendants, is not a final decree within the meaning of cl. (*b*) of s. 595 of the Civil Procedure Code, although the effect of such order may be to make it impossible for the plaintiffs to proceed further in the case, and, consequently, an appeal from such an order of the High Court to the Queen in Council does not lie.

[R., 8 B. 548; 1 O.C. 205 (207); 52 P.R. 1907=34 P.L.R. 1908=119 P.W.R. 1908.]

[261] APPLICATION, by the plaintiffs, for a certificate under s. 600 of the Civil Procedure Code (Act X of 1877) preliminary to filing an appeal to the Privy Council against an order made, on appeal, by Westropp, C.J., and Melvill, J., on the 30th July, 1881.

The suit was for dissolution of partnership and for an account of certain opium transactions in which the plaintiffs and defendants had been engaged. The plaintiffs alleged that there had been large losses in the partnership transactions, which they had paid, and they sought to recover their share of such losses from the defendants. The defendants, on the other hand, alleged that the transactions had resulted in profits which the plaintiffs had appropriated. They alleged, further, that, by the contract of partnership, all transactions were to be effected by one of the defendants named Vittuldass Mungulji; that the plaintiffs had violated this contract by themselves entering into some contracts, and they asked that an account should be taken of all the transactions, and that the plaintiffs should account for the profits. At the hearing the suit was referred to the Master in Equity to take an account of the partnership-dealings and transactions between the plaintiffs and defendants. One of the clauses in the decree was as follows:—"And this Court doth declare that the said account so to be taken by the said Master shall be *limited to all such dealings and transactions as were entered into by the defendant Vittuldass Mungulji in the name of the plaintiffs and on behalf of the said partnership*, and doth order and decree the same accordingly."

After a protracted inquiry the Master made a special report in which he certified that the partnership had effected contracts of sale of 1,235 chests of opium; that, of these, Vittuldass Mungulji had entered into contracts of sale of 615 chests in the name of the plaintiffs and on behalf of the partnership, and that the contracts for the remaining 620 chests had been entered into by the other partners on behalf of the said partnership; but that he was unable, on the evidence produced before him, to distinguish the particular contracts of sale entered into by the said Vittuldass Mungulji from the contracts of sale entered into by the other

* Late Supreme Court file, *Equity Side*.

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partners. The plaintiffs alleged that upon all these contracts of sale a loss had been incurred.

[262] The Master also reported that certain *teji mundi* (1) contracts for the purchase of 450 chests of opium set out in an annexed schedule had been entered into; that the contracts for some of these chests had been made by the defendant Vittuldass Mungulji in the name of the plaintiffs and on behalf of the firm, and that the contracts for the remainder of the chests had been made by the other partners; but that he was unable, on the evidence, to distinguish how many of the 450 chests formed the subject-matter of such contracts as had been entered into by Vittuldass Mungulji in the name of plaintiffs and on behalf of the partnership, and how many of the chests formed the subject-matter of the contracts which had been entered into by the other partners, or to distinguish the two classes of contracts.

To this report some of the defendants filed exceptions, but their exceptions were overruled by the Court, which confirmed the Master's report, and the case went back again to the Master's office.

The plaintiffs were unable to produce further evidence before the Master with reference to the special class of contracts of which an account was ordered by the decree; and in June, 1880, they proposed that out of the 1,235 chests, made up of the 615 chests and the 620 chests mentioned in the Master's special report, there might be selected the 615 chests in respect of which the loss was least, and, therefore, in respect of which the amount claimable from the defendants was least favourable to the plaintiffs; and that such 615 chests might be considered as the chests in respect of which the plaintiffs were entitled to claim in account from the defendants, subject to the plaintiffs proving that they had paid the losses incurred in respect of such 615 chests.

The Master refused to adopt this proposal, and thereupon the plaintiffs moved before West, J., for an order that the Master be directed to proceed in the matter in the way suggested by the plaintiffs. After argument, West, J., made an order on the 7th October, 1880, substantially in the terms proposed by the plaintiffs. From that order the defendants appealed.

Before the Appeal Court—which consisted of Westropp, C.J., and [263] Melvill, J.—a point was taken which had not been suggested in the Court below, *viz.*, that it appeared, in the evidence taken before the Master, that in respect of the 450 chests, which formed the subject-matter of the *teji mundi* contracts, a profit had resulted to the partnership; that the defendants were entitled, under the decree, to be credited with the profits made upon the chests which were the subject-matter of the *teji mundi* contracts of purchase described in the decree; that, by reason of the mode in which the plaintiffs had kept the books, it was, as stated in the Master's report, impossible for the defendants to show how many of the chests fell within the specified class of contracts and that it was unjust that the plaintiffs were, under the order of West, J., to be relieved from the necessity of giving strict proof that the particular chests, in regard to which losses had been sustained, fell within the class of contracts on which the defendants were to be liable under the decree: while the defendants were to be held bound to give such proof with respect to the particular chests on which a profit had been made. The evidence had, however, failed to identify the particular 450 chests.

(1) *Teji mundi* contracts are a certain class of wagering contracts.

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The Court of Appeal refused to confirm the order made by West, J., unless the plaintiffs would consent to give the defendants credit in the accounts for the profits made upon the whole of the 450 chests which formed the subject-matter of the *teji mundi* contracts of purchase, it being impossible to distinguish in their books the chests which fell within the contracts described in the decree. The plaintiffs refused to do this, and the Court thereupon reversed the order made by West, J.

The plaintiffs then presented a petition, under s. 600 of Civil Procedure Code (Act X of 1877), for leave to appeal to the Privy Council, and on the 27th January, 1882, obtained a *rule nisi* calling on the defendants to show cause why a certificate should not be granted that the amount or value of the subject-matter of the suit exceeds the sum of Rs. 10,000.

Kirkpatrick, for the defendants Nos. 1, 2 and 3.

The Hon. *F. L. Latham* (Acting Advocate-General), for the fourth defendant.

Starling, for the plaintiffs.

[264] For the defendants it was contended that the plaintiffs' petition fell within cl. (*b*) of s. 595 of the Civil Procedure Code; that the order, from which the plaintiffs sought to appeal, was not a *final* decree. Counsel referred to the charter of the Supreme Court, 1823, cls. 60 and 63, Stat. 24 & 25 Vic., c. 104; Letters Patent, 1862 and 1865; Act VI of 1874; *Tetley* v. *Jaishankar* (1); *Palah Dhari Rai* v. *Radha Parsad Singh* (2); *Sonbai* v. *Ahmedbhai Hubibbhai* (3); Daniel's Chancery Practice, pp. 850, 855, 857; Seton on Decrees (2nd ed., 1879), Vol. II, 1607; *Cummins* v. *Herron* (4); *White* v. *Witt* (5); *Standard Discount Company* v. *Otard De la Grange* (6).

For the plaintiffs, counsel contended that the order sought for was in the nature of an order for rehearing which had been refused by the Court of Appeal, and he cited *Nazir Alikhan* v. *Rajah Ojoodharam* (7). The order was really a final order, as the plaintiffs could not proceed with the case.

JUDGMENT.

SARGENT, J.—We think that the order made by the Court of Appeal in this case on the 30th July last is not a "final order" such as is contemplated by s. 595 of the Civil Procedure Code. By s. 594 of the Civil Procedure Code it is provided that in the chapter which deals with the subject of appeals to the Privy Council the term "decree" shall include order. By cl. (*b*) of s. 595 an appeal is allowed to the Privy Council from any *final* decree, so that under these two sections an appeal is permitted from any final order. We think, however, that the order made by the Court of Appeal in this case on the 30th July, 1881, was not a *final* order such as is contemplated by s. 595. In cls. 39 and 40 of the Letters Patent we find final judgments and orders contrasted with interlocutory judgments and orders. In s. 595 of the Civil Procedure Code, which is in the same words as s. 4 of Act VI of 1874, the distinction is between final decrees and orders and all other decrees and orders. This distinction, however, is virtually the same as that in the Letters Patent; for as Bramwell, L.J., says in the case of *Standard* **[265]** *Discount Company* v. *Otard*

(1) 1 A. 726. (2) 2 A. 65. (3) 9 B.H.C.R. 398.
(4) 4 Ch. D. 787. (5) 5 Ch. D. 589. (6) 3 C.P.D. 67.
(7) 5 W.R. P.C. 83=10 M.I.A. 540.

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De la Grange (1), "there cannot be an order which is neither final nor interlocutory." Now the order in question is certainly not the final order in the cause. It does not deal finally with the rights of the parties to the suit, but merely affects the mode in which their rights are to be ascertained and determined, and falls within the definition of an interlocutory order given by Cotton, L.J., in the same case, *viz.*, "an order which directs how an action is to proceed."

It has been urged that the order now before us is, in effect, final, inasmuch as, while it stands, the plaintiff will be unable to establish his case against the defendants. Cotton, L.J., however, in the case just referred to, cites *White* v. *Witt* (2) as an authority for the proposition that "although the effect of a final judgment will result from making an order unless it be set aside, still this circumstance does not prevent the order from being interlocutory." In that case Jessel, M.R., says: "It has been said and truly said that in this particular case the whole cause of action was referred to chambers.....It is impossible for us to look at the nature of the contest; we must look at the form of the proceeding."

We are, therefore, of opinion that the order against which the plaintiffs seek to appeal, is not a final order within the meaning of cl. (*b*) of s. 595 of the Civil Procedure Code, and we must refuse to grant the certificate which has been applied for.

Attorneys for the plaintiffs: Messrs. *Tobin and Roughton.*

Attorneys for the defendants: Messrs. *Payne and Gilbert* and Messrs. *Craigie, Lynch and Owen.*

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[266] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice.

NUSSERWANJI MERWANJI PANDAY AND OTHERS, (*Plaintiffs*) *v.* GORDON AND OTHERS, (*Defendants*).*

[24th, 26th, 27th, 29th and 30th August, 1881.]

Company—Injunction—Suit by agents of company to restrain it from carrying into effect a resolution of directors—Power to appoint solicitors to company—Practice—Joinder of causes of action—Same parties suing in different capacities—Civil Procedure Code Act X of 1877, *ss.* 26 *and* 31.

By the Memorandum and Articles of Association of the New Dhurumsey Poonjabhoy Spinning and Weaving Company, the plaintiffs' firm of M. F. & Co. were appointed agents of the company for twenty-five years, and it was provided that they should have the general control and management of the company. Clause 98 of the Articles provided that the said firm, as such agents, should have full power and authority (*inter alia*) to appoint and employ, in or for the purposes of the transaction and management of the affairs and business of the company, such solicitors as they should think proper. An agreement dated 26th August, 1874, was also entered into between the company and the partners in the firm of M. F. & Co., their executors, administrators and assigns, *for the time being constituting the partnership firm of M. F. & Co.*, whereby it was agreed that the said firm should be agents to the company for twenty-five years to buy and sell, &c., and particularly to exercise all the powers contained in cl. 98 of the Articles of Association. Messrs. C. & B. were duly appointed solicitors to the company and acted as such for a considerable time. Merwanji Framji, one of the members of the said firm of M. F. & Co., died in the middle of March, 1876. The plaintiffs complained that G., one of the shareholders in the company, became

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* Suit No. 324 of 1881.

(1) 3 C. P. D. 67.

(2) 5 Ch. D. 589.

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desirous of ousting the plaintiffs from the position of agents of the company, and of becoming the managing director of the company ; that, in July, 1881, he procured his own election, and that of certain nominees of his as directors of the company ; and on the 8th August, 1881, procured the passing of a resolution at a Board meeting to the effect that as Messrs. C. & B., the company's solicitors, were also the solicitors of the agents, it was desirable for the interests of the company, that a change should be made, and that Messrs. H. C., & L. be appointed solicitors of the company. The plaintiffs alleged that the only object of passing the said resolution was to facilitate the design of G., of ousting the plaintiffs from their agency, and getting the management of the company for himself ; that Messrs. H. C., & L. had been for a long time the solicitors of G., and had been advising him in his designs upon the company and upon the plaintiffs, and they contended that the resolution was a breach of the contract between the company and the plaintiffs and a violation of the Articles of Association of the company. The plaintiffs sued G. and two other directors of the company, and the company itself, and prayed for an injunction against the defendants to restrain them from committing any breach of the agreement of 26th August, 1874, and in particular from carrying into effect the resolution appointing Messrs. H. C., & L., as solicitors for the company, and to **[267]** restrain them from doing anything inconsistent with the Memorandum and Articles of Association. The defendants contended that the contract of the 26th August, 1874, had been determined by the death of Merwanji Framji, and that the powers conferred on the agents by cl. 98 of the Articles were, subject to the general powers of management, vested in the directors by the Articles, and that the case was not one in which an injunction could be granted.

Held, that, having regard to the Memorandum and Articles of Association, the contract was that the firm of M. F. & Co. for the time being should be the agents of the company for twenty-five years, and that the right to sue on the contract by its nature survived to the plaintiffs after the death of Merwanji Framji.

Held, also, that there being no provision either in the Articles of Association or the agreement of 26th August, 1874, that the power thereby conferred on the agents should be subject to the control or assent of the directors, there was no right in the directors to interfere with the agents in the exercise of their powers otherwise than as representing the company in virtue of their general powers of management.

It being admitted that the conduct of the defendants would be supported by the company in general meeting, owing to their having a preponderance of votes.

Held, that, inasmuch as the Court would not, by a decree for specific performance or by injunction, compel the company to retain the plaintiffs in the confidential position of agents, it would not restrain the defendants or the company from appointing a solicitor, which was only a violation of what was ancillary or incidental to the principal part of the contract, *viz.*, the agreement that the plaintiffs should be the agents of the company for twenty-five years ; and further, *semble*, that on the merits of the case the Court would not interfere on behalf of the plaintiffs.

Counsel on behalf of the plaintiffs sought to obtain the injunction on the ground that the resolution of the 8th August, 1881, appointing Messrs. H. C., & L., solicitors of the company, was contrary to the Memorandum of Association, and, therefore, *ultra vires ;* and, in order that this point might be pressed against the defendants, it was proposed that the plaint should be amended by alleging a cause of action in two of the plaintiffs *as shareholders* as well as a cause of action in all the plaintiffs as *parties contracting* with the company.

Held, that, under the provisions of ss. 26 and 31 of the Civil Procedure Code (Act X of 1877), the amendment could not be allowed. The plaintiffs, as shareholders and contractors, had not the same cause of action, by which words were meant not only the act complained of, but also the right violated by that act. The rights of the plaintiffs as contractors, alleged to be violated by the resolution, were rights given to them by their agreement; but the rights of the plaintiffs as shareholders were rights secured to them by the Articles of Association.

[Diss., 22 C. 833; **F.**, 17 P.L.R. 1900 ; **R.**, 18 A. 131 ; 18 A. 432 (434) ; 18 B. 702 (714); 26 B. 259=3 Bom. L.R. 878 ; 26 M. 168 (174) ; 13 C.P.L.R. 130 ; 2 O.C. 17 (20) ; 3 O.C. 173 (179).]

THE plaintiffs were the partners of the firm of Merwanji Framji and Company. The first three defendants were directors of the New

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Dhurumsey Poonjabhoy Spinning and Weaving Company, Limited, and the fourth defendant was the Company itself.

[268] The plaint stated that by cl. 4 of the Memorandum of Association (1) of the said company it was provided that the plaintiffs' firm should be appointed agents of the said company, and the said clause provided that the company should enter into an agreement with the plaintiffs' firm providing for the continuance of the plaintiffs' firm as such agents for the term of twenty-five years on the terms specified in the said clause.

By cl. 97 of the Articles of Association (2) of the said company it was provided that the then members of the plaintiffs' firm of **[269]** Merwanji Framji and Company, and such other persons as should for the time being constitute the said firm should, upon entering into an agreement with the company, be the agents of the company for twenty-five years, and should have the general control and management of the company; and by cl. 98 it was provided (3) that the plaintiffs' firm, as such agents, should have full power and authority (*inter alia*) to appoint and employ

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(1) Clause 4.—Merwanji Framji Panday, Nusserwanji Merwanji Panday, Dorabji Framji Panday and Dhunjibhoy Pestonji Panday, and such other person or persons as shall for the time being constitute the firm of Merwanji Framji and Company, now carrying on business in Bombay, shall be appointed agents of the company for the purpose of carrying on the business of the company, and the company shall enter into an agreement with them providing for their continuance in such appointment during the term of twenty-five years at the remuneration of a commission of one half anna on every pound of cotton yarn manufactured and sold by the company, equal or superior in quality to thirties, and of a commission of one-quarter of an anna on every pound of cotton yarn and cloth manufactured and sold by the company, inferior in quality to thirties, and of commission on all other yarns, cloth and other fabrics manufactured by the company as the directors of the company for the time being, and the members of the said firm of Merwanji Framji and Company for the time being shall agree upon; and also providing that, in the event of the company being wound up during the said period of twenty-five years, the said firm of Merwanji Framji and Company shall be entitled to receive and shall receive from the said company or the liquidators thereof as compensation for the loss of their said appointment such a sum of money as will be the then present value of an annuity for the remainder of the said term of twenty-five years of an amount equal to the annual amount earned by them as commission as aforesaid on an average of the three years next preceding the winding up of the company if the company shall have so long existed, and, if not, on an average of the period during which the company shall have existed, which sum is to be ascertained by two actuaries, one to be named by the said company or the liquidators thereof, and the other by the said Merwanji Framji and Company, or, if they differ, by an umpire to be named by them.

(2) Clause 97.—That Merwanji Framji Panday, Nusserwanji Merwani Panday, Dorabji Framji Panday, and Dhunjibhoy Pestonji Panday, and such other person or persons as shall for the time being constitute the said firm of Merwanji Framji and Company shall, upon entering into an agreement with the company in that behalf, be the agents of the company during the term of twenty-five years, and they shall have the general control and management of the company at the remuneration and upon the terms and subject to the conditions to be specified in an agreement to be entered into between the company and the persons hereinbefore mentioned in pursuance of Cl. IV of the Memorandum of Association.

(3) Clause 98.—The agents shall have full power and authority to enter into such contracts and agreements as they may think proper for the purposes of the company, and to appoint and employ in or for the purposes of the transaction and management of the affairs and business of the company such secretaries, managers, bankers, solicitors, engineers, clerks, brokers and other officers as they shall think proper, with such powers and duties, and upon such terms as to duration of office, remuneration or otherwise as they shall think fit, and in like manner from time to time to remove or suspend them or any of them; and generally to appoint and employ any persons in the service or for the purposes of the company as they shall think fit, upon such terms and conditions as they shall think proper.

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in or for the purposes of the transaction and management of the affairs and business of the company such solicitors as they should think proper.

The following are the material portions of the agreement entered into between the plaintiffs' firm and the company in pursuance of cl. 97 of the Articles of Association :—

"Articles of agreement made and entered into this twenty-sixth day of August, 1874, between the New Dhurumsey Poonjabhoy Spinning and Weaving Company, Limited, a joint stock company registered under the provisions of the Indian Companies Act, 1866, and hereinafter called the said company, their successors and assigns of the one part, and Merwanji Framji Panday, Nusserwanji Merwanji Panday, Dorabji Framji Panday and Dhunjibhoy Pestonji Panday and their executors, administrators and assigns, the person for the time being *constituting the partnership firm of Merwanji Framji and Company*, carrying on business in Bombay of the other part, hereinafter described as the said firm of Merwanji Framji and Company, whereby it is mutually agreed and covenanted by and between the parties hereto as follows :—

"*First.*—The said firm of Merwanji Framji and Company shall be and shall serve the said company, and hereby agree and covenant with the said company, their successors and assigns to **[270]** serve the said company as agents of the said company for the purpose of carrying on the business of the said company during the term of twenty-five years from the date hereof for the consideration hereinafter mentioned, and as such agents the said firm shall have full powers and liberty to buy at all times and at their discretion raw cotton, jute, wool and other fibres and products and to sell the yarn, cloth and other fibres to be manufactured by the said company, *and particularly to exercise all the powers contained in clause* 98 (*ninety-eight*) *of the Articles of Association*, and do all such other acts and things as may be necessary for the purpose of carrying on and promoting the business of the said company.

"*Second.*—The said company for themselves, their successors and assigns shall and hereby agree and covenant with the said firm of Merwanji Framji and Company to *retain the said firm of Merwanji Framji and Company as such agents* as hereinbefore mentioned, for and *during the full term of twenty-five years* from the date of these presents, and to pay to them for their services as such agents as aforesaid, by way of rumuneration, a commission of one-half anna on every pound of cotton yarn manufactured and sold by the company, equal or superior in quality to thirties, and a commission of one quarter of an anna on every pound of cotton yarn and cloth manufactured and sold by the company inferior in quality to thirties, and on all other yarns, cloth and other fibres manufactured by the company such commission, as the directors of the said company for the time being and the said firm of Merwanji Framji and Company shall agree upon."

Merwanji Framji, one of the members of the firm of Merwanji Framji & Co., died in the month of March, 1876.

The plaint further alleged that the first defendant had bought a large number of shares with the object, as the plaintiffs believed, of ousting the plaintiff's firm from the position as agents of the company, and with the purpose of himself becoming the managing director of the company, that in consequence of his arrangements with other shareholders, especially with one Cassumbhoy Dhurumsey, he was able to command a majority at any meeting of shareholders and to carry any resolution.

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[271] In the month of July 1881, the first defendant procured his own election and that of certain nominees of his as directors of the said company. The following paragraphs of the plaint state the material part of the plaintiffs' case :—

"The first defendant has made no secret of his intentions, but has openly avowed that he will cause the Board of Directors, on which he has now a majority, to pass a resolution depriving the plaintiffs of their agency, although he is perfectly aware that such a resolution would be *ultra vires* and of no effect." . . . . . At a Board meeting held on 8th August, 1881, it was proposed by the first defendant and seconded by the said Jumabhoy Lalji, the third defendant, that as Messrs. Crawford and Boevey, the company's solicitors, were also the solicitors of the agents, it was desirable, for the interests of the company, that a change should be made, and that Messrs. Hearn, Cleveland and Little be appointed solicitors of the company.

"10. The first and second plaintiffs, who were present at the said Board meeting in their capacity of directors, protested against any such resolution being put or passed, upon the ground that no notice whatever had been given of any such resolution, and on the ground that any such resolution was *ultra vires*, and a direct infringement of the plaintiff's rights as agents of the company. They expressed their willingness to entertain and consider any suggestion made by the Board as to the desirability of changing the solicitors of the company, but objected altogether to the Board interfering with the rights of the agents. The said resolution was, in spite of the protests of the first and second plaintiffs, carried by the votes of the first, second and third defendants.

"11. The plaintiffs submit that the said resolution was beyond the powers of the Board to pass, and was a direct breach of the contract between the said company and the plaintiffs, and a violation of the articles of association of the said company. The only object of passing the said resolution was to facilitate the designs of the first defendant of ousting the plaintiffs from their agency and getting the managership of the said company for himself. Messrs. Hearn, Cleveland and Little have for a long time past been the solicitors for the first defendant, and have been advising [272] him throughout in his attempts to get upon the direction of the said company and in his designs upon the said company and the plaintiffs."

"12. The plaintiffs themselves believe that the interests of the company are perfectly safe in the hands of Messrs. Crawford and Boevey, but they are nevertheless (without prejudice to their rights) willing to appoint any independent firm of solicitors as solicitors of the company in case it is thought desirable that the solicitors of the company should be different from the solicitors of the agents. They certainly, however, will not appoint Messrs. Hearn, Cleveland and Little as solicitors of the said company, as the plaintiffs say they are and have been the solicitors and advisers of the first defendant; and the only result of appointing them will be that the first defendant's views will be carried out, and his intention to oust the plaintiffs from their position as agents will be attempted to be carried out. Such attempt must, the plaintiffs are advised, be most detrimental to the company, as it will embark the company in expensive litigation without a hope of success.

"13. There is no dispute whatever between the company and the plaintiffs' firm as agents aforesaid, though the plaintiffs have little doubt that the first defendant and his nominees and those in his interests will

do their utmost to invent and get up imaginary disputes and complaints against the plaintiffs."

The following was the prayer of the plaint :—

"1. That it may be declared that the resolution passed on the 8th August, 1881, appointing Messrs. Hearn, Cleveland, and Little, solicitors of the company, is *ultra vires* and void.

"2. That the defendants may be restrained by the order and injunction of this honourable Court from committing any breach of the said agreement of the 26th August 1874, between the plaintiffs and the said company, and, in particular, from carrying into effect the resolution appointing Messrs. Hearn, Cleveland, and Little as solicitors for the company, and that they be restrained, by the like order and injunction, from doing anything inconsistent with the Memorandum and Articles of the Association of the said company.

[273] "3. That the defendants may be restrained, by the order and injunction of this honourable Court, from employing the said Messrs. Hearn, Cleveland, and Little as solicitors of the said company, and from paying any of the moneys of the said company to the said Messrs. Hearn, Cleveland, and Little."

Mervanji Framji Panday, one of the parties in the plaintiffs' firm, died in March, 1876.

On the 11th August, 1881, the plaintiffs obtained a *rule nisi* calling on the defendants to show cause why they should not be restrained from carrying into effect the resolution of the 8th August, 1881, appointing Messrs. Hearn, Cleveland, and Little as solicitors for the company, and from employing the said Messrs. Hearn, Cleveland, and Little as solicitors of the said company.

The rule now came on for argument.

Marriott (Advocate-General) and *Lang* for the first three defendants showed cause.—We contend that the agreement of the 26th August, 1874, under which the plaintiffs' firm was appointed agents, is an agreement for personal service. Mervanji Framji, one of the persons therein appointed, died in March, 1876, and the agreement then determined. In no case can an injunction be granted to prevent the breach of such an agreement; Specific Relief Act I of 1877, s. 21, cl. (*b*). It is also an agreement for more than three years: see cl. (*g*): *Mair* v. *Himalaya Tea Company* (1); Lindley on Partnership, p. 1013. The plaintiffs can be removed from the agency although appointed by the memorandum of association. The memorandum of association can be altered as to matters which are not necessarily contained in it: *Duke's Case* (2).

[SARGENT, J.—The question here is not whether the agents can be removed, but whether the plaintiffs, being agents, have not the power to appoint the solicitors to the company.]

The directors have a right to prevent the agents exercising this power. This is a matter of internal regulation, and the Court will not interfere. Counsel referred to the following cases :—*Johnson* v. *Shrewsbury* (3); *Lumley* v. *Wagner* (4); *Hills* v. **[274]** *Croll* (5); *Wolverhampton and Walsall Railway Company* v. *London and N.-W. Railway Company* (6); *Eley* v. *The Positive Government Security Company* (7); *Orton* v. *The Cleveland Fire Brick Company* (8); *Melhado* v. *Porto Alegre Railway*

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(1) L.R. 1 Eq. 411.
(2) 1 Ch. Div. 620.
(3) 3 De G. M. & G. 914.
(4) 1 De G. M. & G. 604.
(5) 2 Phil. 60.
(6) L.R. 16 Eq. 433.
(7) 1 Ex. Div. 20—88.
(8) 3 H. & C. 868.

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Company (1) ; *South Wales Railway Company* v. *Wythes* (2) ; *Ogden* v. *Fossick* (3) ; *Feto* v. *Brighton Company* (4) ; *Ferguson* v. *Wilson* (5) ; *Spackman* v. *Evans* (6) ; *Anderson's Case* (7).

The Court will not interfere merely to restrain anticipated injury : *Earl of Ripon* v. *Hobart* (8) ; *Haines* v. *Taylor* (9) ; *Pattison* v. *Gilford* (10) ; Indian Companies Act X of 1866, ss. 8, 9, 10.

Jardine, for the company, did not address the Court.

Inverarity, for the plaintiffs, in support of the rule.—We contend the directors had no power to pass the resolution. The directors have only the powers which are given to them by the articles of association : *Bennett's Case* (11) ; *Ernest* v. *Nicholas* (12).

[SARGENT, J.—The plaintiffs here do not sue as shareholders and complain of the acts of the directors as *ultra vires*. They complain of a breach of contract entered into with the company.]

We complain both as shareholders and as outsiders ; if necessary, the plaint can be amended. Two of the plaintiffs are shareholders in the company, and they can sue in that capacity as well as in the capacity of persons contracting with the company. The same act which injures the three plaintiffs as contractors, gives two of them a cause of action also as shareholders. The grievance complained of by them in both capacities rests on the same facts. Counsel referred to the Civil Procedure Code (Act X of 1877), ss. 26, 31, 53, 45, 46 ; *Booth* v. *Briscoe* (13) ; *Durham* v. *Spence* (14) ; *Umfreville* v. *Johnson* (15) ; *Vale of Neath Colliery Co.* v. *Furness* (16) ; **[275]** English Rules and Orders, Order 16, Rule 1 ; *Harry* v. *Davey* (17). As to the right of amendment, *Budding* v. *Murdoch* (18) ; *Ruston* v. *Tobin* (19).

SARGENT, J.—I cannot allow an amendment in this case. The plaintiffs in the plaint sue as parties who have made a contract with the company who are defendants, and they complain of the breach of that contract on the part of the directors of the company. Now, it is argued that the act which constitutes the breach of the contract was *ultra vires* ; and in order that this point may be pressed against the defendants, it is proposed that the plaint should be amended by alleging a cause of action in two of the plaintiffs as shareholders as well as a cause of action in all the plaintiffs as parties contracting with the company. I do not think such an amendment can be permitted. S. 26 of the Civil Procedure Code allows all persons to be joined as "plaintiffs in respect of the same cause of action." The question is, therefore, whether the plaintiffs, as shareholders, would have the same cause of action as is alleged in the plaint as now framed. No doubt the plaintiffs, both as shareholders and as contractors, would complain of the same act, *viz.*, the passing of the resolution in question by the directors. But the words "cause of action" mean not only the act complained of, but also the right violated by that act. Now, in this plaint, the rights of the plaintiffs which are alleged to be violated by the resolution, are rights given them by their agreement ; but the rights of the plaintiffs as shareholders would be the rights secured to them by the articles of association. The causes of action, therefore, cannot be said to be the same. They are perfectly

(1) L.R. 9 C.P. 503. (2) 5 De G.M. & G. 880. (3) 4 De G F. & J. 426.
(4) 1 H. & M. 468. (5) L.R. 2 Ch. 77. (6) L.R. 3 Eng. & Ir. Ap. 171.
(7) 7 Ch. Div. 93. (8) 3 May and R. 369. (9) 2 Phil. 209.
(10) L.R. 18 Eq. 263. (11) 5 De G.M. & G. 297. (12) 6 H.L. 417.
(13) 2 Q B.D. 496. (14) L.R. 6 Ex. 46. (15) L.R. 10 Ch. 580.
(16) 45 L.J. Ch. Div. 276. (17) 5 Ch. D. 697. (18) 1 Ch. D. 42.
(19) 49 L.J. Ch. Div. 262.

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distinct; and if the amendment asked for were permitted, the result would be such a misjoinder of plaintiffs as is contemplated by the latter part of s. 31 of the Code. I, therefore, refuse to allow any amendment, and the suit must proceed, framed as it is at present, *viz.*, as a suit by parties contracting with the company, and not as a suit by shareholders.]

Inverarity resumed.—The Court can enforce the contract by restraining the company from employing other agents or solicitors. **[276]** Counsel referred to *Hill* v. *Croll* (1); *Catt* v. *Tourle* (2); *Dietrichsen* v. *Cabburn* (3); *Rolfe* v. *Rolfe* (4); *Great Northern* v. *Manchester Railway Company* (5); *Webster* v. *Dillon* (6); *Montague* v. *Flockton* (7); *Fechter* v. *Montgomery* (8); *Wolverhampton and Walsall Railway Company* v. *London and N. W. Railway Company* (9); *Doherty* v. *Allman* (10); *De Mattos* v. *Gibson* (11); Contract Act (IX of 1872), ss. 40 and 42; *Pritchard's Case* (12); *Orton* v. *Cleveland Fire Brick Company* (13).

JUDGMENT.

SARGENT, J.—The question which I have to determine is whether the plaintiffs, who are the agents of the New Dnurumsey Poonjabhoy Spinning and Weaving Mill, are entitled to an interlocutory injunction of this Court to restrain the three first defendants, who are three of the directors of the company, and also the company itself from carrying into effect the resolution passed at a Board meeting held on the 8th August, 1881, appointing Messrs. Hearn, Cleveland and Little as solicitors for the company, and from employing the said Messrs. Hearn, Cleveland and Little as solicitors of the company.

The grounds upon which the plaintiffs base their right to this injunction are stated in para. 11 of the plaint. (His Lordship read the paragraph above set forth). At the hearing of the rule it was stated that two of the plaintiffs were shareholders, and it was sought to maintain the injunction also, on the ground that the appointment was contrary to the memorandum of association, and, therefore, *ultra vires*, and I was asked to allow the plaint to be amended by alleging that two of the plaintiffs were such share-holders. I, however, expressed my opinion that a plaint framed with such a double aspect would amount to such a misjoinder as is contemplated by the latter parts of s. 31 of the Civil Procedure Code, and having refused to allow the amendment, confined the plaintiffs to the case as originally made by the plaint, *viz.*, that the appointment was a breach of their contract with the company.

[277] Now, by cl. 4 of the memorandum of association of the company, it is provided that (his Lordship read the clause: see *supra*, p. 268, *note* (1).) In pursuance of this provision an agreement was entered into by the firm with the company on 26th August, 1874, to the following effect. (His Lordship read the agreement above set forth.) Clause 98 of the articles of association, referred to in the agreement, is as follows. (His Lordship read the clause: see *supra*, p. 269, *note* (1).)

It was contended for the plaintiffs that the resolution of the Board of 24th August, 1881, appointing Messrs. Hearn, Cleveland, and Little, solicitors of the company, was in breach of this agreement, and that the directors and company should be restrained from carrying into effect the said resolution.

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(1) 2 Phil. 60.
(2) L.R. 4 Ch. 654.
(3) 2 Phil, 52.
(4) 15 Sim. 88.
(5) 5 De G. & J. 138, (149).
(6) 3 Jur. N. S. 432.
(7) L. R. 16 Eq. 189.
(8) 33 Bea. 26.
(9) L.R. 16 Eq. 433.
(10) L. R. 3 Ap. Cas. 709.
(11) 4 De G. & J. 276.
(12) L.R. 8 Ch. 956.
(13) 3 H. & C. 868.

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On the part of the defendants it was said that the contract had been determined by the death of Mr. Merwanji, and further that the powers conferred on the agents by cl. 98 of the articles were subject to and subordinate to the powers of management vested in the directors by cl. 94 of the articles of association (1), but that in any case an injunction could not be granted consistently with the principles upon which relief is given by injunction either by English Courts or under the Specific Relief Act.

As to the first of the defendants' objections, I think that, having regard to the memorandum and articles of association, the contract, however informally and clumsily worded, was that the firm, for the time being, should be the agents of the company for twenty-five years. The right, therefore, to sue on the contract would, by its nature, survive to the three plaintiffs after the death of Merwanji.

[278] It is to be remarked that cl. 4 of the memorandum of association, cls. 97 and 98 of the articles of association, and the agreement entered into between the company and the firm, from which several instruments the agents derive their powers, contain no provision that the exercise of those powers should be subject to the assent or control of the directors. The powers are given absolutely and unconditionally, and to be exercised as the agents may think fit. Again, cl. 94 of the articles of association, which determines the powers of the directors and confers on them the management of the business of the company and the power to do all acts which the company are authorized to do (otherwise than in general meeting), expressly makes such powers subject to the provisions of the articles, themselves, and, therefore, in subordination to those powers which are by cls. 97 and 98 of those articles, and the agreement expressly conferred by the company itself on the agents. It is plain, I think, that the directors have no other right to interfere with the agents in the exercise of their powers otherwise than as representing the company in virtue of their general powers of management of the business of the company, and in such character to watch over the interests of the company, and take care that those powers are properly and efficiently exercised by the agents in accordance with their contract. The directors, therefore, in taking upon themselves to appoint Messrs. Hearn, Cleveland, and Little as solicitors were exceeding their powers.

However, it seems to have been admitted throughout, that the defendants and Cassumbhoy Dhurumsey have sufficient votes to control the company in general meeting, and there is, therefore, no practical reason for separating the company from the defendants in the consideration of the question of injunction, although the conduct of the directors may well affect the question of costs. The real question, therefore, to be determined is, whether the Court will interfere by injunction to prevent the company from appointing a solicitor.

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(1) Clause 94.—The business of the company shall be managed by the Board who in addition to the powers and authorities by the said Act, or by these presents expressly conferred upon them, may exercise all such powers, give all such consents, make all such arrangements, and generally do all such acts and things as are or shall be by the said Act and these presents directed or authorized to be exercised, given, made or done by the company, and are not thereby expressly directed to be exercised, given, made or done by the company in general meeting, but subject, nevertheless, to the provisions of the said Act and of these presents, and subject also to such (if any) regulations as are from time to time prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if the regulation had not been made.

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The wording of the resolution of 8th August, 1881, shows that the intention of the Board was not to appoint an additional solicitor to represent their interests as distinct from those of the agents, but to effect a change in the solicitors of the company.

[279] Had the action of the Board been confined to appointing an additional solicitor, I think it may well be doubted whether that would be in violation of the agreement with the agents, although it might well be a course which the shareholders themselves might object to. The appointment, however, of a firm of solicitors to be the solicitors of the company *in substitution* for the firm already appointed by the agents, was clearly an interference with the powers of the agents, and, therefore, in breach of their contract. The Specific Relief Act purports to deal only with perpetual injunctions, leaving temporary injunctions to be regulated by Chap. XXXV of the Code of Civil Procedure. Sections 492 and 493 of that Code state the particular cases in which a temporary injunction may be granted. In the latter section it is provided that an application may be made for a temporary injunction to "restrain a breach of contract." It is plain, however, that, apart from the special circumstances which determine whether the Court should, in its discretion, grant an injunction before the hearing of the suit; the same general principles must equally apply to the granting of a temporary injunction as to a perpetual injunction, and those principles must, therefore, be sought in the Specific Relief Act itself.

Now, the contract between the plaintiffs and the company is in the affirmative form throughout. The firm agree to serve the company as agents for the purpose of carrying on the business for twenty-five years, for the consideration therein named; the firm to have full power to exercise all the powers contained in cl. 98 of the articles of association and to do all such other acts and things as may be necessary for carrying on and promoting the business of the company. The company, on the other hand, undertake to retain the firm as such agents as aforesaid for the term of twenty-five years, and to pay them for their services as such agents a certain remuneration or commission. The object of the enumeration of the particular powers conferred on the firm would appear to have been to define with greater accuracy the nature of the agency they were to administer. In other words, the company undertakes that the firm shall be their agents with certain powers, and the Court is now asked to interfere, by injunction, to restrain the company [280] from usurping one of those powers in violation of their contract.

A great deal of learned argument was addressed to me as to the cases in which the Court of Chancery has been in the habit of granting relief by injunction in the cases of an affirmative agreement such as the present. It is not necessary to refer to any other authorities than the cases of *Catt* v. *Tourle* (1) before the Lords Justices; *Wolverhampton and Walsall Railway* v. *London and North Western Railway Company* (2) before Lord Selbourne; and *Doherty* v. *Allman* (3) before the House of Lords, to show, that the Court, as Lord Cairns says in the latter case, "although it cannot enforce affirmatively the performance of a covenant, will, in special cases, interfere to prevent that being done which would be a departure from and violation of the contract." The two former cases are good illustrations of the circumstances in which the Court will thus interfere. This statement

(1) 4 Ch. App. 654. (2) L.R. 16 Eq. 439. (3) L.R. 3 App. Cases, 709.

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of the practice of the Court of Chancery is adopted in s. 57 of the Specific Relief Act.

Before considering whether the present case is one in which the Court would grant an injunction, I may allude to an objection which was taken for the defendants, *viz.*, that the Court would not assist the defendant, as there was no mutuality of remedy; the Court not having any power to compel the plaintiffs to perform their part of the contract. The remarks, however, of Lord Cottenham in *Dietrichsen* v. *Cabburn* (1) dispose of this objection, as it is not alleged that the plaintiffs have not performed their contract up to the present time. Lord Cottenham says: "The equitable jurisdiction to restrain by injunction an act which the defendant by contract or duty was bound to abst ain from, cannot be compared to cases in which the Court has jurisdiction over the acts of the plaintiff; for, if that were so, it could not interfere to restrain the violation of contracts by tenants or of duty by agents as in the cases of *Yovatt* v. *Winyard* (2) and *Green* v. *Folgham* (3), or by an attorney as in *Cholmondeley* v. *Clinton* (4), in none of which cases was there [281] anything to be done by the plaintiff which equity could enforce. Such also are cases of injunctions sought by tenants against their landlords as *Rankin* v. *Huskisson* (5), where there was a negative agreement, and *Squire* v. *Campbell* (6), where one was attempted to be raised by the exhibition of a plan. In none of these cases was there any equity to be administered against the plaintiff, and yet the jurisdiction was assumed." Moreover, the proviso at the end of s. 57 of the Specific Relief Act shows that the injunction may be granted, "provided the applicant has not failed to perform the contract so far as it is binding on him."

The circumstances of *Hill* v. *Crolls* (7), decided by Lord Lyndhurst, which was relied on for the defendants, were very special. The case is explained by Lord St. Leonards in *Lumley* v. *Wagner* (8). However, it may well be doubted whether it was rightly decided.

It is to be remarked that the power, the violation of which is complained of by the plaintiffs, is ancillary to the agency which the plaintiffs have to administer. At the close of cl. 1 of the agreement it is said the plaintiffs are to exercise all the powers contained in cl. 98 of the articles of association, and all such other acts and things as may be necessary for the purpose of carrying on and promoting the business of the company, *i.e.*, necessary for the proper exercise of the agency vested in the plaintiffs. That being so, I apprehend that the propriety of granting an injunction to restrain the company from doing an act in usurpation of one of the powers mentioned in s. 98, must greatly depend upon whether the Court would compel the company to retain the plaintiffs in their service on the business of the company. The question arises, therefore, whether the Court, consistently with principle and authority, could compel the company to retain the plaintiffs as their agents?

In *Johnson* v. *The Shrewsbury and Birmingham Railway Company* (9) the Court was asked to restrain the company from determining a contract with the plaintiffs who had contracted to work the line and keep the engines and rolling plant in repair at a [282] specified remuneration. Lord Justice Knight Bruce describes the inadvisability of enforcing such a contract by injunction in the following terms:—"We are asked

(1) 2 Phil. 52.
(2) 1 J. & W. 394.
(3) 1 Sim. & St. 398.
(4) 19 Ves. 261.
(5) 4 Sim. 13.
(6) 1 My. & Cr. 459.
(7) 2 Phil. 60.
(8) 21 L J. Ch. 398 = 1 De. G. M. & G. 604.
(9) 3 De. G. M. & G. 914.

to compel one person to employ against his will another person as his confidential servant for duties, with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still, if the two do not agree—and good people do not always agree—enormous mischief may be done." In *Mair* v. *Himalaya Company* (1) the plaintiffs had contracted with the company to act as managers of their tea estates. A dispute having arisen between the plaintiffs and the company as to the terms upon which they had recognized the agency, the directors appointed a new manager in the room of the plaintiffs' firm, and refused to recognize them any longer as their agents, and the plaintiffs filed then a bill to restrain the company from acting upon and enforcing his voluntary resignation. Wood, V.C., refused the injunction,and in, his judgment referring to *Johnson* v. *The Shrewsbury and Birmingham Railway Company* (2) says: "Even assuming, in favour of the plaintiff, the construction given by him to the articles that he was to be irremovable, except by the authority of a general meeting, or that his acceptance of shares was conditional on his being retained as agent, the Court cannot act in his favour, as the duties of an agent are in the nature of personal service, and, as such, incapable of being enforced in equity." In *Stocker* v. *Brocklebank* (3) we find Lord Truro expressing his opinion that the contract between the parties being one of service and hiring, the Court could not interfere to compel the continuance of the relationship. The contract in that case was that the plaintiff should manage for the defendant's business of working certain patents which had become vested in them.

Now, I apprehend that the principle to be deduced from these cases is that the Court will not compel one man to continue to employ another in services of a personal nature, by which I understand services of such a nature as to depend for their efficiency upon the personal qualities of those with whom the contract is entered into, and more especially when they are services of trust **[283]** and confidence. It was said that the agency in this case was not a personal service, because it was vested by the company in a firm, whose members might be ever changing. But the efficiency of the agency will none the less depend upon the members of the firm for the time being, and the company may fairly be supposed (if, indeed, this company can be said to have had any share in the appointment of the plaintiffs under the circumstances of this case), to have selected the firm as their agents from the confidence in the members of the firm and their successors. Applying this principle to the present case, is it possible to conceive any duties of a more confidential character than those of a manager of a spinning and weaving company, to whom the entire business of buying raw material, creating the manufactured articles, and selling the outcome of the mill is entrusted, together with the largest possible powers for the efficient discharge of those duties. Would it be possible to impose a heavier burden on a company of this character, than by compelling it to retain a firm in the exercise of such duties after it had forfeited the confidence of the directors and shareholders. I can come to no other conclusion than that this Court would not, either by decreeing specific performance or by injunction, compel a company to retain its agents in its employ, but would leave the latter to their action for damages.

If this be so, ought the Court to restrain the company from doing that which is only a violation of what is ancillary to, or incidental to the

(1) L. R. 1 Eq. 411. (2) 3 De G. M. & G. 914. (3) 3 Mac. & G. 250.

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principal part of the contract, *viz.*, the agreement that the plaintiffs should be agents for twenty-five years. The case of *Brett* v. *East India and London Shipping Company* (1) has, I think, a distinct bearing on this question. Here the exercise of the powers mentioned in cl. 98 of the articles is but an adjunct to the agency, and if the Court could not compel the company to retain the plaintiffs as their agents, would it not be worse than futile to restrain them from doing acts which are equivalent to carrying on the business of the company, simply because they are in violation of the agents' powers. It is to be remarked that V. C. Wood reserves his opinion as to what the Court would do if the term in the agreement, the violation of which he sought to be restrained, were [284] quite distinct from the rest, by which I understand him as meaning if there had been no question of removing the agents. In the present case the agents have not been removed; but it is evident, from the affidavits on both sides, that the appointment of the firm of Messrs. Hearn, Cleveland and Little is with a view to that end. [His Lordship here read the affidavits.] The perusal of these affidavits can leave no doubt on my own mind that the appointment of new solicitors to the company is regarded by both parties as the first active operation against the position of the plaintiffs as agents—the first parallel against the fortress at present occupied by them, and from which they are able to dominate over the affairs of the company. Under these circumstances it would not be, in my opinion, in accordance with the principles which determine the action of Courts in Equity of England (and which are always treated as our best guides in such matters) if I were to interfere by injunction with the resolution of the directors of the 8th August, 1881.

This suffices to dispose of the rule; but I cannot help remarking that, independently of the above considerations, I doubt much whether the merits of the case would not preclude the interference of the Court on behalf of the plaintiffs. This contract is certainly not one which, to use the language of Lord Cairns in *Eley* v. *Positive Government Security Life Assurance Company* (2), "ought to receive any special favour from the Court." The appointment of the plaintiffs as agents was the result of a previous arrangement between them and Cassumbhoy Dhurumsey, the previous agent, who had a commanding influence in the old company, just as, in the case cited, it was one between the agents and the promoters, and under circumstances which were the same. In this case there is the additional circumstance that by the arrangement (and this term in the arrangement could not, in any possible view of the subject, be denied to have been brought to the notice of the shareholders) half of the remuneration to be paid to the plaintiffs, which the shareholders would naturally suppose was the necessary one to obtain the entire and efficient services of their agents, was to be paid over to Cassumbhoy. In other words, the transaction was one entered into to suit exclusively [285] the interests of the old and new agents, and with little or no regard to the real interests of the company and behind the backs of the shareholders. The rule must, therefore, be discharged, but without costs, as I consider the directors to blame in acting, as they did, without first calling a general meeting to decide upon a matter which was provided for by the articles of association. The three first defendants must pay the costs of the company.

Rule discharged.

(1) 2 H. & M. 404.

(2) 1 Exch. Div. 20.

Attorneys for plaintiffs.—Messrs. *Crawford and Boevey.*

Attorneys for the first three defendants.—Messrs. *Hearn, Cleveland, and Little.*

Attorneys for the fourth defendant.—Messrs. *Craigie, Lynch, and Owen.*

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CRIMINAL JURISDICTION.

Before Sir Charles Sargent, Kt., Justice.

EMPRESS *v.* BAL GANGADHAR TILAK. [9th March, 1882.]

Commission—Criminal trial—Evidence of Government servant ordered on service taken by commission previously to departure—High Court Criminal Procedure Act X of 1875, s. 76.

Where a Government servant who had executed his recognizance to appear and give evidence for the prosecution at a criminal trial to take place in the High Court of Bombay was subsequently ordered to a distant station on the public service, and could not, with due regard to the public interests, return to Bombay in time for the trial.

Held, on the application of Government, that his evidence might be taken by commission before his departure from Bombay, under the provisions of s. 76 of the High Court Criminal Procedure Act X of 1875.

[R., 19 B. 749 (757) ; **D.**, 24 C. 551 (556).**]**

THE accused was charged by Rao Bahadur Mahadev Wasudev Barve with defamation.

One of the witnesses for the prosecution was Brigade Surgeon Joynt. He was examined on the 22nd February at the preliminary inquiry in the Police Court, but counsel for the defence declined then to cross-examine him, wishing to reserve the cross-examination until the case came on for trial at the Sessions.

[286] On the 1st March, 1882, the accused was committed for trial at the Sessions of the High Court fixed to commence on the 10th April, 1882, and Dr. Joynt duly executed his recognizance to appear at the said Sessions when called upon to give evidence.

Early in March, Dr. Joynt received orders from the Military authorities to proceed at once to Quetta, and it became necessary to apply to the Court for an order dispensing with his attendance at the Sessions. A notice was served upon the attorneys for the accused, informing them that an application would be made to the Court "for an order that the personal attendance of Dr. Joynt as a witness at the next Criminal Sessions be dispensed with."

Hon. *F. L. Latham* (Acting Advocate-General), on behalf of Government, applied for an order in the terms of the above notice, and read an affidavit by the Government Solicitor, in which he stated that he was informed by Government that Dr. Joynt's services were urgently required at a distant station, and that he (Dr. Joynt) could not, therefore, with due regard to the interests of the public service, be detained in Bombay longer than was absolutely necessary, and that he (the Government Solicitor) had received instructions from Government to take proceedings on their behalf for an order dispensing with the personal attendance of Dr. Joynt at the said Sessions so as to render his services available for public duty elsewhere without returning to Bombay in April next.

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Inverarity, for the prosecution, did not object. Dr. Joynt's evidence might be taken by commission under s. 76 of Act X of 1875.

P. M. Mehta, for the accused.—I object to the order now applied for. It is important for the defence that Dr. Joynt should be examined and cross-examined before the jury at the Sessions. I submit that the Government has no *locus standi* to make this application. This is a private prosecution, and the Government is not a party. Section 76 does not contemplate an application by a third party.

[SARGENT, J.—The Government applies on behalf of its servant Dr. Joynt.]

[287] [*Latham*.—It is to the Government that Dr. Joynt is bound over by his recognizance to attend the Sessions.]

Again, the section clearly does not apply to a case where the witness is within the jurisdiction. The duty of examining a witness would not be imposed on a Magistrate where it might be performed by the High Court itself.

The application, of which notice was given to us, was only for an order dispensing with Dr. Joynt's attendance. Section 76 only provides for taking evidence by commission, but no application for a commission is now before the Court.

The affidavit in this application made is insufficient. No case of urgency is shown.

JUDGMENT.

SARGENT, J.—I think a commission to take Dr. Joynt's evidence must be allowed. It appears that Dr. Joynt has received orders from Government to proceed at once to a distant station where his services are urgently required, and that it is important that he should not be required to return to Bombay early in the month of April. Under these circumstances I think the order, now applied for, should be granted, unless, indeed, there was something very special in the criminal case to be tried at the Sessions which rendered it necessary, in the interests of justice, that Dr. Joynt should be personally present. There is nothing suggested here to lead to any such conclusion; and it appears to me that his evidence, both in examination and cross-examination, will be just as effective if taken on commission as it would be if he were to appear in Court. It has been argued by the counsel for the defence that the Court is not authorized to grant a commission to examine a witness who is within its own jurisdiction. There is, however, nothing in the language of s. 76 in support of this contention, and I think I may make the order now applied for, and direct Dr. Joynt's evidence in this case to be taken on Monday next before the Chief Presidency Magistrate.

Solicitor to Government.—Mr. *H. Cleveland*.

Attorneys for the prosecution.—Messrs. *Hearn, Cleveland and Little*.

Attorneys for the accused.—Messrs. *Shapurji and Thakurdas*.

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[288] APPELLATE CRIMINAL.

Before Mr. Justice West and Mr. Justice Pinhey.

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EMPRESS v. DAJI NARSU AND GOVINDA NATHA.*

[8th March, 1882.]

Evidence—Confession certificate—The Code of Criminal Procedure (X of 1872), s. 122—The Indian Evidence Act, I of 1872, s. 30.

If the certificate required by s. 122 of the Code of Criminal Procedure (Act X of 1872) that a confession is voluntarily made is not recorded by the Magistrate at the time the confession is made, or, at any rate, on the day it is reduced to writing, the confession is bad and inadmissible in evidence.

To render the statement of one person jointly tried with another for the same offence liable to consideration against that other, it is necessary that it should amount to a distinct confession of the offence charged.

[R., 23 B. 221 (228) : Rat. Unrep. Cr. Cas. 436 (439).]

THIS was a case submitted by R. F. Mactier for confirmation of the sentence of death passed on Daji bin Narsu. This was also an appeal made by the said Daji bin Narsu and his fellow prisoner Govinda bin Natha, sentenced, on conviction of murder, to transportation for life.

The circumstances of the case are as follows :—

The accused Daji and Govinda were charged before R. F. Mactier with having, on the 2nd day of January, 1882, caused, at Borjai Vadi, Taluka Koregaon of the Satara District, the death of one Narsu bin Hari, under circumstances which amounted to the offence of murder.

The prosecution alleged and the evidence showed that the death of the deceased was not due to suicide, and that it was due to a blow inflicted on the left temple of the deceased by means of a heavy weapon. The Session Judge held it proved that the deceased had been carrying on an intrigue with Daji's wife, and that, in consequence, there was ill-feeling between them. As regards the state of feeling between the deceased and the other prisoner Govinda, the Judge, upon the admission of Govinda himself and other evidence, came to the conclusion that Govinda had some sort of a grudge against the deceased, arising out of an alleged mischief done to his crops, and that Govinda wished to do the deceased some personal injury.

[289] One Manu Mali, a fellow worker with the deceased in a field, deposed to having been an eye-witness of the murder. He said, he and the deceased were present at an entertainment given at the village temple by a company of performers ; that they stayed there till 11 P.M., and then went to their field and slept at the distance of 25 cubits from one another, the deceased having near him, as was his wont, his iron-bound stick Sometime afterwards, he says, two men came near the deceased ; that one of them took up the stick which lay near and hit him on the left temple which caused him to give a cry. The two men, whom he know and whom he recognized to be the two accused, then went up to the witness and cautioned him not to make an outcry, or to disclose the transaction, or their names. The witness further said, he sat still till day-break from fear, and not till then did he perceive that Narsu had been dead. He then went to the village and reported the fact of his death to the patel without disclosing to him or to any one the names of the murderers. He mentioned those to the

* Confirmation Case No. 4 of 1882.

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chief constable who came a few days afterwards to the village to conduct the investigation.

The prisoner Govinda, on the 3rd of February, 1882,—that is, a day after the murder,—made a statement before the 3rd Class Magistrate of Koregaon. This statement was in the form of question and answer, and bore the mark of the prisoner and the signature of the Magistrate. It was also certified in due form that the statement had been taken down in the presence and the hearing of the Magistrate; that it was accurate: and that the confession was voluntarily made. This latter fact, however, was not recorded at the time or on the same day, but some few days afterwards.

Govinda also made a statement before the committing Magistrate. In this he tried to throw the principal blame on the shoulders of Daji, and admitted no more than that he had intended to give the deceased Narsu a sound beating.

A statement of the prisoner Daji's was also deposed to by two members of the inquest who examined Narsu's body soon after the murder. The Panch depose "that Daji admitted before them he had gone to where Narsu was asleep in a field and had struck him on the head with an iron-bound stick and killed him."

[290] The Session Judge relying upon the above statements and the evidence of two more witnesses, which he said corroborated those statements, came to the conclusion that "the actual killing of the deceased Narsu was the act of Daji, and that the prisoner Govinda was there present, and abetting, by previous agreement, personal injury to Narsu, though he may not have imagined the killing of Narsu." And being of opinion that the act of each amounted, in law, to murder, convicted each of that offence, sentencing Daji to death, and Govinda to transportation for life.

Both the convicts appealed to the High Court.

Branson, for Govinda and *Ganesh Ramchandra Kirloskar*, for Daji.—The findings of the Judge are based on illegal evidence: the statement of Govinda before the 3rd Class Magistrate did not bear, at the time it was made, the certificate that it was voluntarily made, but was added on three or four days afterwards. This is contrary to the procedure laid down in ss. 122 and 346 of the Code of Criminal Procedure (X of 1872) and the ruling of the Court in the case of *Bai Ratan* (1). The statement is objectionable on another ground also. It bears the mark of Govinda's attestation; and Govinda is a person who can write. The Legislature could not have intended to allow persons who can write to put their mark only. His statement before the committing Magistrate does not amount to a confession of his guilt, and cannot be considered against Daji. The alleged confession of Daji is also inadmissible before he was in police custody. The other evidence is incredible, and insufficient for conviction of any accused.

Nanabhai Haridas, Government Pleader, *contra*.

JUDGMENT.

WEST, J.—The first question which we have to consider in this case, is how much of the evidence which has been recorded by the Session Judge at the trial of the prisoners is legally admissible? We are of opinion that the statement of Govinda before the Subordinate Magistrate

(1) 10 B.H.C.R. 166.

is inadmissible for the reason that the certificate as to the Magistrate's belief, that the confession was voluntarily made, was not recorded by the Magistrate at the time the statement was made, but three or four days afterwards. Section 122 of the Code of Criminal Procedure (X of 1872) enacts [291] that the Magistrate shall make a memorandum to that effect at the foot of the confession. We think that the making of such a memorandum is a judicial, or, at least, a quasi-judicial act. A good many acts of a ministerial nature may properly be performed not precisely at the time contemplated when they are of a kind leading up to or following judicial functions; but when those latter are performed, the necessary formalities should be promptly and strictly gone through. It is not permissible for a Magistrate, after a statement of a person has once gone out of his hands, to attach to it, several days afterwards, the certificate that it was voluntarily made. To enable him to do so he must either depend solely upon his own memory or have his memory refreshed by the impression of some one, perhaps by a police officer who was present at the time the statement was taken down. This is unsatisfactory. If the statement in the present case did not amount to a confession, we might consider whether we should not allow it to be proved in some other way; but the contention for the prosecution is that it does amount to a confession, and, having regard to the case of *Bai Ritan* (1) and other cases in which the decision there arrived at was followed, we are of opinion that a confession upon which the necessary certificate is not recorded at the time, or, at any rate, on the day the confession was reduced to writing is bad, and cannot be admitted in evidence.

The next piece of evidence is the confession of Daji deposed to by two members of the Panch. The Government Pleader felt himself unable to deal with it as a confession. When it was made, Daji was in police custody. The Legislature, choosing the lessor of two evils, has excluded confessions taken under such circumstances.

The next point for consideration is the statement of prisoner Govinda before committing Magistrate. In this it is obvious that Govinda does not intend to criminate himself. His intention is to exculpate himself and make Daji the murderer of Narsu. When a person admits guilt to the fullest extent, and exposes himself to the pains and penalties provided for his guilt, there is a guarantee for his truth, and the Legislature provides that his statement may be considered against his fellow prisoners charged [292] with the same crime. By exculpating himself Govinda fails to provide this guarantee, and his statement must also be set aside in weighing the evidence against Daji.

This reduces the evidence to the deposition of Manu Mali, for the evidence of Babaji and Shiva—besides being conflicting—is not very material. Manu's evidence is not free from objections. He does not make his statement till after the arrival of the chief constable to his village for conducting the investigation. It is not quite unusual in this country for ignorant people to withhold information of the kind. They are afraid of being charged with complicity in the crime they have happened to witness. At the same time the evidence of timid people given after some delay must be received with considerable caution. It is not safe to give ready credence to such testimony. Shorn of Govinda's evidence, the case is quite barren. It bears, moreover, indications of police manipulation, and we are unable to uphold the convictions.

(1) 10 B.H.C.R. 166.

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We accordingly reverse the sentences, but not without regret. The case has not been efficiently handled, and justice has possibly been defeated. We are unable to say to whom this result is due; but there has been mismanagement on the part of some one there is but little doubt. A strong suspicion remains in our mind as to the guilt of Daji. But under the circumstances we must acquit both him and Govinda.

Conviction reversed.

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6 B. 292=6 Ind. Jur. 424.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice Melvill.

BHAVANISHANKAR SHEVAKRAM AND ANOTHER (*Plaintiffs*)
v. PURSADRI KALIDAS (*Defendant*).*
[14th February, 1882.]

Jurisdiction—Judgment—Decree—Native Courts, suit on decree of—Suits in India on judgments of Courts in India—Suit on foreign judgment—Jurisdiction of Small Cause Court—Civ. Pro. Code (Act X of 1877), s. 434.

No suit is maintainable in any Court in British India founded upon the judgment of a Court situate in a Native State.

[293] The Courts of British India cannot enforce the decrees of any Native Courts, except as provided by s. 434 of the Civ. Pro. Code, Act X of 1877. Under that section the decrees of certain Native Courts may be executed in British India, as if they had been made by the Courts of British India.

A suit will not lie in the Courts of India upon the judgment of any Court in British India. The only exception to this rule is in the case of judgments of a Court of Small Causes on which suits are permitted to be brought in the High Court in order to obtain execution against immoveable property.

A foreign judgment creates an obligation belonging to the class of implied contracts.

A Court which entertains a suit on a foreign judgment cannot institute an inquiry into the merits of the original action or the propriety of the decision.

Quœre—Whether suits on foreign judgments are maintainable in the Civil Courts of India.

[Diss., 7 M. 164; N.F., 22 C. 222=21 I.A. 171=4 M.L.J. 267; F., 8 B. 593; R., 8 B. 1; 24 B. 86.]

UNDER s. 617 of Act X of 1877, this case was referred for the opinion of the High Court by C. M. Cursetji, Judge of the Small Cause Court of Ahmedabad.

On the 14th August, 1877, the plaintiffs obtained a decree against the defendant, for a sum less than Rs. 500, in one of the Courts of His Highness the Gaekwar of Baroda. Both the parties resided in Ahmedabad, and the plaintiffs sued the defendant, on the said decree, in the Small Cause Court of that place. The defendant pleaded that the Court had no jurisdiction to entertain the suit. The Judge of the Small Cause Court was of opinion that he had jurisdiction.

There was no appearance for the plaintiffs.

Manekshah Jahangirshah, for the defendant.

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* Small Cause Court Reference 5 of 1880.

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JUDGMENT.

MELVILL, J.—The question referred for our decision is whether the Court of Small Causes at Ahmedabad has jurisdiction to entertain a suit on a foreign judgment.

If we were to give a general answer to a question stated in such general terms, we should say that, in our opinion, a Court of Small Causes is as competent as any other Court to entertain a suit on a foreign judgment, provided that the judgment be for a sum not exceeding Rs. 500. In *Mancharam Kalliandas* v. *Bakshe Saheb* (1) ; Couch, C. J., expressed a doubt whether the obligation created by a judgment comes within the terms of s. **[294]** 6 of Act XI of 1865, namely, "claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages." But for many years past this Court has consistently held that Courts of Small Causes have jurisdiction over claims arising out of implied, as well as express, contracts. Thus, in *Dullab Shivlal* v. *T. C. Hope* (2), it was held that a Court of Small Causes has jurisdiction over a claim to recover back taxes illegally levied. Similar decisions were passed in regard to a suit for money had and received by the defendant to the use of the plaintiff: *Ratanshanker* v. *Gulabshanker*(3); and a suit by one surety against another for contribution: *Hari Trimbak* v. *Aba Saheb* (4). These are a few instances, among many, of implied contracts which Courts of Small Causes have been held competent to enforce. The obligation arising out of a foreign judgment is of a similar nature. The law raises an implied contract to pay a sum of money, adjudged to be due from one man to another by the sentence of a foreign or Colonial Court (Addison on Contracts, 6th ed., p. 40). The principle, as stated by Parke, B., in *Williams* v. *Jones* (5), is that "where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and Colonial Courts are supported and enforced." This is equivalent to saying that a foreign judgment creates an obligation belonging to the class of implied contracts, which are described as arising from the "general implication and intendment of the Courts of judicature, that every man hath engaged to perform what his duty or justice requires:" 3 Blk. Com., 163, 164. To the same effect are the observations of this Court in *Umedchand* v. *Sha Bulakidas* (6).

But the wider question remains whether *any* Court in British India ought to entertain a suit founded, as this suit is, upon the judgment of a Court situate in a Native State? As observed by **[295]** Blackburn, J., in *Godard* v. *Grey*(7), "it is not an admitted principle of the law of nations that a State is bound to enforce within its territories the judgment of a foreign tribunal. Several of the Continental nations (including France) do not enforce the judgments of other countries, unless where there are reciprocal treaties to that effect. But in England, and in those States which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon the principle stated by Parke, J., in *Williams* v. *Jones*." Here, in India, the jurisdiction of our Civil Courts is carefully defined by

(1) 6 B.H.C.R.A.C.J. 231.
(2) 8 B.H.C.R. A.C.J. 213.
(3) 10 B.H.C.R. 21.
(4) 4 B. 321.
(5) 13 M. & W. 633.
(6) 5 B.H. C. R. O. C. J. 16 (22).
(7) L.R. 6 Q.B. 139.

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statute; and, if it had been intended that suits should be brought in those Courts on foreign judgments, it might have been expected that such suits would be expressly provided for. It cannot be said that the question of foreign judgments escaped the notice of the Legislature; for by s. 14 of Act X of 1877 a foreign judgment is allowed to be pleaded in bar, no doubt on the principle that "*nemo debet bis vexari pro eadem causa.*" But the Code contains no provision for making a foreign judgment an engine of attack, as well as a means of defence. It is not, however, necessary for us to express any general opinion upon this question. The reports show that suits on the judgments of French Courts in India have been entertained by the Calcutta and Madras Courts (1), and we are not by any means to be understood as saying that those suits were improperly entertained. What we are now concerned with, is the judgments of Courts situate in Native States. We cannot find in the reports a single instance in which a suit founded upon the judgment of such a Court has been entertained by a Court in British India, and in the absence of precedent, we are not disposed to express an opinion favourable to the entertainment of such suits. There has been much conflict of opinion as to the conclusiveness of foreign judgments (*vide* Mr. Smith's notes to the Duchess of Kingston's case (2); Taylor on Evidence, s. 1553; Story on the Conflict of Laws, s. 607); but it may now be taken as established that a Court which entertains a suit on a foreign judgment [296] cannot institute an inquiry into the merits of the original action or the propriety of the decision. It can feel no confidence that it is doing justice between the parties, except in so far as such confidence is based upon its general belief that the tribunals of the foreign State ordinarily conduct judicial inquiries with intelligence and integrity. Are we justified in reposing such confidence in the tribunals of Native States? Some Courts in Native States may be sufficiently well constituted, and their proceedings sufficiently well conducted, to entitle their judgments to respect; but this is notoriously not so in regard to other States, and, indeed, must be regarded as the exception rather than the rule. Our Courts are not in a position to draw distinctions, which would necessarily be invidious, and not necessarily correct, between the Courts of different Native States. Section 434 of the Code of Civil Procedure imposes this duty upon the Governor-General in Council, who is certainlythe best informed, and, therefore, the fittest authority to discharge it. That section provides that "the Governor-General in Council may from time to time, by notification in the *Gazette of India*, (*a*) declare that the decrees of any Courts situate in the territories of any Native Prince or State in alliance with Her Majesty, and not established by the authority of the Governor-General in Council, may be executed in British India, as if they had been made by the Courts of British India, and (*b*) cancel any such declaration." We think that it is safe and proper to hold that the Legislature did not intend that the Courts of British India should in any way enforce the decrees of any Courts situate in Native States, except such Courts as may have been notified by the Governor-General in Council under s. 434. It follows at once from this that a suit cannot lie in a British Court upon the judgment of any Native Court not so notified. As regards Courts which have been so notified, s. 434 provides that their decrees may be executed in British India as if they had been made by the Courts

(1) 4 W.R. 108 = 15 W.R. 500 = 8 M.H.C.R. 14.
(2) 2 Smith's L. Cases, p. 730 (6th ed.).

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6 B 292 = 6 Ind. Jur. 425.

of British India. We think that it was clearly the intention of the Legislature that the decrees of the privileged Native Courts should occupy the same position as the decrees of British Courts, and should not carry with them any greater advantages. If, therefore, a suit would not lie upon the judgment of one of [297] our own Courts, neither is there reason to suppose that it will lie upon the judgment of one of the privileged Native Courts. Now, upon this question we may refer to the observation of Couch, C. J., in *Mancharam* v. *Bakshe Saheb* (1). The question which he was considering was whether a suit could be maintained upon the judgment of a Court in British India? He said: "The Legislature has been careful in the Limitation Act to provide that the judgments and decrees of Civil Courts shall be enforced within certain periods; and if an action might be brought upon a judgment or decree which is within those provisions, the Law of Limitation might be evaded. When an action on a judgment or decree will not give to the plaintiff a higher or better remedy than he already has, there is no advantage in allowing it to be brought; and it would be contrary to the spirit of the Code of Civil Procedure, to do so. Where it will give a higher or better remedy, the case is different, and there are cases in which an action may be the only mode of enforcing a judgment or decree." In the last paragraph the Chief Justice was probably referring to judgments of a Court of Small Causes, on which suits are permitted to be brought in the High Court, in order to obtain execution against immoveable property. Except in this peculiar case, it must be taken to be settled that a suit will not lie in our Courts upon the judgment of any Court in British India; and it follows, for the reasons which we have stated, that a suit will not lie upon the judgment of any native Court, although such Court may have been notified under s. 434. The decrees of the Courts so notified may be enforced by execution in the ordinary manner, but not by a suit upon the judgment.

It is not stated in this reference whether any notification has been made under s. 434 in favour of the Courts of His Highness the Gaekwar. We have not been able to find any such notification in the *Gazette of India*; and it is probably because no such notification has been made that the decree-holder in this case has resorted to the expedient of bringing a suit upon his judgment. Our reply to the Judge of the Court of Small Causes must be that the suit cannot be maintained.

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6 B. 298 = 6 Ind. Jur. 426.

[298] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

MANCHARAM (*Original Plaintiff*), *Appellant v.* PRANSHANKAR (*Original Defendant*), *Respondent.** [13th March, 1882.]

Hindu law—Hereditary secular and religious office, alienation of, when valid—Partibility of such offices—Partition—Mode of partition of such offices.

Hereditary offices, whether religious or secular, are no doubt treated by the Hindu text writers as naturally indivisible; but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as

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* Second Appeal No. 287 of 1881.

(1) 6 B.H.C.R.A.C.J. 231.

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can be had of such property by means of a performance of the duties of the office and the enjoyment of the emoluments by the different co-parceners in rotation.

There is no reason why the alienation of a religious office to a person standing in the line of succession, and free from objections relating to the capacity of a particular individual to perform the worship of an idol or do any other necessary functions connected with it, should not be upheld. The alienation, therefore, by a divided member of a Hindu family to his sister's son, of the right of worshipping a goddess and receiving a share of the offerings was upheld.

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[N F., 35 C. 226 = 7 C.L J. 315 = 12 C.W.N. 323; 12 C.W.N. 98; **Rel.**, 36 C. 795 = 13 C.W.N. 1084 = 3 Ind. Cas. 76; **R.**, 9 B. 198; 20 B. 495; 23 B. 131; 17 C. 557; 23 C. 645; 24 C. 83; 6 M. 76; 15 M. 183 = 2 M.L.J. 19; 19 M. 211 = 4 M.L.J. 288; 1 C.W.N. 493; 10 Ind. Cas. 399; 13 Ind. Cas. 225 = 5 S L.R. 107; U B.R. 1892—1896, 420; **D.**, 19 A. 428 (433); 34 C. 828 = 11 C.W.N. 782.]

THIS was an appeal from the decision of S. Hammick, Assistant Judge of Surat, confirming the decree of the Subordinate Judge of Bulsar.

The facts of the case were as follows:—

There was a temple of the goddess Ashapuri in the village of Vejalpor. It was founded by two brothers, Ghulabat and Bhagvanbhat. Bhagvanbhat died, leaving behind him two sons, the defendant Mancharam and Devsbankar. Devsbankar died, leaving him surviving a son named Ganpatram. Ganpatram died on the 9th of February, 1876, leaving behind him a widow. On the 12th of August 1875, Ganpatram made a will, bequeathing all his estate, including the right of worshipping the goddess and receiving his share of the offerings, to his nephew, the plaintiff Pransbankar (a son of Ganpatram's sister). Pranshankar obtained a probate of the will from the District Court of Surat.

The plaintiff sued for a declaration of his right to worship the goddess and receive his share of the offerings, and for a perpetual injunction restraining the defendant from interfering with the exercise of his right. The plaintiff further sought **[299]** to recover Rs. 120 on account of the offerings received wrongfully by the defendant (his mother's uncle).

The defendant, *inter alia*, contended that the right claimed was not partible, and could not be alienated to any person not in the male line of succession of the founders; that the family was united; and that, in fact, Ganpatram never made the will set up by the plaintiff; and that, even if he did, it was invalid.

Both the Courts below found on these points in favour of the plaintiff, and gave him a decree. The defendant appealed to the High Court.

Shantaram Narayan, for the appellant.

Nanabhai Haridas, Government Pleader, for the respondent.

JUDGMENT.

MELVILL, J.—The first objection taken to the decree appealed against is that a religious office and its endowment, or the fees connected with it, are impartible; that they cannot lose their character of joint property; and that, consequently, in accordance with the rule in force in this Presidency, *viz.*, that a co-parcener cannot give or devise by will his share in the undivided estate, the bequest by Ganpatram to the plaintiff must be treated as null and void.

No doubt, hereditary offices, whether religious or secular, are treated by the Hindu text writers as naturally indivisible; but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as can be had of such property, by means of a performance of the duties of the office, and the enjoyment of the emolument, by the different co-parceners in rotation. One of the most recent cases on the

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subject is that of *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry and others* (1), in which it was held that the reasons for which one of several joint owners is entitled to a partition of the joint property apply also to the case of a joint right of performing the worship of an idol; and that the joint owners of such a right are entitled to a decree for the performance of the worship by turns.

The next objection to the Assistant Judge's decree is that a religious office, and particularly one which involves the worship [300] of an idol, is by its nature inalienable. Among the cases cited upon this point were several in which it has been held that the right of a *sebait*, to perform the worship of an idol, cannot be sold in execution of a decree. The reasons on which these decisions were based, must commend themselves to every mind as necessarily consonant with Hindu law and sentiment. In the cases of *Juggurnath Roy Chowdry* v. *Kishen Pershad Surmah alias Rajah Baboo and another* (2) *and Kali Charan Gir Gossain* v. *Bangshi Mohan Das Baboo* (3) it was said, that, if such property were subject to attachment and sale, the purchaser might be a Mahomedan or a Christian, whowould be both unwilling and incompetent to perform the service of the idol; and in the case of *Dubo Misser* v. *Srinibas Misser* (4) Mr. Justice Mitter further observed that he might be unfit to prepare food for the idol. The same reasons would militate against an unrestricted right of alienation by private sale or gift. Such an alienation to an improper person would defeat the object of the endowment, and in some cases, as in the Privy Council case *Rajah Vurmah Valia* v. *Rave Vurmah Kunhi Kutty* (5), it might be inconsistent with the presumed intention of the founder of the endowment. It may be admitted, also, that it would not be desirable to lay down any such rule regarding such alienations as would involve the Courts in nice questions of caste distinctions, bearing upon the capacity of a particular individual to perform the worship of, and prepare food for, a Hindu idol. But there may be alienations which are free from any of these objections; and in such cases there would appear to be no reason why any restriction should be placed upon the exercise of the ordinary rights of property. Assuming that, for the reasons which we have stated, the alienation of a priestly office to a stranger would be invalid, it does not follow that an alienation to a member of the founder's family, standing in the line of succession, would be open to objection. In *Sitarambhat* v. *Sitaram Ganesh* (6) the sale of an hereditary priestly office was upheld, where the purchasers were the next in succession to the office. In that case it was said: "It is not [301] necessary to decide the question as to whether such offices can be sold to strangers. In this case the purchasers were grand-children, who would eventually succeed to the office as heirs, and the grandfather did nothing more than relinquish his right in their favour. There have been previous dealings with this office of a somewhat similar nature, which is some evidence of a usage justifying the alienation in the present case." We do not think that there is much difference, in principle, between the case just cited and that now before us, though the endowment in the present case is of too recent a foundation to render any evidence of usage possible. In both cases the purchasers are persons standing in the line of succession, and claiming through females: and though in the present case the purchaser is not the next heir, but only a possible heir—for he is Ganpatram's sisters' son, and, therefore a

(1) 14 B.L.R. 166. (2) 7 W.R. 266. (3) 6 B.L.R. 727.
(4) 5 B.L.R. 617. (5) 1 M. 235. (6) 6 B.H.C.R. A.C.J. 250.

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bandhu, if not a *sapinda*: *Srinivasa Ayyangar* v. *Rengasami Ayyangar* (1) —yet the next heir, Ganpatram's widow, has expressed her acquiescence in the bequest to the plaintiff. If the alienation of a priestly office is open to objection only on the grounds that it would be contrary to the founder's intention that the office should pass out of his family, and that it would be incompatible with the due performance of the duties of the office that it should be held by a person of a different religion or caste, then, (in the absence of any restriction to a particular class of heirs, imposed either by the founder or by usage), there would appear to be no reason why an alienation should not be upheld, which is made in favour of any person standing in the line of succession, and not disqualified by any personal unfitness.

For these reasons we confirm the decrees of the Courts below with costs.

Decrees confirmed.

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6 B. 302=6 Ind. Jur. 428.

[302] APPELLATE CIVIL.

Before Mr. Justice Melvill.

MOTIGAVRI (*Original Paintiff*), *Appellant v.* PRANJIVANDAS AND OTHERS (*Original Defendants*), *Respondents.* [10th January, 1882.]

Court Fees Act, VII of 1870—*Memorandum of appeal—Stamp—Suit for recovery of land and money.*

In deciding the amount of stamps to be borne by the memorandum of appeal, the High Court is not bound by the decision of the Court of first instance as to the stamp on the plaint.

[F., 15 B. 82 ; R., 20 B. 265 ; 30 M. 61=16 M.L.J. 462=1 M.L.T. 426.]

THIS was a reference, under s. 5 of the Court Fees Act VII of 1870, by the Taxing Officer of the High Court, Appellate Side.

The defendant No. 1 had, in a suit against the plaintiff, obtained a decree for Rs. 7,595, and in execution of this decree certain property had been sold to defendants Nos. 2 and 3. The plaintiff has brought this action to recover this property and the sum of Rs. 1,417-2-8, being the profits derived therefrom by the defendants Nos. 2 and 3, and also mesne profits until recovery of possession, or, failing this, to recover Rs. 3,300 from the first defendant, being the amount realized by him by the sale of the property, on the ground that the former decree against her was null and void, she having been a minor and not properly represented in the suit.

Plaintiff stamped her claim as in a suit for Rs. 4,747. The Subordinate Judge held that the suit was virtually to set aside a decree for Rs. 7,595, and was, therefore, insufficiently stamped, and on this and other grounds dismissed it.

Plaintiff appealed and stamped her appeal to the same amount as she had stamped her plaint. The District Judge thereupon dismissed the appeal, on the ground that the Court of first instance having decided what the stamp duty was, he was precluded by s. 12 of the Court Fees Act (VII of 1870) from re-opening the question, and he, therefore, held that the appeal was understamped.

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(1) 2 M. 304.

The plaintiff appealed to the High Court, and stamped this second appeal as she stamped the plaint and first appeal.

[303] The questions referred by the Taxing Officer for decision were—

Whether, when the Court below had decided that a certain stamp was payable on the plaint, the appellate Court was bound to accept its valuation as the basis on which the appeal is to be valued?

What was the correct valuation of this appeal?

The Taxing Officer's opinion was that, in valuing the appeal, he was not bound to follow the valuation put on the plaint by the Court below; that in this case the plaint had been overvalued, as the suit was one for possession of land and mesne profits; and that, as regards the alternative relief sought, the larger of the two reliefs must determine the amount of the stamp.

The Chief Justice having referred the question to Mr. Justice Melvill for disposal, his Lordship delivered the following

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JUDGMENT.

MELVILL, J.—The Court is of opinion that, in deciding the amount of stamp to be borne by the memorandum of appeal, this Court is not bound by the decision of the Court of first instance as to the stamp on the plaint. The Court is also of opinion that the Registrar and Taxing Officer is right in holding that the appeal ought to be stamped as in a suit for the recovery of land and money, and that, as regards the alternative relief sought, the larger of the two reliefs sought must determine the amount of the stamp. This decision will be final as determining the stamp on the memorandum of second appeal; but it will not preclude the Division Bench, before which the appeal may come, from determining (contrary to the *ex-parte* decision now passed by the Court), that the lower appellate Court was right in holding itself bound by the decision of the Court of first instance on the question of stamp.

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6 B. 304.

[304] APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

RANCHODJI AND OTHERS (*Original Plaintiffs*), *Appellants v.* LALLU AND OTHERS (*Original Defendants*), *Respondents.** [9th March, 1882.]

Judge—Judicial discretion—Appeal—Review—Limitation.

Where the law leaves a matter within the discretion of a Court, and the Court, after proper inquiry and due consideration, has exercised the discretion in a sound and reasonable manner, the High Court will not interfere with the conclusion arrived at, even though it would itself have arrived at a different conclusion.

Consequently, where a District Judge, after due inquiry, refused to admit an appeal presented after the time prescribed by the Statute of Limitation, the High Court would not interfere with his order.

[R., 23 B. 513; 31 B. 33 = 8 Bom. L.R. 858; 8 A.L.J. 793 = 11 Ind. Cas. 814; 1 L.B.R. 313; 3 O. C. 37 (40).]

THIS was an appeal from the order of G. M. Macpherson Judge of Surat, dismissing a petition of appeal against the decree of Rao Saheb Chunilal Maneklal, Subordinate Judge of Bulsar.

* Second Appeal, No. 450 of 1881.

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The plaintiffs sued for a declaration that a right to recover a certain assessment which the defendants possessed against them under two instruments executed by the ancestors of the plaintiffs to those of the defendants in 1808 and 1829 was limited to the amount of assessment which the Government might fix. They also prayed for an injunction restraining the defendants from suing them for a large sum.

The defendants, *inter alia*, contended that the stipulations of the documents should be carried out to the fullest extent, and that the plaintiffs' suit did not lie.

The Subordinate Judge rejected the claim of the plaintiffs, who appealed to the District Judge.

The District Judge refused to admit the appeal.

Nanabhai Haridas, Government Pleader, for the appellants.

Gokaldas Kahandas, for the respondents.

JUDGMENT.

KEMBALL, J.—This is an appeal against the order of the District Judge of Surat, dismissing a petition of appeal on the ground that it was presented after the period prescribed therefor. It appears that the decree of the Court of first instance was passed by the Subordinate Judge of Bulsar, on the 27th April last, shortly **[305]** before the commencement of the annual vacation, and the petition of appeal against it ought to have been presented on the 16th June following, the day on which the Courts in the Surat District re-opened. It was not, however, presented till the morning of the following day, *i.e.*, the 17th, when the appellant, Ranchodji, represented to the District Judge by petition (the truth of which was sworn to) that he had left his village of Eru for the nearest railway station, Navsari, at 9. P.M. on the 15th *idem*, in order to catch the mail train which would have taken him to Surat on the same night; but that the axle of the cart, in which he was travelling, having broken, he was, in consequence, delayed on the road, and did not reach the aforesaid railway station till after the said train had left. He further stated that he went on by the very next train to Surat, and, on arrival there, proceeded to the Court, which he reached at 5 P.M., only, however, to find that the Court had risen. This explanation the District Judge considered "quite insufficient", and desired the production of further affidavits, especially as to the times at which appellant Ranchodji left his house and arrived at the station. Affidavits and further affidavits of the cart-driver who had accompanied the said appellant Ranchodji from his village to the spot where the cart broke down and of a friend who met Ranchodji at the station were accordingly put in, and on a consideration of these, coupled with the original petition, the District Judge found that, whereas Ranchodji had said that on his cart breaking down he proceeded at once to the station which he reached just as the train had left, it appeared from the affidavits that he stayed some three quarters of an hour to catch his bullocks which had fled when the axle broke, and arrived by so much late at the station; and further that, looking at the hour at which Ranchodji stated he left his village and at the advertised time for the mail train to leave Navsari, he must have left himself barely time in any case to reach the station. The appeal was accordingly rejected. Had such an application, based on such affidavits, been presented to this Court, I have little doubt, speaking from an experience of almost twelve years in it, that the result would have been different; but the question which we have to consider is, whether this Court has any power to interfere with the discretion of the **[306]** Court below

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which expressed itself not satisfied with the sufficiency of the reason put forward by the appellant Ranchodji for the delay. The said appellant himself appears to have felt this difficulty; for instead of stating, as he was required to do by s. 541 of the Civil Procedure Code, (X of 1877), *the ground of objection* to the decree appealed against, he contented himself, after setting forth the facts, with this request: "Your Lordships will, therefore, be pleased to order such appeal to be received and disposed of on the merits." However, it has been argued here by Mr. Nanabhai, on the said appellant's behalf, that if this Court is disposed to think that the delay should, under the circumstances explained, have been excused, it can and ought—an appeal being given by law against the District Judge's order of rejection—to interfere, albeit the matter was one entirely within the District Judge's jurisdiction. Several cases have been cited by Mr. Nanabhai in the course of his argument. *Zaibulnissa Bibi* v. *Kulsum Bibi* (1); *Hardatrai Shrikisondas* v. *Victoria Finance and Bullion Association* (2); *Juggomohun Ghose* v. *Manickchund and another* (3); *Murtunjoy Chuckerbutty* v. *John Cockrane, Official Assignee of the estate of Messrs. Hickey, Bailey and Co., Insolvents* (4); *M. G. Pendse* v. *R. S. Malse* (5); *Mowree Bewa* v. *Soorundarnuth Roy* (6); *The Secretary of State for India in Council* v. *Mutu Sawmy and another* (7); *Lee and another* v. *The Bude and Torrington Junction Railway Company* (8); *Dubey Sahai* v. *Ganeshi Lal* (9).

With reference to the cases quoted from Moore's Indian Appeals while I am unable to see the applicability of the second case, it is sufficient for me to observe that it is, to say the least, extremely doubtful whether the Judicial Committee, though dealing as they have to deal with questions of fact as well as law, would, save under exceptional circumstances, interfere with the discretion of a Court. The other cases cited seem to me only to go to this, that the discretion of a Court is liable to review or appeal where such Court is acting through caprice or prejudice, or where the discretion **[307]** is exercised without any proper legal materials to support it. There can be no doubt that where the exercise of discretion is perverse this Court can and will interfere, as it did in the case of *Hardatrai Shrikisondas* v. *Victoria Finance and Bullian Association* (2); but I am not aware of any single authority for the proposition that a sound and reasonable exercise of the jurisdiction given by law to a Court is open in any way to revision, though there are decisions to the contrary: see *Raj Coomar Roy* v. *Sheikh Mahomed Wais and others* (10) *and In the matter of Bhujohuree Mundul* (11). It is, I think, impossible to hold that the Judge in the present case has exercised his discretion capriciously or without material sufficient in law to satisfy himself whether or no there was sufficient cause for the delay; and the order complained of, being the result of the exercise of a judicial discretion vested in the Judge, is, in my opinion, clearly one with which an appellate Court cannot interfere. The decree (which the order appealed against must be taken to be under s. 2, Civil Procedure Code), of the District Judge must, therefore, be confirmed with costs.

PINHEY, J.—The appellants Ranchodji and sixteen others filed a suit in the Subordinate Court at Bulsar against eleven defendants to

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(1) 1 A. 250. (2) 3 B.H.C.R. O. C. J. 60. (3) 7 M. I. A. 263.
(4) 10 M. I. A. 229. (5) 3 B.H.C. R. A.C J. 94 (101). (6) 10 W. R. 178.
(7) 4 B.L.R. Appx, 84. (8) L. R. 6 C. P. 576. (9) 1 A. 34, F. B.
(10) 7 W.R. 337. (11) 18 W.R. 293.

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obtain a declaratory decree. The Subordinate Court, on the 27th April, 1881, dismissed the claim with costs. The summer vacation intervening, the District Court of Surat re-opened on the 16th June, and, therefore, if the plaintiffs desired to appeal from the decision of the Subordinate Court, they should have presented their appeal to the District Court on that day. No appeal was, however, presented until the following day,—that is, the 17th June. The memorandum of appeal and a *vakalatnama* in the name of all the plaintiffs were taken from their village to Surat by the appellant Ranchodji, who is now present in Court; and the reason which he gave to the District Court at Surat for not presenting the appeal in time, was that he missed the mail train which would have brought him to Surat on the morning of the 16th, and that the next train brought him to Surat on the 16th after the District **[308]** Court was closed, and so he could not present the appeal until the 17th. The District Court, after postponing the case for enquiry and taking evidence, refused to admit the appeal, considering the delay in presenting it not satisfactorily accounted for. The District Court found that, notwithstanding the extended time given by the occurrence of the vacation for the presentation of the appeal, Ranchodji had put off taking the appeal to Surat until the last train that would have taken him to Surat in time, and had, moreover, put off starting from his home for that train until it was almost (if not quite) physically impossible for him to catch that train.

We are asked to set aside the order of the District Court and to direct that Court to admit the appeal and proceed to dispose of it on its merits. I am, however, of opinion that the order of the District Court should not be set aside. No error of law was committed by the District Court; but, after a proper enquiry and due consideration of the facts alleged by the appellant Ranchodji, the District Court, in the exercise of its discretion, held that the delay in presenting the appeal was not satisfactorily accounted for. That is not an order which the High Court should reverse on appeal, even if the members of the Court think they individually would have treated the appellant more leniently if either of them had been presiding over the District Court when the appeal was presented: *Raj Coomar Roy* v. *Shaikh Mahomed Wais and others* (1). That case is on all fours with this; and I entirely concur with the opinion expressed by Jackson, J., in it. In all the other cases which have been cited for the appellant (with one exception), in which the High Court varied the order of the Court below, whether for receiving or refusing to receive an appeal after time, the ground on which the High Court's order proceeded was that the Court below either had exercised no discretion at all, or had no legal evidence before it on which the discretion of the Court could operate. The only exception to this rule is the case of *Hardatrai Shrikisondas* v. *Victoria Finance and Bullion Association* (2), and that case was not a case in which the Court below had refused to admit an appeal after time, but had refused to re-admit a case dismissed for default in consequence **[309]** of the non-appearance of the plaintiff. The suit was dismissed under the Code of Civil Procedure, of 1859; and, under s. 119 of that Code, an appeal was specifically given from an order refusing to set aside the dismissal of the suit. And the order of the Judge rejecting the plaintiff's application was so obviously

(1) 7 W.R. 337.

(2) 3 B. H. C. R. O. C. J. 60.

perverse and improper, that counsel for the defendant did not apparently attempt to support it.

In the present case the District Court considered the reasons given for the delay in presenting the appeal fully on their merits, and, in the exercise of its discretion, determined that the delay was not satisfactorily accounted for. I have given the substance of the reasons of the District Court's order above. I further notice that it appears from the District Court's judgment that the appellant appears to have endeavoured to mislead the Court by falsehood, or, at least, by prevarication. To use the words of James, L. J., in *Sheffield* v. *Sheffield*, I would "not encourage appeals in cases which, like this, depend entirely upon the discretion of the Judge," especially where, as in this case, the Judge has exercised his discretion carefully and after having the case before him on two separate days.

I would confirm the order of the District Court with costs.

Decree confirmed accordingly with costs.

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6 B. 309.

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Before Mr. Justice Melvill and Mr. Justice Kemball.

MIR AZIMUDIN KHAN (*Original Plaintiff*), *Appellant* v. ZIA-UL-NISA AND ANOTHER (*Original Defendants*), *Respondents.** [7th March, 1882.]

Sale by a young person not a minor—Grounds for its cancelment—Sale by seamen—Sales by expectant heirs of reversionary interests.

In the case of a sale by a person, young indeed and in distressed circumstances but not without advice or means of information, of an estate actually vested in him, but not to be obtained without litigation, the party seeking to set aside the sale must establish the fraud, actual or constructive, which entitles him to relief. It is not sufficient for him to show that he did not receive the full value of the estate to which the result of the litigation might ultimately show him to be entitled. The difference between that value and the purchase-money, if not **[310]** too disproportionate, may be legitimately taken to represent the difference between certainty and immediate enjoyment on the one hand, and risk, worry, expense and delay on the other.

The exceptional equitable principles which, in a sale by an expectant heir of a reversionary interest, throw upon the purchaser the onus of showing that he gave a fair price, and which, on failure of such proof, entitles the expectant heir to have the sale set aside, have no application in the above case, or in that of every ignorant and improvident person.

Where a person, by right of inheritance, sued for a declaration of his title to a share in a certain sum of money to which the defendants laid claim, and the defendants met that allegation by setting up a sale, which the plaintiff admitted.

Held that the plaintiff was bound to mention in his plaint the fact that he had parted with his title, and to allege the particular circumstances—misrepresentation, undervalue, or fraud—on which he relies to have the sale set aside: also that the cause of action arose at some time within the period of limitation applicable to the case. If sufficient cause exists, the Court may require the plaintiff to amend the plaint.

[R., 6 B. 467 (469).]

THIS was an appeal from the decision of Rao Bahadur Mangeshvar Balvant, Subordinate Judge, First Class, Surat.

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* Regular Appeal, No. 34 of 1880.

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6 B. 309.

The appellant Mr. Azimudin Khan and his sister Fatma Begam brought this suit in 1872 to obtain a declaration of the title of the plaintiffs to a share of annas two and pies three in the rupee *plus* anna one and pies six in the event of the marriage of the female plaintiff, in all annas six, in a sum of money in the hands of the Agent to the Governor of Bombay at Surat. The plaintiffs stated that they were entitled to the three-fourths share of their deceased brother Jenudin, one-fourth going to his widow.

The female plaintiff having died in the course of the suit, Mir Azimudin subsequently claimed seven annas and eight and quarter pies share in the rupee in Government promissory notes and cash of the value of Rs. 1,75,415-8-11 held in deposit by the Agent as a share, three annas in the rupee, adjudged to the plaintiff's father in the estate of the late Nawab of Surat by an award of Mr. W. E. Frere, the then Agent, dated 21st December, 1852, and finally upheld by Her Majesty in Council in 1869. The plaintiff rested his claim on an alleged will, dated 11th April, 1863, of his father, and also upon the law of inheritance.

The defendants contended, amongst other things, that the plaintiff's share had been sold to them on the 30th of April, 1855. The plaintiff admitted the sale, but averred that it was effected **[311]** under pressure for an inadequate consideration, and should be set aside.

The Subordinate Judge upheld the sale, and rejected the plaintiff's claim. The plaintiff Mir Azimudin Khan appealed to the High Court.

The Hon. *F. L. Latham* (Acting Advocate General), *Framji R. Vikaji* and *Pandurang Balibhadra* appeared for the appellant.

Jardine and *Shantaram Narayan* appeared for the respondents.

JUDGMENT.

MELVILL, J.—The previous history of this case is so clearly and succinctly stated by the Subordinate Judge in his judgment, that we cannot do better than borrow his description.

"1. Nawab Mir Afzuludin Khan died in A.D 1842, leaving a daughter Bakti-ul-Nisa Begam, who was married to Mir Jaffar Ali and the present defendants are his daughters.

"2. The late Nawab left also two widows and two cousins, all of whom are dead. One of these two cousins was Mir Kamrudin Khan, plaintiff's father.

"3. On the Nawab's death, a dispute arose as to his inheritance among the sharers, and legislation was resorted to in 1848 (Act XVIII of 1848).

"4. Mir Jaffar Ali, on behalf of his two daughters (then minors), claimed the whole estate. The then Agent, Mr. W. E. Frere, adjudicated on the claim, and awarded it in the following proportions, *viz.*, to Mir Kamrudin Khan annas 3; to the defendants in right of their mother, who had died in the meantime, annas 8; to Mir Mohinudin Khan, the other cousin, annas 3; and to each of the two widows an anna; making in all sixteen annas.

"5. This award was made on the 21st December, 1852.

"6. Against this award all the parties appealed to Government, who confirmed the Agent's adjudication on or about the 23rd July, 1853. During the pendency of appeal, Mir Kamrudin Khan made his will (Ex. No. 34), dated 11th April, 1853, and died soon after, *viz.*, on the 5th May, 1853.

"7. In appeal, Government confirmed the decision, and Mir Jaffar Ali, as guardian of the defendants, feeling dissatisfied with the decision,

appealed to the Privy Council; but the appeal was **[312]** rejected (30th June, 1854) as not cognizable by that tribunal, who made a suggestion that, if the case in question were referred to them by Her Majesty for their opinion, they would submit their opinion.

"8. On the 30th April, 1855, one Mahomed Ali, brother-in-law of Mir Jaffar Ali Khan, obtained three documents, *viz.*, a deed of sale (Ex. No. 57) executed by Mir Kamrudin's heirs; second, a petition to the Agent to His Excellency the Governor (Ex. No. 89) informing him of the sale which they had effected, and stating that they had transferred all their rights and title in the three annas' share to the vendee, so that he might not be obstructed in recovering it. They also requested by the said petition that a copy of the sale-deed should be made, and kept in the records of the Agency, and the original returned; third, a *mukhtyarnama* (Ex. No. 90) appointing one of the plaintiffs, Mir Azimudin Khan, for presenting the sale-deed to the Agent.

"9. To the sale-deed and to the petition to the Agent the signature of the plaintiff Azimudin Khan has been made by Mir Jenudin, his brother, and the signature of Fatma Begam has also been made by Mir Jenudin, as her Agent.

"10. On the presentation of the documents, the Agent, on the 3rd May, 1855, endorsed an answer on Ex. No. 89, to the effect that a copy of the deed would be taken and returned, but that, by doing so, Government is not to be supposed to be bound by the arrangements effected.

"11. On the 3rd May, 1855 (Ex. No. 134) the Agent made a report to the Government on the subject of the sale.

"12. Government, in reply, dated 8th June, 1855 (Ex. No. 135) approved the agent's advice to the vendors, and, therefore, the Agent informed the vendors Jenudin, &c. (16th July 1855, Ex. No. 89) that Government had no objection to the sale as already effected.

"13. In order to prove that a portion of the consideration money had been paid, receipts (Exs. Nos. 58 to 64) have been produced by the defendants to show that about Rs. 16,000 were paid.

[313] "14. Exhibits Nos. 65 and 102 are extracts of the day-book containing entries of the debit of Rs. 32,000, the amount for which the sale was effected. These are dated 30th April, 1855.

"15. In 1861, Mir Jaffar Ali, as guardian of his daughters (defendants), petitioned Her Majesty the Queen by way of appeal against the decision of the Agent and the Bombay Government, and the matter was referred to the Privy Council, and their Lordships, on the 17th March, 1869, gave their opinion, confirming the decision of the Bombay Government (Ex. No. 121).

"16. Mahomed Ali, the purchaser, made an affidavit, under date the 27th March, 1862, to the effect that he had made the purchase in trust for Mir Jaffar Ali with his money (Ex. No. 113).

"17. Mir Jaffar Ali died in 1863.

"18. After the receipt of the Privy Council's decision, Mr. Hope, the then Agent, invited all the heirs and claimants to the late Nawab's estate for distribution of the assets of the Nawab in the hands of the agent.

"19. The plaintiffs and the defendants both set up their claims.

"20. Plaintiffs asked their share as legatees under the will of their father Mir Kamrudin Khan, and the defendants set up their title as purchasers through Mahomed Ali.

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"21. The plaintiffs were, therefore, ordered by the Agent to file an action in the Civil Court to establish their title to three annas' share.

"22. Government accorded their final sanction to the institution of this suit under Act XVIII of 1848 under date 8th October, 1872 (Ex. No. 3)."

The plaint in the present suit makes no mention whatever of the sale whereby the plaintiffs and other heirs of Mir Kamrudin conveyed all their rights to Mahomed Ali on the 30th April, 1855. It simply states that a sum of Rs. 1,75,415-8-11 is available for distribution among Mir Kamrudin's heirs; that this sum is claimed by the defendants, but on what ground is not stated; and it, therefore, asks that a decree may be made declaring the plaintiffs, as two of Mir Kamrudin's heirs, entitled to a certain specified share of the sum mentioned.

[314] This plaint was, of course, immediately met by the answer that the plaintiffs had sold their interest in the property seventeen years before the institution of the suit, and that for this, and other reasons, they were not entitled to the declaration sued for.

This being the state of the pleadings, and the sale being admitted, it appears to us clear that we could not, without an amendment of the plaint, make a declaration of title in favour of the plaintiffs, or rather of the surviving plaintiff. The plaintiff Azimudin stands in this position. He asks that he may be declared entitled to certain property as one of the heirs of Mir Kamrudin; but he is obliged to admit that, seventeen years before the institution of the suit, he and the other heirs of Mir Kamrudin sold all their interest in the property to Mahomed Ali. As he brings this suit in his own name, and does not make Mahomed Ali a party, he must be taken to admit, and by his counsel he does in fact admit, that Mahomed Ali was merely an agent of Mir Jaffar Ali, the father of the defendants, and that the purchase was, in fact, made for the benefit of Mir Jaffar Ali. The defendants being Mir Jaffar Ali's heirs, it follows that they are entitled to the property claimed, and that the plaintiff cannot be entitled to the declaration asked for, so long as the conveyance of the 30th April, 1855, remains uncancelled.

The case made for the plaintiff is that he is entitled to be relieved against that conveyance; but this is a case which he has never made for himself in the manner which the law requires. Before he could ask for a declaration of his title, he was bound to mention in his plaint the fact that he had parted with that title, and to allege the particular circumstances—misrepresentation, undervalue, or fraud—on which he relies, as entitling him to have the conveyance set aside. He was also bound to state that the cause of action arose at some date within the period of limitation applicable to the case. As it is, we have nothing but the suggestions of counsel that the plaintiff may have been influenced by a statement in the conveyance which is said to amount to a misrepresentation, and that the plaintiff may not have known, until recently, that he had been imposed upon. These suggestions may or may not have much to support them; but they cannot supply the place of allegations which the law requires the party himself **[315]** to make upon oath. If, therefore, we thought that there was any prospect of a sufficient case being made out to entitle the plaintiff to relief, we should still require him to amend his plaint, and to state the circumstances on which he grounds his claim to relief, and to show that his right to relief is not barred by lapse of time. As it is, however, we have no doubt that the best case which could be made for him has been submitted

to the Court in argument; and it has not been suggested that any evidence is forthcoming which is not already on the record. That argument, and the evidence before us, have not led us to the conclusion that the plaintiff would be entitled to have the conveyance of the 30th April, 1855, set aside; and it is, therefore, unnecessary for us to direct him to amend his plaint by inserting therein a demand for the cancellation of that instrument.

The grounds, on which it has been contended that the conveyance is voidable, are that there was a distinct misrepresentation by the purchaser, and that advantage was taken of the distressed circumstances of the vendors to induce them to part with a valuable estate for a very inadequate consideration.

Now, on the 30th April, 1855, the date of the conveyance, the state of affairs was this: Mir Jaffar Ali had appealed to the Privy Council against the decision of the Bombay Government, confirming Mr. Frere's award, and the Privy Council had, on the 30th June, 1854, declined to entertain the appeal (1), on the ground that the provisions of Act XVIII of 1848 debarred them from exercising jurisdiction. At the date of the conveyance, therefore, the appeal to the Privy Council was no longer pending, and, consequently, it is contended that the following passage in the conveyance contains a false statement of fact: "The defendants" (Mir Jaffar Ali, on behalf of his daughters) "were dissatisfied with the decision" (of Mr. Frere), "and made an appeal in England, *and there the case has not as yet been decided.*" It is admitted that Mahomed Ali, the purchaser, was not actually apprized of the result of the appeal, but it is said that, as he was an agent of Mir Jaffar Ali in the transaction, and Mir Jaffar Ali was acquainted with the facts, the ignorance of the agent cannot enable Mir Jaffar Ali's heirs to take the benefit of the misrepresentation. **[316]** Assuming this to be so (and the authority of *Cornfoot* v. *Fowke* (2) to the contrary is not very strong: see Story on Agency, s. 139, note), we have to consider whether the words in question amounted to a misrepresentation, and, if so, whether the misrepresentation was such as to have been likely to influence the contract by causing Mir Kamrudin's heirs to give a consent which they would otherwise have withheld. Now, although the Judicial Committee declined jurisdiction, yet it appears to us that their decision could hardly have been regarded by any of the parties at the time as a final decision of the case. Their Lordships are reported to have said: "The petitioners, therefore, will take such course as they may be advised with reference to an application to the Crown, through the Board of Control or otherwise. By possibility, in consequence of such application, if made, the matter may come here again; and their Lordships will readily do their duty in hearing it. At present, they consider it not to be within their ordinary function to do so" (3). Here we have not so much a decision as a suggestion of a mode in which a decision might ultimately be obtained; and as Mir Jaffar Ali was a man who had both the means and the determination to try every mode of getting Mr. Frere's award set aside, and did, in fact, postpone the final decision of the Privy Council for fifteen years longer, it can hardly be said that there was any misrepresentation on the part of Mahomed Ali, when he said that "the case has not as yet been decided." But, assuming that the expression was not strictly accurate, we are still of opinion that, if the plaintiff had been acquainted with the

(1) 5 M.I.A. 499. (2) 6 M. & W. 358. (3) 5 M.I.A. 499 (510.)

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exact terms of the Privy Council judgment, he would not have been any the less eager to enter into the transaction. Two considerations must have been present to his mind, and have acted as an inducement to him and the other heirs to accept the offer.

Rs. 32,000, paid down, in lieu of all claims to a share in the Nawab's estate. The first was that Mir Jaffar Ali might ultimately obtain a judgment in his favour; and there was nothing in the Privy Council judgment, if the plaintiff had known its terms, to allay this fear. The second was that the heirs of Mir Kamrudin were likely, even if they were ultimately successful, to [317] be kept for a long time out of the fruits of the litigation; and the Privy Council judgment certainly held out no prospect that this period was likely to be abbreviated. Jaffar Ali was a most determined litigant. The proceedings of the Legislative Council of India, of the 31st July, 1858, show that, when the Privy Council refused to entertain his appeal, he was in no way discouraged. He applied to the Court of Directors to order the retention of the Nawab's estate by the Government of Bombay, until he could come to some settlement with the other claimants. When the Court of Directors refused his request, he went to the Board of Control, and obtained the order he wished for, much to the indignation of the Court of Directors. He then applied to the Indian legislature to amend Act XVIII of 1848, so as to enable the Privy Council to entertain his appeal. Failing in this, we are informed that he got a Bill carried through the House of Commons, but it was thrown out in the House of Lords. Finally, he adopted the suggestion of the Privy Council, and in 1861 obtained from Her Majesty a reference of his petition to the Judicial Committee. It was not until the 22nd February, 1869, that the Judicial Committee finally reported to Her Majesty that they found no reason that the award and adjudication of Mr. Frere, and the decision of the Right Honourable the Governor of Bombay in Council of the 27th July, 1853. thereupon, should be disturbed. Jaffar Ali died in 1863. It was not till 1871 that Mr. Hope, the Agent of the Governor at Surat, was able to proceed to the distribution of the estate. With such a prospect of vexation, and delay, and possible failure, before them, it seems impossible to hold that Kamrudin's heirs were misled in 1855 by the misrepresentation, if such there were, or that they were thereby induced to enter into a transaction, which they would have repudiated, if they had been more accurately informed.

Next as to the allegation of inadequacy of consideration. This, if made out, would, according to the ordinary rule, be no ground for relief, unless the bargain were so unconscionable as to point clearly to the conclusion of fraud. The sum actually paid (for we consider it proved that the full amount named in the conveyance was paid), was Rs. 32,000. Now, we have really no sufficient materials to enable us to say what was the actual value of [318] the share of Mir Kamrudin's heirs in 1855. It is alleged in the plaint, and the allegation has not been controverted, that the value of the share in 1871 was Rs. 1,75,415. But in the interval of sixteen years the landed portion of the estate must undoubtedly have increased greatly in value, in consequence of the extension of railways to Gujarat, and the funded property had been increasing at compound interest in the hands of the Government. The learned Advocate-General, in opening the case, estimated that if a distribution of the Nawab's estate had taken place in 1855, Mir Kamrudin's heirs would have been entitled to about Rs. 96,000, out of which, however, he admitted that they would have been bound, under the

terms of Mir Kamrudin's will, to set aside one anna in the rupee, or Rs. 6, 000, for a purpose therein specified; so that the amount actually at their disposal would have been Rs. 90,000. According to this estimate, (for which it cannot be said that there are any sufficient data), Mir Kamrudin's heirs received little more than one-third of the amount which would have come to their hands if the distribution of the Nawab's estate had taken place immediately. In his reply, the Advocate-General submitted to the Court another estimate, to the effect that Rs. 32,000 (of the Broach currency), improved from 1855 to 1871 at 9 per cent. compound interest (not an unusual rate in this country, and less than Mir Kamrudin's heirs were paying to their creditors) would have amounted in 1871 to Rs. 1,24,000; so that, upon this calculation, the claim of Mir Kamrudin's heirs was discounted for rather more than two-thirds of its actual value, as determined by the event. But, whichever of these two widely divergent estimates be adopted, it seems impossible to say that the bargain is proved to have been an unconscionable one. The interest sold was the subject of very expensive and prolonged litigation. It might turn out to be worth nothing at all; and, at all events, would yield no fruit so long as Mir Jaffar Ali was able to persuade or compel the Bombay Government to withhold distribution. The vendors relieved themselves of the worry and expense of struggling against Mir Jaffar Ali's persistent attacks. They obtained a sum of money sufficient to enable them to pay off all their creditors, who were putting great pressure upon them, and whose claims were accumulating at a high rate of interest. **[319]** They were able to keep half the purchase-money for their own wants, and without it it does not appear that they would have had any adequate means of subsistence. Considering all these circumstances, we cannot hold that the transaction was an unfair, or even an improvident one. The best proof that it was not so, is afforded by the opinion expressed at the time by a person who was in the best possible position to form an opinion on the subject. Mr. Hebbert, the Agent of the Governor at Surat, was in charge of the whole of the Nawab's estate in 1855, and, therefore, knew better than any one else what was the value of the share of Mir Kamrudin's heirs. He was a careful and able judge, and competent to form an opinion of the probable results of Mir Jaffar Ali's efforts to upset Mr. Frere's award. It was his duty to advise the Government in the matter of the administration of the Nawab's estate, and to protect the interest of Mir Kamrudin's heirs as much as those of the other claimants. On the 3rd May, 1855, we find Mr. Hebbert writing to the Government the following letter:—

"I have the honour to report, for the information of the Right Honourable the Governor in Council, that Mir Kamrudin's heirs have this day jointly presented a paper to me, apprizing me of their having sold their right to $\frac{3}{16}$ths of the property of the late Nawab of Surat to Mir Mahomed Ali valad Mir Ahmed Ali, a brother-in-law of Mir Jaffar Ali for Rupees 32,000. I have, at their request, placed an authenticated copy of the bond on the records of the Agency, but have told them I cannot assent to their transaction in any way without the sanction of Government. I have little doubt the real purchaser is Mir Jaffar Ali, though, as he is absent in England prosecuting his claim to the whole of the late Nawab's estate, as his sole heir, he seeks to conceal the fact by purchasing in another's name. All things considered, I think Mir Kamrudin's heirs have made no bad bargain, and I know of no reason why Government should object to the transaction." After adjusting Mir Kamrudin's

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debts, I understand about Rs. 15,000 will remain available to his family. I have strongly advised them to invest this, and live on the interest thereof, with what other property they have; but I have no idea they will follow my advice. They are an [320] uneducated, thoughtless set, and will, I fear, shortly be worse off than ever." To this letter the Secretary to Government, on the 18th June, 1855, sent the following reply:—"I am directed by the Right Honourable the Governor in Council to acknowledge the receipt of your letter No. 16, dated the 3rd ultimo, and to infrom you that Government entertains no objection to the sale, by Mir Kamrudin's heirs, of their share of the property of the late Nawab of Surat, and it approves of the advice given by you to the vendors."

It would certainly be a strange proceeding on our part if, after the lapse of so many years, and with the very scanty materials on which we are asked to form a judgment, we were to declare that the view taken by Mr. Hebbert and the Bombay Government at the time of the transaction was altogether erroneous, and that instead of the sale by Mir Kamrudin's heirs being, as Mr. Hebbert described it, "no bad bargain," there was in it (to use Lord Thurlow's words in *Groynne* v. *Heaton* (1)) "an inequality so strong gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it."

We may add that there is no evidence whatever of any haste or precipitancy in the transaction which we are considering, nor of any concealment, nor of any inability on the part of Mir Kamrudin's heirs to acquaint themselves with the real value of the property. The estate was in Mr. Hebbert's hands: he was a trustee for all the claimants: and it is not to be supposed that he would have withheld any information which it was important to any of them to obtain. The conveyance was prepared in the house of the Kazi. It is in evidence (and the evidence has not been contradicted, though the statement was made before Mr. Hope in 1870, and Mr. Hebbert is still alive to contradict it) that Mr. Hebbert was consulted as to the sale before it took place, and expressed his approval of the transaction. He was the trustee of the vendors, and the fact that everything was done with his consent is the strongest proof of the *bona fides* of the proceeding. The plaintiff, though young, was not a minor at the time; and though his sister Fatma was a Mahomedan lady, she [321] does not seem to have lived in very strict seclusion; and the evidence shows that she was an active woman, who took an important part in the management of the family affairs, and that in this particular instance she was informed of, and understood, the nature of the transaction into which she was entering. Finally, both the plaintiff and Fatma had the assistance of their elder brother Jenudin, and they had an independent legal adviser in their family-lawyer Dhirajram (witness No. 118). It has, indeed, been suggested by counsel that, as Dhirajram was a creditor of Mir Kamrudin's heirs, and received payment of his debt out of the purchase-money, he was not an honest adviser. But the witness (who was called by the plaintiff) has himself stated that he discouraged the sale; and the plaintiff has not contradicted him upon this point, nor made any attempt to discredit his honesty.

On the whole, we may say that we are thoroughly statisfied, from all the circumstances of the transaction and from Mr. Hebbert's opinion, that

(1) 1 Bro. C.C. 18.

the sale by Mir Kamrudin's heirs was not an unconscionable bargain; and we are not satisfied, from the evidence adduced, that the bargain was even an ill-advised or improvident one, or that the price paid was less than the market value of the property at the time.

In what we have hitherto said, we have dealt with the case as falling under the general rule that a sale is not to be set aside for mere inadequacy of price, unless the party seeking relief show that the price was so inadequate as to indicate fraud. But we must not omit to notice the argument which was much pressed upon us, that the Court ought to deal with this case, not under the general rule, but on the peculiar principles upon which Courts of Equity deal with sales by expectant heirs of reversionary interests, and that it ought to set aside the sale, even without proof of fraud, if the purchaser fail to prove that he gave a fair value for the property. Even if the onus of proof were thus shifted upon the defendants, we are not prepared to say that we should not hold that they had sufficiently discharged themselves of it. But, in fact, this is not a case of the sale of a reversionary interest, but of an interest in possession, although the subject of litigation. The leading case on the subject is *Chesterfield* v. **[322]** *Janssen*, and the other cases bearing upon the subject are collected in White and Tudor's note to that case. We do not find that any of those cases relate to the sale of an expectancy not contingent upon the death of some person other than the parties to the contract. Mr. Story (Equity Jur., s. 333) grounds the relief in this class of cases upon the circumstance that the contract or other Act is substantially a fraud upon the rights of third persons; and in *Chesterfield* v. *Janssen*, Lord Hardwicke makes observations to the same effect. "In most of these cases," he says, "have concurred deceit and illusion on other persons, not privy to the fraudulent agreement. The father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark. The heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation. This misleads the ancestor, who has been seduced to leave his estate, not to his heir or his family, but to a set of artful persons who have divided the spoil beforehand." Even if the principle could be applied to a case like the present, the evidence would fail to make out the principle ground of relief in such cases; for there was here no concealment from the person holding the estate, and interested in preserving it, but, on the contrary, as we have said, a reference to Mr. Hebbert for advice, and an approval of the sale by him and by the Government. The only case to which we have been referred, and the only one which we have been able to find, in which the sale of an expectancy other than a reversionary interest has been dealt with on the same principles, is that of *How* v. *Weldon* (1) in which (contrary to the *dictum* of Lord Hardwicke in *Chesterfield* v. *Janssen*, "that the contracts of sailors, selling their shares before they knew what they were, could not be set aside here"), a sale of prize money by a seaman for a quarter of its value, and under circumstances of actual fraud, was set aside by the Master of the Rolls, Sir Thomas Clarke, who observed: "It is reasonable to consider the vendor at least in as favourable a light as a young heir. I am warranted in saying that by what has been often said in cases of this kind, and what has been done by the Legislature itself, which has considered

(1) 2 Ves. Sen. 516.

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them as a race of men loose and unthinking [323] who will almost for nothing part with what they have acquired perhaps with their blood; therefore are they restrained by two Acts of Parliament." In this, and in other cases, seamen have, no doubt, been treated as a peculiar class, who, on grounds of public policy, and because of the special necessity of protecting them, are to be treated with the same indulgence as expectant heirs. But transactions by seamen are an exception to all ordinary rules (see Story's Equity Jur. s. 322; Fonblanque on Equity, Book I, Chap. II, s. 12, note); and we can find no authority for extending the exception to all ignorant and improvident persons, and for requiring persons who deal with them to make good the bargain, according to the rule stated by Lord Cottenham in *Earl of Oldborough* v. *Frye* (1), that "where a party deals with an expectant heir, the onus is upon him to show that he gave a fair price." In the case before us we have nothing more than the sale by a person, young indeed and in distressed circumstances, but not without advice or means of information, of an estate actually vested in him, but not to be obtained without litigation. In such a case we think that the party seeking to set aside the sale must establish the fraud, actual or constructive, which entitles him to relief. It is not sufficient for him to show that he did not receive the full value of the estate to which the result of the litigation might ultimately show him to be entitled. The difference between that value and the purchase-money may, if not too disproportionate, be legitimately taken to represent the difference between certainty and immediate enjoyment on the one hand, and risk, worry, expense, and delay on the other.

It only remains to notice an argument to which the learned Advocate General declined to commit himself, but which was put forward by Mr. Framji Vikaji, namely, that the sale was void *ab initio*, as being contrary to the rules of Mahomedan law. This argument, if we understood it aright, proceeded upon the ground that the contract was for future delivery at an indefinite time. We have looked at the authorities to which Mr. Framji referred us; but we do not find that they are of such a character as would oblige us to hold that such a sale as we are considering is forbidden by the Hedaya.

[324] For these reasons we confirm the decree of the Subordinate Judge with costs. This decree, however, is without prejudice to any right which Mir Kamrudin's heirs may have, jointly, to receive from the Government one-sixteenth of the property held by the Government as Mir Kamrudin's share; which sixteenth is stated by the plaintiff's counsel to have been devised by Mir Kamrudin in trust for a specific purpose, and to have been, consequently, not liable to alienation by Mir Kamrudin's heirs.

We are constrained to notice with disapprobation the very prolonged period over which the trial of this and the companion cases extended in the lower Courts. There was nothing in the circumstances of these cases which rendered such delay necessary. The suits might have been decided in a very much shorter time, if the different Subordinate Judges, before whom they came, had been less ready to grant adjournments, many of which appear to have been asked for by the pleaders of the parties without any sufficient reason.

(1) 7 Cl. & F. 436 (456).

6 B. 324.

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Before Mr. Justice Melvill.

BALKRISHNA DHONDO AND OTHERS (*Appellants*) *v.* NAGVEKAR AND ANOTHER (*Respondents*).* [13th February, 1882.]

Mortgage—Suit against a mortgagee for the recovery of a portion of property mortgaged—Court Fees Act VII of 1870, *s.* 7, *cl. ix, item* 1, *sch. I.*

In cases in which it is competent to the mortgagor to sue to recover a portion of the mortgaged property, the debt must be regarded as distributed over the whole property; and, as regards the portion of the property sued for, "the principal money expressed to be secured" must be taken to be the proportionate amount of the debt for which such portion of the property is liable.

[Diss., 23 T.L.R. 123; **Appr.**, 8 A. 438=6 A.W.N. 146.]

THIS was a reference, under s. 5 of the Court Fees Act, VII of 1870, by the Taxing Officer, High Court, Appellate Side, for the decision of the Chief Justice, who referred the matter to Mr. Justice Melvill.

The circumstances of the reference were thus stated:—

"By a deed of December 7th, 1823, certain property was mortgaged for Rs. 1,201 to three mortgagees who were given possession. **[325]** Subsequently, a second deed of mortgage for Rs. 304 was executed in favour of the same mortgagees, thus making the whole debt secured up to Rs. 1,505. As the mortgagor could not pay this money, he sold two-thirds to two of the mortgagees. For some time all three mortgagees continued in joint possession, but after a time they effected a partition among themselves, each taking his one-third share.

"The plaintiff is the vendee of the mortgagor's widow, and seeks to redeem the one-third share which the mortgagor had not sold. He valued his claim at one-third of Rs. 1,505 (native currency) with the addition of a small item representing the cost of a notice, and has stamped his appeal, as in a redemption suit, for Rs. 438-15-4. The shirastedar claimed stamp duty on Rs. 1,505 or its equivalent in Government rupees."

The question referred by the Taxing Officer for decision was—

When by mutual arrangement the mortgage-debt has been broken up and treated as three separate debts severally secured on three distinct plots of ground, and when the suit is merely to redeem one plot of ground by payment of the portion of the original debt which the parties have treated as being secured thereon, must the Court-fee be calculated according to the strict wording of cl. ix of s. 7 of Act VII of 1870 "according to the principal money expressed to be secured by the instrument of mortgage," (*i.e.*, in this case on Rs. 1,505); or may a more liberal view be taken, and the stamp duty be levied only on so much of the principal of the debt as remains to form the subject-matter in dispute?—(*vide* the phraseology of item 1 of sch. I of the Court Fees Act).

No one appeared to support or oppose the reference.

JUDGMENT.

MELVILL, J.—The stamp appears to me to be sufficient. In cases in which it is competent to the mortgagor to sue to recover a portion of

* Reference by Taxing Officer, High Court.

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the mortgaged property, I think that this debt must be regarded as distributed over the whole property, and, as regards the portion of the property sued for, "the principal money expressed to be secured" must be taken to be the proportionate amount of the debt for which such portion of the property is liable.

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[326] ORIGINAL CIVIL.

Before Mr. Justice Bayley.

In re THE INDIAN COMPANIES ACT X OF 1866.
PURMANUNDASS JIVANDASS (*Claimant*) *v.* H. R. CORMACK AND OTHERS (*Official Liquidators*).

[19th, 21st, 22nd, 25th and 28th July and 13th September, 1881.]

Company—Winding up—Liability of company for loan to secretary, treasurer, and agent—Principal and agent—Undisclosed principal—Election—Indian Contract Act (IX of 1872), ss. 230, 233, 234.

By the Memorandum and Articles of Association of the New Fleming Spinning and Weaving Company, N.K. was appointed secretary, treasurer, and agent of the company with power to raise or borrow from time to time, in the name or otherwise on behalf of the company, such sums of money as he might think expedient by bonds, debentures, or promissory notes, or in such other manner as he might deem best; and for the purpose of securing the repayment of any money so borrowed to make any arrangement which he might deem expedient by conveying or assigning away property of the company to trustees or otherwise. N.K was also secretary, treasurer, and agent of three other mill companies in Bombay.

On the 31st October, 1878, the directors passed the following resolution:—

"That the unallotted shares be filled up in the name of Nursey Kessowji, Esq., secretary, treasurer, and agent who is empowered to mortgage them at a fair rate of interest to enable him to obtain funds for the use of the company."

On the 11th November, 1878, P. advanced a sum of Rs 1,00,500 upon the terms contained in a Gujarati writing of that date, and signed by N.K. In this document N.K. acknowledged the receipt of the money for which 335 shares in the New Fleming Spinning and Weaving Company were duly handed over as security, and he agreed to repay it within three months. The last clause in the agreement stated that it was "duly agreed to and approved by him (N.K) and his heirs and representatives." As an additional security, P., when advancing the loan, obtained from K.N. (father of N.K.) a guarantee in the following terms:—

"To Thuker Purmanundass Jivandass.

"Written by Sha Kessowji Naik.

"To wit:—This day Sha Nursey Kessowji has received from you Rs. 1,00,500 namely one lakh and five hundred, having deposited, by way of security, 335, namely, three hundred and thirty-five 'shares' of 'The New Fleming Spinning and Weaving Company, Limited.' If your said money cannot be paid with interest by the expiration of the time, and you should sustain any kind of loss in (respect of) that, I am duly to pay the same. As to that I am not to raise any obstacle or objection. In case it should be necessary, I am to fill up and duly deliver to you an 'indemnity bond' on stamped paper through your vakil (solicitor). This writing is duly agreed to and approved by me and my heirs and representatives. Bombay, the 11th of November in the English year, 1878."

On the evening of the day on which the loan was made, *viz.*, 11th November, 1878, but without the knowledge of K. N., it was agreed between N. K. and P. that the time for the repayment of the loan should be extented to six months. In [327] December, 1878, N. K. became insolvent, and on 28th December, 1878, a petition was presented to the High Court to wind up the New Fleming Spinning and Weaving Company. On the 30th December P, through his solicitors wrote a letter to the company, stating that N. K. had obtained a loan from him

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of Rs. 1,00,500 on behalf of the Company and inquiring whether the fact appeared in the company's books. To this letter he received a reply signed by "K. N. Director," stating that the loan appeared in the books in P.'s name. On the 17th January 1879, an order was made for the winding up of the New Fleming Spinning and Weaving Company, and on the 4th February, 1879, P. gave notice to the official liquidators of the company of his claim against the company for the money advanced by him on the 11th November, 1878. In March, 1879, he filed a suit against K. N. to enforce his guarantee, but was unsuccessful, the Court holding that, by extending the period of the loan to six months, the agreement of the 11th November, 1878, had been materially varied without K.N.'s knowledge and that K. N. was consequently discharged. On the 24th April, 1879, P filed his affidavit in support of his claim against the company. The company resisted the claim.

Held (1) that the Directors had power under the Memorandum and Articles of Association, to authorize N. K. to borrow money on behalf of the company, and that they had done so, and with that object had entrusted him with the unallotted shares.

(2) That when P. advanced the loan to N. K. he was led to believe that N.K. was obtaining it on behalf of the four mill companies of which he was secretary, treasurer and agent but that P was not aware and was not informed for which of the said companies the loan was obtained, and that the money was, in fact, advanced to N. as to an agent acting on behalf of an undisclosed principal.

(3) That P. when he discovered that the money was obtained for the New Fleming Spinning and Weaving Company, was entitled to claim against the company and to rank as a creditor of the company for the amount advanced to N.K. with interest from the date of the loan, *viz.*, 11th November, 1878, to the date of the presentation of the petition to wind up the company.

[R., 9 B. 373 (400); 20 M.L.J. 969.]

THIS was a claim by Purmanundass Jivandass in the winding up of the New Fleming Spinning and Weaving Company to rank as a creditor for the sum of Rs. 1,00,500, which sum he alleged he had lent to Nursey Kessowji, the secretary, treasurer, and agent of the company, for the use of the said company on the 11th November, 1878. Nursey Kessowji was also secretary, treasurer, and agent of three other mill companies in Bombay.

The New Fleming Spinning and Weaving Company, Limited, carried on business in Bombay, and, by the Memorandum and Articles of Association, Nursey Kessowji, who carried on an extensive business as merchant in Bombay under the firm of Nursey Kessowji and Company, was appointed the secretary, [328] treasurer, and agent for a term of twenty-five years, "with full power and authority to enter into such contracts and agreements as he may think proper for the company." The Articles of Association also provided (*inter alia*) that the 'following powers and authorities are expressly given to and conferred upon the Board and the secretary, treasurer, and agent and his nominee :—

"To *raise or borrow* from time to time in the name *or otherwise on behalf of the company* such sums of money as they from time to time think expedient either by way of sale or mortgage of the whole or any part of the property of the company or by bonds, debentures, or promissory notes, *or in such other manner as they deem best*, and for the purpose of securing the repayment of any money so borrowed with interest to make and carry into effect any arrangement which they may deem expedient by conveying or assigning *any property of the company* to trustees or *otherwise*."

From the evidence given at the hearing of the claim it appeared that on the 6th August, 1878, the directors of the company passed the following resolution :—

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"*Resolved*—That Messrs. Nursey Kessowji and Company be the bankers of the company, and that interest payable by them on cash balance due by them to the company be annas 8 per cent. per mensem, and interest payable to them on cash balance by the company be annas 12 per cent. per mensem."

At another meeting of the directors, held on the 31st October, 1878, the following resolution was adopted :—

"*Resolved*—That the unallotted shares be filled up into the name of Nursey Kessowji, Esquire, the secretary, treasurer, and agent, who is empowered to mortgage them at a fair rate of interest to enable him to obtain funds for the use of the company.

"The number of certificates of shares with the names of mortgagees be recorded at the first meeting of the Board held after such transaction is done."

It was further proved that persons acting on behalf of Nursey Kessowji had been, for some days prior to the 11th November, 1878, endeavouring to obtain the loan of the money in question [329] from the claimant. During the negotiations it was represented to the claimant that the money was wanted for the company, which was then in difficulties ; that, finally, the claimant agreed to advance the sum required on the security of 335 shares in the company, the market value of which was then Rs. 400 each. The terms upon which the loan was advanced, were contained in the following Gujarati agreement executed by Nursey Kessowji to the claimant :—

"To Shet Purmanundass Jivandass.

"Written by Sha Nursey Kessowji—I give in writing to you as follows :—I have this day received from you Rs. 1,00,500, namely, one lakh five hunderd in cash on the following conditions :

"First as follows :—Interest for the said Rs. 1,00,500 is fixed at Rs. $\frac{3}{4}$ namely, rams (*i.e.*, annas) twelve per cent. per mensem.

"Second as follows :—The time (for the repayment) of the said money is fixed at months 3, namely, three ; should I pay within that time the money received from you nevertheless calculating the interest for the above-mentioned fixed period (1) I am duly to pay you (the same).

"Third as follows :—As security for the repayment of the said Rs. 1,00,500, shares 335, namely, three hundred and thirty-five, of the New Fleming Spinning and Weaving Company, Limited, have been deposited at your office, and the (money) has been received. As to the same when I shall pay your said money with the interest, you are duly to transfer the said shares to me. And whatever expenses (namely for) the transfer-fee, &c., there may be incurred, I am duly to pay.

"Fourth as follows :—The time (for the repayment) of the said money is fixed at months 3, namely, three, on the expiration of the said period whenever you may demand payment of the said money, I am duly to pay (the same) with interest; should I fail to pay the same you are to sell the said shares at the market rate by private contract or by public auction, according as you may find it convenient without (your) sending me a notice, and recover your money with interest. And should you demand margin money on the price of the said shares decreasing, I am [330] duly to pay (the same) ; should I fail to pay (the same), you are at liberty to dispose of the said shares at the market rates either by

(1) Meaning that interest for the whole period is to be paid.

private contract or by public auction according as you may find it convenient without (your) sending me a notice. On this score I am not to raise any objection. And on the sale of the said shares as to whatever expenses (namely) for stamps, &c., there may be incurred, and on recovering your money with the interest and expenses as to whatever the deficit or the surplus may be, I am duly to give and take credit for the same.

"Fifth as follows:—The market value of the said shares is at present Rs. 400, namely, four hundred; should (the same) become less than that (by) Rs. 25, namely, twenty-five, and should I without notice not pay margin money, then you may sell the above-mentioned shares at the market rate or you may wait. As to that I am not to raise any objection.

"Sixth as follows:—The risk and liability with respect to the said shares rest on my head.

"Seventh as follows:—The numbers of the said shares are from 3221 to 3555.

"Eighth as follows:—The said shares 335 in my name are given to you 'blank'. The risk and liability with respect to the same rest on my head.

"Ninth as follows:—Interest on the said money shall duly accrue from the 11th November in the year 1878.

"According to these particulars, agreeably to the above writing, I have received the money in cash in full from you, and have made and given this writing. It is duly agreed to and approved by me and my heirs and representatives—Bombay the date 11th November, 1878."

As a further security for the loan, the claimant obtained a guarantee from Kessowji Naik, the father of Nursey Jessowji, in the following terms:—

"To Thuker Purmanundas Jivandass.

"Written by Sha Kessowji Naik.

"To wit:—This day Sha Nursey Kessowji has received from you Rs. 1,00,500, namely, one lakh and five-hundred, having deposited **[331]** by way of security, 335, namely three hundred and thirty five 'shares' of 'The New Fleming Spinning and Weaving Company, Limited.' If your said money cannot be paid with interest by the expiration of the time, and you should sustain any kind of loss in (respect of) that, I am duly to pay the same. As to that I am not to raise any obstacle or objection. In case it should be necessary, I am to fill up and duly deliver to you an 'indemnity bond' on stamped paper through your vakil (solicitor). This writing is duly agreed to and approved by me and my heirs and representatives. Bombay the 11th of November in the English year 1878.

Both the above documents were executed at Kessowji Naik's bungalow on the 11th November, 1878.

On the evening of the same day, and without the knowledge or sanction of Kessowji Naik, it was agreed between Nursey Kessowji and the claimant that the time for the repayment of the loan should be extended for a further period of three months. This agreement was in writing, and was as follows:—

"To Thuker Purmanundass Jivandass written by Sha Nursey Kessowji—to wit. On this day having borrowed from you Rs. 100,500, namely, one lakh and five hundred in cash, and having given, by way of security, 335, namely, three hundred and thirty five, shares of the

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New Fleming Spinning and Weaving Company, Limited, I have received (the said sum) the time thereof has been fixed for 3, namely, three months. But with your and my consent it is enlarged by further time of 3 (three) months. Sha Nursey Kessowji, I will (*a*) give credit for the interest thereof at the rate of 1, namely, (one) (*b*) per cent., Sha Nursey Kessowji. In all, the time in respect of the above-mentioned money is fixed for 6, namely, six months. Should I pay the money within the said time (still) I will without any objection truly give you credit for interest for 6, namely, six months. Bombay, dated the 11th November, 1878."

After this document had been executed, the money was paid to Nursey Kessowji by the claimant, and the share certificates handed over as security.

[332] In the month of December, 1878, Nursey Kessowji became insolvent, and on the 28th December, 1878, a petition was presented to the High Court to wind-up the New Fleming Spinning and Weaving Company. On the 30th December, 1878, Messrs. Macfarlane and Gilbert, the claimant's solicitors, wrote the following letter to the Secretaries of the Company :—

"30*th December*, 1878.

"The Secretaries of the New Fleming Spinning and
Weaving Company, Limited.

"Gentlemen,

"We are instructed by our client, Mr. Purmanundass Jivandass to ask if the sum of Rs. 1,00,500, borrowed by Messrs. Nursey Kessowji and Company from our client on or about the 11th day of November last, appears in the books of the New Fleming Spinning and Weaving Company, Limited, to the credit of our client.

"We understand that the above sum of Rs. 1,00,500, was borrowed by Messrs. Nursey Kessowji and Company on behalf of the above company.

"Please confirm this.

"An early answer will oblige.

Your obedient servants,
(Signed) MACFARLANE AND GILBERT."

To this letter they received the following reply :—

10*th January* 1879.

"Messrs. Macfarlane and Gilbert.

"Dear Sirs,

"We beg to acknowledge receipt of yourt letter dated 30th December last, addressed to the secretary of this company, inquiring whether the sum of Rs. 1,00,500 borrowed by Messrs. Nursey Kessowji and Company from your client, Mr. Purmanundass Jivandass, appeared in the books of this company; in reply we beg to confirm that the above said sum appears in the company's books in your client's name.

"The clerk who handed us the letter was shown the entry to this effect.

Yours faithfully,
(Signed) KESSOWJI NAIK,
Director."

[333] On the 10th January, 1879, Nursey Kessowji and Company filed their petition in the Insolvent Court, and on the 17th January, 1879,

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an order was made by the Court to wind-up the New Fleming Spinning and Weaving Company.

On the 4th February, 1879, the claimant's solicitors wrote the following letter to the official liquidators of the Company :—

"Dear Sirs,

"On behalf of Mr. Purmanundass Jivandass, of Hornby Row, Fort, Bombay, we beg to give you notice that he claims from the company a sum of Rs. 1,00.500 and interest thereon at 9 per cent. per annum from the 11th November, 1878, under an agreement dated that day, and signed by Nursey Kessowji, the secretary, treasurer, and agent of the company. Our client holds, as further security for this advance, 335 and 50 shares in the company, and he also holds the personal guarantee of Mr. Kessowji Naik for the same.

"Dated this 4th day of February, 1879.

Yours truly,
(Signed) CHALK AND WALKER."

On the 24th April, 1879, the claimant filed his affidavit in proof of his claim against the company.

He had already endeavoured to enforce the guarantee given by Kessowj Naik. In March, 1879, he filed a suit (No. 258 of 1879) against Kessowji for this purpose. Kessowji, however, had discovered the agreement of the 11th November, 1878, between the claimant and Nursey Kessowji, by which the time of the loan had been extended to six months. He accordingly filed a written statement contending that the claimant's suit was premature. The claimant on the 17th June, 1879, obtained leave to withdraw the suit, with liberty to bring a fresh one on or before the 24th June, 1879.

On the 18th June the claimant filed another suit (No. 385 of 1879) against Kessowji Naik to enforce his guarantee against him. In that suit, however, he failed. The learned Judge (Sargent, J.,) held that the agreement between the claimant and Nursey Kessowji guaranteed by Kessowji Naik had been varied subsequently **[334]** to the guarantee without his knowledge or consent, and that he (Kessowji Naik) was, therefore, discharged. The decree in that suit was confirmed in appeal.

In reply to the claimant's affidavit of proof against the company, the official liquidators contended that the loan was made to Nursey Kessowji, personally, and not to the company ; that the claimant had, at all events, elected to give credit to Nursey Kessowji and to Kessowji Naik as guarantor, and that he sought to charge the company only after he had failed to recover the said loan from Nursey Kessowji or from Kessowji Naik.

Lang and *Telang*, for the claimant.—Nursey Kessowji had ample authority to borrow on behalf of the company, and the claimant knew it. The loan was clearly for the company. Both Nursey Kessowji and the company are liable: Indian Companies Act, (X of 1866), s. 233. Even though the claimant gave credit to Nursey, he is not precluded from suing the company if it was the principal: Pollock on Contracts (3rd ed.) 109 ; Story on Agency, ss. 160 A, 288-289. The law in force here as to the liability of principal and agent is contained in ss. 230-234 of the Contract Act. Assuming that the company is the principal, the claimant has done nothing to disentitle him from suing: *Calder* v. *Dobell* (1) *Curtis* v. *Williamson* (2); Pollock on Contracts (3rd ed.) 114.

(1) L. R. 6 C. P. 486.

(2) L. R. 10 Q. B. 57,

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Marriott (Advocate General) and *Inverarity* for the company.—The loan by the claimant was to Nursey Kessowji personally, not to the company, and the company is not liable. The claimant gave credit to Nursey and to his father and not to the company. Further, we contend that the claimant made his election to charge the agent, and cannot now charge the company: *Paterson* v. *Gandesequi*; 2 Smith's Leading Cases (6th ed.) 313; Indian Contract Act (IX of 1872), s. 234; Story on Agency, s. 446; *Smethurst* v. *Mitchell* (1). The company had no power to mortgage unallotted shares, and, therefore, could not appoint Nursey Kessowji their agent to mortgage them. Counsel referred to Memorandum and Articles of Association; Brice on *Ultra Vires*, 157; **[335]** *Balfour* v. *Ernest* (2); *Turquand* v. *Royal British Bank* (3); *Rideley* v. *Plymouth Banking Company* (4); *Ashbury Railway Company* v. *Riche* (5); *Phœnix Life Assurance Company* (6).

Cur. adv. vult.

JUDGMENT.

September 13. BAYLEY, J.—This is a claim by Purmanundass Jivandass, who carries on business at Hornby Row, in the Fort, to rank as a creditor of the New Fleming Spinning and Weaving Company, Limited, in liquidation, in respect of a sum of Rs. 1,00,500 which on the 11th November, 1878, he lent to Nursey Kessowji, then the secretary, treasurer and agent, and also the banker of the said company, repayable in three months with interest at 9 per cent. per annum. To secure this loan, Nursey Kessowji executed a Gujarati agreement containing various provisions, and deposited with Purmanundass 335 shares in the New Fleming Company, the advance being made at the rate of Rs. 300 per share, such shares being then worth Rs. 400 each in the market. By a Gujarati contract of the same date, but on unstamped paper; Kessowji Naik, the father of Nursey Kessowji, guaranteed the repayment of the above loan, and on the 23rd of the same month executed a writing duly stamped, and which was in the same terms as the unstamped guarantee of the 11th November.

Subsequently to the execution of the above-mentioned documents by Nursey and Kessowji on the 11th November, but without the knowledge or sanction of Kessowji and at a later period of the same evening, Nursey and Purmanundass, by a document dated and signed on the 11th November, agreed that the time for repayment of the loan should be extended for a further period of three months; and, after such paper had been duly signed by Nursey, the money was paid, excepting Rs. 800, for which Purmanundass gave a promissory note payable on demand.

Nursey Kessowji became insolvent at the end of December, 1878, and on the 28th December, 1878, a petition was presented to the High Court to wind up the New Fleming Company. On the 30th December, 1878, Purmanundass' solicitors, Messrs. Macfarlane and Gilbert, wrote to the secretaries of the New **[336]** Fleming Company, and asked if the sum of Rs. 1,00,500 borrowed on the 11th November, appeared in the books of the New Fleming Company to the credit of their client, and stating that they understood that such sum was borrowed by Messrs. Nursey Kessowji and Company on behalf of the New Fleming Company. By a letter dated the 10th January, 1879, headed

(1) 1 E. & E. 622=28 L J R B 241. (2) 5 C. B. N. S. 600
(3) 6 El. & Bl. 327. (4) 2 Ex. 711. (5) L. R. 7 H. L. 653.
(6) 2 J. & H. 441.

the New Fleming Spinning and Weaving Company, Limited, and addressed to Messrs. Macfarlane and Gilbert, signed only by Kessowji Naik, director, though evidently intended to be signed by other directors as well, it was stated that they begged to acknowledge the receipt of the letter dated the 30th December, addressed to the Secretary of the Company, and in reply they begged to confirm that the above sum appeared in the Company's books in Purmanundass' name, and that the clerk who handed them the letter was shown the entry to that effect. On the 10th January, 1879, Nursey Kessowji and Company filed their petition in the Insolvent Court.

On the 11th January, 1879, Messrs. Macfarlane and Gilbert wrote to the New Fleming Company, stating that the shares held by Purmanundass were insufficient to cover the advance; that he had received 335 shares of the above company as a deposit in the first instance, and afterwards a further deposit of 50 shares more; and that they (Messrs. Macfarlane and Gilbert) were informed by their client that such shares were that morning quoted at Rs. 40 a share, and that they were instructed to ask the New Fleming Company to state if they would pay the amount due and take over the shares held by Purmanundass, and intimating that, should they not hear from the company satisfactorily in reply within twenty-four hours, Purmanundass would sell the shares without further reference, and would assert his claim as he might be advised.

On the 17th January, 1879, an order was made by Mr. Justice Green to wind up the New Fleming Company.

On the 4th February, 1879, by a letter of that date addressed by Purmanundass, through their solicitors (Messrs. Chalk and Walker) to Messrs. H. R. Cormack, Nowroji Furdunji and M. R. DeQuadros, the official liquidators of the New Fleming Company, **[337]** Messrs. Chalk and Walker, on behalf of Purmanundass, gave them notice that he claimed from the company a sum of Rs. 1,00,500 and interest thereon at 9 per cent. per annum from the 11th November, 1878, under an agreement of that day, and signed by Nursey Kessowji, the secretary, treasurer, and agent of the company; that their client held, as further security for this advance, 335 and 50 shares in the company, and also the personal guarantee of Mr. Kessowji Naik for the said sum.

In pursuance of a notice from the official liquidators, advertised in the newspapers calling upon persons claiming to be creditors of the company to send in their claims, Purmanundass made an affidavit in proof of his claim which was affirmed on the 23rd, and filed on the 24th April, 1880.

In Nursey Kessowji's schedule, filed in the Insolvent Court on the 6th February, 1879, the name of Purmanundass did not appear as a creditor, but he was entered as a debtor for Rs. 800 in respect of the promissory note above referred to.

The schedule showed that the debts of Nursey Kessowji and Company amounted to the enormous sum of Rs. 1,96,62,514-4, Purmanundass took proceedings in the High Court against Kessowji Naik on his guarantee, but without success.

On the 29th March, 1879, he filed his plaint in suit 258 of 1879, Kessowji Naik during his inspection of Purmanundass' books discovered the agreement extending the time of the loan to six months, and put in a supplemental written statement in which he contended that the suit was premature. Purmanundass on the 17th June, 1879, obtained leave to

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withdraw his suit on payment of costs, with liberty to bring a fresh one on or before the 24th June then instant.

On the 18th June, 1879, he accordingly filed another suit (No. 385 of 1879) against Kessowji, which was heard by Sir Charles Sargent on six days in June, 1880; and on the 8th July, 1880, he passed a decree in favour of the defendant, with costs, holding that the agreement for the advance of Rs.1,00,500 by way of loan made between Purmanundass and Nursey had been varied after the execution, by Kessowji Naik, of the guarantee, the subject of the suit, and that Kessowji was not aware of, and did not assent to, such variation.

[338] Purmanundass appealed against that decision; but the decree of Sir Charles Sargent was confirmed, and the appeal dismissed with costs.

The official liquidators by the affidavit of one of them, Mr. DeQuadros, sworn on the 10th and filed in this matter on the 11th January, 1881, denied that Purmanundass had any claim in respect of his loan of Rs. 1,00,500 against the New Fleming Company, and alleged (para. 2) that the contract for the loan was made with, and the loan was made to, Nursey Kessowji in his personal and individual capacity, and not as secretary, treasurer, and agent of, or for, or on behalf of the company; and (para. 8) even if the Court should be of opinion that the New Fleming Company must be considered to be the principal on whose behalf the loan was raised, the official liquidators submitted that on the evidence of Purmanundass given and recorded in his suit 385 of 1879 against Kessowji Naik, it was apparent that before the making of the said loan he knew or was informed that it was required for the said company, and that he nevertheless elected to give credit to and to treat Nursey as the principal, and as the only person, save Kessowji Naik as such guarantor as aforesaid, liable to him in respect of the said loan, and that he sought to charge the company only after he found it impossible to recover the said loan from Nursey and Kessowji. The official liquidators craved leave to refer to the proceedings of record in the said suit, and especially to the evidence therein of Purmanundass, of John Gordon, and Premchund Roychund.

It appears that Purmanundass made no claim against Nursey or his estate, and that Nursey did not in his schedule insert him as a creditor; also that Purmanundass made his claim against the New Fleming Company, which he formally did by his letter dated the 4th February, 1879, to the official liquidators, written within less than three weeks of the date of the order to wind up the company (dated 17th January, 1879,) and nearly two months before he took proceedings against Kessowji Naik on his guarantee, the plaint in his first suit against that person not being filed until the 29th March, 1879. At the hearing of the matter of this claim before me, which occupied seven days from the 19th July to the 4th August 1881, the learned Advocate General, who **[339]** appeared for the official liquidators, took many points in addition to those raised in the affidavit of Mr. DeQuadros, and the case was argued with great ability by him on behalf of the New Fleming Company and by Mr. Lang on behalf of Purmanundass. The evidence of Purmanundass and of Mr. John Gordon and of Premchund Roychund, who had negotiated the loan, was taken orally before me, and their evidence, given before Sir Charles Sargent, was also put in. The accounts of the respective books of Purmanundas, of Nursey Kessowji and Company, and of the New Fleming Company are annexed to the affidavit of Mr. DeQuadros, and were relied on very strongly by the Advocate-General. The Court, therefore, has all

the materials necessary to enable it to arrive at a correct opinion upon the matters at issue between the parties.

It was contended on behalf of the official liquidators that the loan was to Nursey: that Purmanundass gave credit to him and to Kessowji's guarantee, and never looked to the New Fleming Company: that Purmanundass elected to give credit to the agent and not to the New Fleming Company, knowing that the latter was the principal and that he was not entitled afterwards to turn round and charge the principal on the default of the agent that, rightly or wrongly, Nursey treated the 335 shares as his own, and that the proceeds of the loan went into the coffers of his firm. It was further contended that the New Fleming Company had no power at all to mortgage the unallotted shares of the company, of which 335 shares formed part, and that such unallotted shares were not the "property" of the company: that a resolution of the Board of Directors, dated 31st October, 1878, to the effect that the unallotted shares (of which there were 787) be filled up into the name of Nursey Kessowji, Esquire, the secretary, treasurer, and agent, who was empowered to mortgage them at a fair rate of interest to enable him to obtain funds for the purpose of the company, was absolutely *ultra vires*, and that the directors could not, so as to bind the company, raise money on the shares: that Purmanundass was bound to take notice of the Memorandum and Articles of Association, and to know that the directors had no power to pledge or borrow on that security: that the directors, who were trustees and agents **[340]** for the company, could not hold out Nursey Kessowji as authorized to raise money for, or pledge the credit of, the company, and that the claim should be dismissed with costs.

I will first consider the power which the directors had, and the authority which they conferred or professed to confer upon their agents; next the circumstance under which the loan was made by Purmanundass; and, lastly, whether or not he ought, in my opinion, to succeed in his present claim against the company.

The modern doctrine of *ultra vires*, in relation to contracts made by directors of companies incorporated under the English Companies Acts, is nowhere more clearly stated than in the judgment of Lord Chancellor Cairns in the House of Lords, in the important case (decided in 1875) of the *Ashbury Railway Carriage and Iron Company (Limited)* v. *Rich* (1). The contract there for breach of which Mr. Rich sued the company, and which in substance was an engagement to supply the contractors for the construction of a railway in Belgium with the funds necessary to enable them to execute their contract, had occasioned great difference of views in the Court of Exchequer, where two of the Judges were for the plaintiff and one for the defendants; and afterwards in the Exchequer Chambers in which Court the six Judges were equally divided in opinion. The five Law Lords in the House of Lords, however, were unanimously of opinion, that the contract, being of a nature not included in the Memorandum of Association, was *ultra vires* not only of the directors, but of the whole company, so that even the subsequent assent of the whole body of shareholders would have no power to ratify it. Lord Cairns after pointing out the marked difference between the two documents which, he said, from the title-deeds of companies of that description, *i.e.*, the Memorandum of Association on the one hand and the Articles of

(1) L.R. 7 H.L. 653.

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Association on the other, said (p. 667): "With regard to the Memorandum of Association, your Lordships will find, as has often already been pointed out, although it appears somewhat to have been overlooked in the present case, that that is, as it were, the charter, and defines the limitation of powers of a company to be established under the [341] Act. With regard to the Articles of Association, those Articles play a part subsidiary to the Memorandum of Association. They accept the Memorandum of Association as the charter of incorporation of the company, and so accepting it, the Articles proceed to define the duties, the rights, and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. With regard, therefore, to the Memorandum of Association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise, whether that which is so done is *ultra vires*, not only of the directors of the company, but of the company itself. With regard to the Articles of Association, if you find anything which, still keeping within the Memorandum of Association, is a violation of the Articles of Association or in excess of them, the question will arise, whether that is anything more than an act *ultra vires* the directors, but *intra vires* the company."

By the Memorandum of Association of the New Fleming Company it is provided (cl. vi) "that Nursey Kessowji, Esquire, shall be the secretary, treasurer, and agent of the company at the remuneration, upon the terms, and subject to the conditions and provisions contained in the agreement set forth in the schedule annexed to the accompanying Articles of Association." And by cl. vi, "the nominal capital of the company is Rs. 22,50,000, divided into 3,757 shares of Rs. 500 each and 1,486 shares of Rs. 250 each, which capital may be increased."

By cl. 6 of the Articles of Association, "the allotment of so many of the shares in the original capital as shall not be required for the purpose of paying for the property business and good-will of the Fleming Spinning and Weaving Company, Limited, as mentioned in the Memorandum of Association and in cl. 102 of the Articles, and as have not been allotted at the date of the registration of the Articles, shall exclusively appertain to, and be vested in the directors, who shall have the power, at their absolute discretion, to allot all or any of such shares as fully or in part paid up at a discount or otherwise in [342] such manner and to such person or persons as they, in their absolute discretion, shall think fit." By cl. xvi of the agreement set forth in schedule A annexed to the Memorandum of Association, and referred to in the above cited cl. iv of that Memorandum, Nursey Kessowji was to *deposit with such bank or bankers, as the directors should appoint*, all money due from him to the company and exceeding in amount at any one time the sum of Rs. 5,000.

By cl. 116 of the Articles of Association, Nursey Kessowji was appointed secretary, treasurer, and agent of the company for the period of twenty-five years at the remuneration, on the terms and subject to the conditions specified in the agreement set forth in schedule A annexed to the Memorandum of Association, and by cl. 117 he was declared to have, during the said period of twenty-five years, full power and authority *to enter into such contracts and agreements as he may think proper for the purposes of the company*, and to appoint and employ in, and for the purposes of the

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transaction and management of the affairs and business of the company or otherwise for the purposes thereof; and from time to time to remove or suspend such managers, bankers, solicitors, engineers, clerks, brokers and other officers as he shall think proper, with such powers and duties and upon such terms as to duration of office, remuneration or otherwise as he shall think fit.

By cl. 102 of the Articles of Association among other powers and authorities expressly given to, and conferred upon, the board of directors, and the secretary, treasurer, and agent, were the following:—

"(c) *To raise or borrow* from time to time in the name *or otherwise on behalf of the company* such sums of money as they from time to time think expedient either by way of sale or mortgage of the whole or any part of the property of the company or by bonds, debentures, or promissory notes, *or in such other manner as they deem best*; and for the purpose of securing the repayment of any money so borrowed with interest to make and carry into effect any arrangement which they may deem expedient by conveying or assigning *any property of the company* to trustees or *otherwise.*"

[343] From the minutes of a meeting of the directors held on the 6th August, 1878, it appears that the agent, *i.e.*, Nursey Kessowji, informed the Board that the company was registered on the 31st July, 1878, and it was noted (*inter alia*) that Messrs. Nursey Kessowji and Company be the bankers of the company, that interest payable by them on cash balance due by them to the company be 8 annas per cent. per annum, and that interest payable to them on cash balance by the company be annas 12 per cent. per mensem.

This appointment in August, 1878, of Nursey Kessowji and Company as bankers of the company—Nursey Kessowji and Company being a trading firm carrying on very large and hazardous speculations as was shown by their schedule filed in the Insolvent Court on the 8th February, 1879, and not a firm of bankers in the ordinary sense of the word—seems to have been a very questionable act on the part of the directors, and looks much like a violation of cl. xvi of the agreement set forth in sch. A accompanying the Memorandum of Association, and which agreement so incorporated in the memorandum formed a part of it, and a part of what, according to Lord Cairns, was the charter of the company; for, by cl. xvi of that agreement, Nursey is to deposit with such bank or bankers, as the directors should appoint, all money due from him to the company exceeding in amount at any one time the sum of Rs. 5,000; clearly contemplating some other bank or bankers, and not the firm in which Nursey himself was the senior and only moneyed partner. Clause 117 of the Articles of Association, giving power to Nursey Kessowji to appoint bankers of the company, would not, I think, authorize the appointment of his own firm to act as bankers. The consequences which resulted from this appointment were most disastrous to the company; as, from the minutes of a meeting of the directors held on the 6th January, 1879, it is recorded that, from the trial balance-sheet of the affairs of the company made up to 28th December, 1878, it appeared that Messrs. Nursey Kessowji and Company were indebted to the company in the sum of Rs. 11,65,333.

From the minutes of a meeting of the directors held on the 9th January, 1879, it appears that a letter dated the 8th January, **[344]** 1879, from Nursey Kessowji was read, intimating to the directors that as he was unable to meet his engagements, and was being pressed by his

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creditors, he felt he had no alternative left but to file his petition in the Insolvent Debtors' Court, which he said he intended to do that day.

The minutes of meetings of the directors held on the 6th and 24th August, 25th September, 17th October, 2nd November, 29th November and 12th December, 1878, show that the powers of borrowing were largely exercised by the directors,—the agent reporting to the Board at such meetings what loans had been taken or renewed, and what had been paid.

I now come to the power expressly given by the directors to their secretary and agent to raise the money in question. At a meeting of the directors held on the 11th October, 1878, the agent informed the Board that there were 787½ unallotted shares of Rs. 500 each, which appertained to, and were vested in, the directors with power at their absolute discretion to allot. (That the directors had such power appears by cl. 6 of the Articles of Association already noticed.) The Board resolved that the agent be desired to insert advertisements in the local papers asking application for the purchase of the unallotted shares (787½) of the company.

At a meeting of the directors held on the 31st October, 1878, the agent informed the Board that the unallotted shares could not be sold in the market at a fair rate. The Board then passed the following resolution :—

"*Resolved*—That the unallotted shares be filled up into the name of Nursey Kessowji, Esquire, the secretary, treasurer, and agent, who is empowered to mortgage them at a fair rate of interest, to enable him to obtain funds for the use of the company. The number of certificates of shares with the names of the mortgagees to be recorded at the first meeting of the Board held after such transaction is done."

The argument that these unallotted shares were not a part of the property of the company, which the company, having regard to cl 3, sub-cl. (*c*) of the Memorandum, and cl. 102, sub-cl. (*c*) of the Articles of Association, could validly mortgage, **[345]** appears to me to be quite unreasonable; and if any authority on this point were required, it is to be found in the case of *The York and North Midland Railway Company* v. *Hudson* (1)—a decision which declares the position and duties of directors in regard to shares placed by the company at their disposal in a very clear and unambiguous manner.

In that case a general meeting of the York and North Midland Railway Company placed 12,058 shares in a projected extension line "at the disposal of the directors." The Master of the Rolls, Sir John Romilly, in his judgment said (p. 491): "The directors are persons selected to manage the affairs of the company for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely. A resolution by shareholders, therefore, that shares or any other species of property shall be at the disposal of the directors, is a resolution that it shall be at the disposal of trustees; in other words, that the persons entrusted with that property shall dispose of it within the scope of the functions delegated to them in the manner best suited to benefit their *cestuis que trust*;" and he held that Hudson, who was the chairman, and exercised uncontrolled authority in the conduct of the concerns of the company, having sold a considerable part of such shares at a premium, was liable to account to the company for their produce with interest at £5 per cent.

(1) 16 Beav. 485.

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Hudson having also, whilst chairman of the company, allotted a number of the unappropriated shares to his nominees. which were sold at a premium and of which the produce was received by him, was held, as trustee, bound to the company for the profit made. He also, whilst chairman of the company, appropriated various unallotted shares to the use of various persons, whose names he did not mention, in order to secure or reward services which he declined to state, but which, it was insinuated, was in the nature of "secret service money."

The Master of the Rolls held, that if the defendant had applied the property of the company in a manner which would not bear the light, he must suffer the consequences, and that, being charged **[346]** with the receipt of the money, he could not discharge himself by the suggestion of such an application, and he directed an account accordingly.

Having regard to the powers especially given by cl. 102, sub-cl. (*c*), of the Articles of Association to the Board and the secretary, treasurer, and agent, to raise or borrow from time to time in the manner or otherwise on behalf of the company, such sums of money as they from time to time think expedient by bonds, debentures or promissory notes *or in such other manner as they deem best*, I entertain no doubt that the Board of Directors had power to authorize their agent to raise money for the company, and upon the security of the unallotted shares.

No doubt cl. 103 of the Articles of Association states that a receipt signed by any two directors, or by any person authorized by a resolution of the directors to give a receipt for any moneys lent to the company, shall be an effectual discharge on behalf of the company for the moneys in such receipt acknowledged to be received, and the person paying any such money shall not be bound to see to the application, or be answerable for any misapplication thereof. No such resolution has, in terms, been produced authorizing Nursey to give such receipt.

I think, however, there is ground for holding that Nursey, by implication, had such authority. The resolution of the Board of Directors of the 31st October, 1878, states that the number of certificates of shares with the names of the mortgagees is to be recorded at the first meeting of the Board held "after such transaction is done." The transaction is not to be reported while it is in progress, but after it is "done." The transaction would, of course, not be "done"—*i.e.*, not completed—until the money was paid, and the money would not be paid until the shares were handed over to the lender. Agents often make contracts without disclosing the names of their principals. A person might lend money to Nursey on the security of these shares, knowing that Nursey was borrowing on behalf of some principal, but without knowing precisely who that principal was. The directors here sent Nursey into the market to raise money for the company on the security of the unallotted shares, which stood, all of them, in Nursey's name.

[347] Assuming—what, however, is not very probable—that the lender had read the Articles of Association, he might have seen that, by cl. 117, Nursey Kessowji had during twenty-five years full power and authority to enter into such contracts and agreements as he may think proper for the purposes of the company.

By s. 188 of the Contract Act (IX of 1872), an agent having an authority to do an act, has authority to do every lawful thing which is necessary to do such act. A person lending money to Nursey on the security of these shares might, under certain circumstances, be justified in taking Nursey's receipt alone. He certainly would, if Nursey did not

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disclose who this principal was. Then, if, as the learned Advocate-General contended, the directors had no power to borrow on the unallotted shares, the money lent would, nevertheless, be still money lent, although the security might be valueless. And all that the lender would have to do, would be to return them. On the first branch of the case, therefore, I am of opinion, that the directors had ample power under the Memorandum and Articles of Association, and that they authorized the secretary, treasurer and agent to borrow money for the purposes of the company, and with that object they entrusted him, as they lawfully might, with the unallotted shares then worth about Rs. 400 each, to raise money in the market by mortgage of such shares.

I will next consider the circumstances under which the loan of Rs. 1,00,500 was made by Purmanundass to Nursey on the 11th November, 1878, and the liability (if any) of the New Fleming Company in relation thereto. Negotiation for a loan from Purmanundass had been going on for about a month before the 11th November, 1868, between Purmanundass and Mr. Gordon, Secretary of the Chamber of Commerce, and Premchund Roychund acting on behalf of Nursey.

Premchand in his evidence before me stated that in October, 1878, Nursey asked him to get him money from any place, saying that he wanted money for the mills. He wanted two lakhs. Premchand suggested the name of Purmanundass as a likely person, and that Mr. Gordon, who was intimate with Purmanundass, should be asked to speak to him.

[348] Mr. Gordon stated in his evidence before me that in October, 1878, just after the failure of W. Nicol & Co., Nursey came to him and asked him to obtain for him a loan from Purmanundass. Mr. Gordon's evidence on this point is extremely important, and I will give it in his own words :—

I asked him what he wanted the money for. He said he was hard pressed by the mill-creditors, and the money was wanted to pay off the mill-deposits.

The mill had received the money on deposit like banks for fixed periods of time at fixed rates of interest.

He said he wanted a lakh and a half, and would give 500 shares in Fleming Mill Company or the Nursey Mills. Nursey was secretary, treasurer, and agent of the Fleming and the three other mills.

He used to manage all four mills.

I communicated Nursey's request to Purmanundass. I told him what Nursey wanted the money for, and the security offered.

He ultimately agreed to advance one lakh and Rs. 500 ; that must have been about three or four weeks after Nursey's application to me.

There was some haggling about the rate of interest, and about the amount to be advanced on each share.

Purmanundas refused to abate his terms for sometime.

A day or two before the loan was made, Nursey came again to me and asked me to get Purmanundasss to lend the money.

I saw Nursey on Sunday, the 10th November ; I saw Purmanundass on Sunday at Nursey's request.

I went to Kessowji's bungalow on Sunday, after seeing Purmanundass ; Nursey was at Kessowji's bungalow.

On the Monday I saw Purmanundass again, and communicated what had taken place at Kessowji's bungalow.

On the Sunday and the Monday the interest and the amount were arranged and the number of share to be given.

I understood from Nursey that he wanted the money for the companies, and not for his own purposes.

I told Purmanundass distinctly that the money was wanted for the mills."

In cross-examination by the Advocate-General, Mr. Gordon said :—

The understanding in my mind was that he wanted the money for the four mills or for some of them.

The expression I think he used was that he was pressed by the mill-creditors.

I talked to Nursey in English which he spoke very fluently,—exceptionally so.

Purmanundass wanted 15 per cent. per annum interest. Nursey objected to pay that, because, he said, it would hurt his credit in the bazaar.

I told Purmanundass that the money was wanted for the mills generally.

In the first interview which I had with Nursey I asked him if a lakh and a half would satisfy his creditors. The mill-creditors alone he said were pressing him. He said it would.

In re-examination Mr. Gordon gave this very important answer.

Nursey did not tell me which mill in particular he wanted the money for.

[349] Premchund's evidence was to a similar effect. He said—

Nursey told me he wanted money for the mills. I went with Mr. Gordon to see Purmanundass. I told him for what purpose the money was wanted. I saw him on other occasions without Mr. Gordon.

I told him Nursey wanted the money for the mills.

I did not tell him which of the four mills the money was wanted for.

I knew that the 335 shares formed a part of the unallotted shares of the Fleming Company.

Nursey told me the directors had authorised him to borrow money on those shares.

I do not recollect whether I told Purmanundass that.

I understood that the loan was being made to the Fleming Company.

In cross-examination he said :—

"Nursey told me the money was wanted for the mills.

"He did not say he wanted the money for any particular mill."

In answer to a leading question put to him by the learned Advocate-General, he said :—

"Nursey is the person to whom Purmanundass gave credit coupled with Kessowji's guarantee."

He explained that on re-examination thus—"Purmanundass advanced the money to Nursey with Kessowji's guarantee on the shares.

"That is what I mean by saying he gave credit to Nursey."

Premchund, whose knowledge of financial matters in Bombay was, and is, probably unrivalled, said that the mill companies (*i.e.*, the four of which Nursey was the secretary, treasurer, and agent) were all hard up, and that Nursey Kessowji and Company's creditors, and the mill creditors were both pressing about the 11th November.

Both Mr. Gordon and Premchund appeared to me to give their evidence with most perfect candour and fairness, and I feel that I can rely upon it with safety.

Purmanundass in his evidence corroborates the principal portions of Mr. Gordon's and Premchund's evidence. I am, however, quite unable to accept as correct his statement that Mr. Gordon told him the money was required for the New Fleming Company. Mr. Gordon says distinctly that Nursey did not tell him which **[350]** mill in particular he wanted the money for, and that he (Mr. Gordon) told Purmanundass that the money was wanted for the mills generally.

It is most improbable that Mr. Gordon would have told Purmanundass a fact of which he himself was quite ignorant.

The Advocate-General, too, strongly contended on behalf of the official liquidators that it was not pretended that the money was wanted for any particular mill, and that Nursey borrowed the money for the mills, used the money for his firm, and appeared to treat the mills as his own property.

Several questions were put to Purmanundass in cross-examination with a view, if possible, of getting from him an admission that he considered Nursey as his debtor for the amount advanced; but his answers were, in substance, uniform and, in my opinion, correct, *viz.*, that he lent the money

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on the shares, that he was to look for payment out of the proceeds of the 335 shares (then worth Rs. 400 each), and if there was any balance, he was to be recouped out of the guarantee of Kessowji Naik.

I consider it to be clearly proved that Purmanundass lent his money and paid it to Nursey, who, he was led to believe by Mr. Gordon and Premchund, was raising the loan on behalf of the four mill companies, of each of which Nursey was, and was known by Purmanundass to be secretary, treasurer, and agent, but that neither during the progress of the three or four weeks' negotiations, nor when the loan was finally arranged and the money paid on the 11th November, 1878, was Purmanundass aware or informed for which of the four mill companies the loan was obtained; in other words, that the money was advanced to Nursey and the documents signed by him and by Kessowji on the 11th November, he, the said Nursey, then acting on behalf of an undisclosed principal.

Sir Charles Sargent upon the evidence before him in suit No. 385 of 1879, the second suit brought by Purmanundass against Kessowji Naik, arrived at a similar conclusion, as will be seen from the following passage in his judgment—

"It does not appear, upon the evidence, that the plaintiff was given to understand when the loan was negotiated that it was **[351]** required for any particular mill. He seems to have been told simply, as he described it in cross-examination, that Nursey wanted money. In re-examination, he says he was told that it was wanted for the Fleming Spinning Company. This is not consistent with either Mr. Gordon's or Premchund's evidence—the latter of whom particularly says that Nursey did not say on whose account he wanted it. However this may be, in December, 1878, plaintiff, no doubt, had reason to think that it had been borrowed for, and on behalf of, the company; and the question arises, whether the plaintiff has so elected to treat the company, the undisclosed principal, as his debtor as to have discharged Nursey, in which case it would follow that the defendant would himself be discharged from his guarantee."

Nursey having, therefore, obtained the loan while acting on behalf of an undisclosed principal (the New Fleming Company), what were or are the liabilities of the latter, first upon the English authorities, and, secondly, under the Indian Contract Act, No. IX of 1872, which is mainly based upon English law and English decisions.

Thompson v. *Davenport* (1), decided by the Court of King's Bench in 1829, is a leading authority upon this point. There, at the time of making a contract of sale at Liverpool, the party buying the goods represented that he was buying them on account of persons resident in Dumfries, but did not mention their names, and the seller did not enquire who they were; but afterwards debited the agent who purchased the goods. It was held that the seller might afterwards sue the principals for the price.

The judgment of Lord Tenterden, C.J., is constantly acted upon in Courts of England at the present day. I will quote from that portion of it which is most applicable to the facts now under consideration :—

"On the other hand if at the time of the sale the seller knows not only that the person who is nominally dealing with him is not principal but agent, and *also knows who the principal really is*, and notwithstanding all that knowledge chooses to make the agent his debtor, *dealing*

(1) 9 B. & C. 78.

with him and him alone, then, according [352] to the cases of *Addison* v. *Gandesqui* and *Paterson* v. *Gandesqui*, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal *having once made his election at the time when he had the power of choosing between the one and the other*.....The plaintiffs were informed that M'Kune, who came to them to buy the goods, was dealing for another; that is, that he was an agent, but they were not informed who the principal was. They had not, therefore, at the time the means of making their election.....*Not knowing who the principal really was, they had not the power at that instant of making their election.*"

Mr. Justice Bayley in the course of his judgment in the same case said:—

"But there are cases which establish this position; that although he debits the agent who has contracted in such a way as to make himself personally liable, yet, unless the seller does something to exonerate the principal and to say that he will look to the agent alone, he is at liberty to look to the principal when that principal is discovered. In the present case the seller knew that there was a principal; but there is no authority to show that mere knowledge that there is a principal, destroys the right of the seller to look to that principal, as soon as he knows who that principal is, *provided he did not know who he was at the time when the purchase was originally made.*"

The case of *Calder* v. *Dobell* (1), decided in January, 1871, is an extremely important one.

There, Cherry, a broker at Liverpool, was authorized by the defendant, a merchant there, to buy cotton for him, but not to disclose his name. Cherry's credit not being good enough to enable him to obtain a contract upon his own sole responsibility, he gave the plaintiff the name of his principal, and bought and sold; notes were exchanged between the plaintiff and Cherry in which the latter was named as the buyer. Cherry sent the defendant an advice note informing him that he had bought the cotton of the plaintiffs "for him," and the defendant did not repudiate the transaction. An invoice was made out to Cherry, and the [353] market falling, Cherry was called upon by the plaintiffs to accept and pay for the cotton, and was threatened with legal proceedings. Failing to obtain payment from Cherry, the plaintiff sued the defendant.

At the trial before Mr. Justice (now Lord Justice,) Brett at the Liverpool Assizes he left three questions to the jury, of which the first was: "Did the defendant authorize Cherry to make the contract for him;" and the third was "Did the plaintiffs, knowing that Cherry was acting as agent for the defendant, elect to contract with Cherry, as principal, upon the terms of giving credit to him and to him alone." This third question, Brett, J., said, when the case afterwards came before the full Court, he left to the jury, having *Thompson* v. *Davenport* before them.

The Court consisting of Bovill, C. J., Willes, Montague Smith, and Brett, JJ.— a very strong one, as each of those Judges had had great experience in commercial cases—held that the fact that the defendant's name was disclosed at the time of the contract did not preclude the plaintiffs from having recourse to him; that parol evidence of the circumstance under which the contract was made was admissible; that the Insertion of Cherry's name in the contract, though his principal was known at the time, and the subsequent demands upon Cherry for payment, did not

(1) L.R. 6 C.P. 486.

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necessarily amount to an election on the part of the plaintiff to give credit to Cherry, and to him alone. The rule to set aside the verdict for the plaintiff was refused.

Bovill, C.J., said (p. 489) : "It has for many years been a generally received impression that when a broker makes a contract for an undisclosed principal, the latter may sue upon it, and equally, that when discovered, he may be made responsible for its performance. There can be no doubt that the defendant might have sued upon the contract so made by Cherry ; and I am equally of opinion that he may be made responsible, provided that parol evidence was admissible to show that he was the real principal....The suppression of the principal's name is entirely consistent with the practice of many trades to conceal transaction of speculation. The effect is that if the broker enters into contracts in his own name, and has a principal, those whom he contracts with, will have the responsibility both of the principal **[354]** and of the brokers. There is nothing inconsistent in thus giving an option to hold either responsible. I am of opinion that, in accordance with all the authorities, the parol evidence was admissible."

Mr. Justice Willes said (p. 494) : "I do not agree with Mr. Holker that two persons cannot be severally liable on the same contract. The question is, whether there was anything in the circumstances of this case to negative or conclude the liability of both principal and agent, or to substitute the liability of the latter for that of the former....There is nothing to prevent the seller from insisting upon having both principal and agent liable to him at the same time, with the additional advantages of knowing the principal's name at the time...To hold that asking the name of the principal at the time is to discharge the principal, would seem to me to be contrary to common sense."

Of Mr. Justice Montague Smith's judgment I will only quote this passage (p. 497) :—

"The cases show that the seller may make his election whenever the principal is discovered ; and the only difference in principle between the case where the principal is disclosed and where he is not disclosed, is, that, in the former case, the election may be made at the very time the contract is made."

An appeal was brought against the above judgment, and was decided in the Exchequer Chamber in June, 1871, by Kelly, C.B., and six other Judges, without calling upon the counsel for the plaintiff.

Kelly, C.B., said (p. 499) : "I think the case is free from doubt or difficulty : the contract was made in the name of Cherry, the agent ; but the case shows that it was made on behalf of a principal who was named at the time. I think the plaintiff had a right to sue either the agent or the principal at their election. No doubt the election being once determined, there is an end of the matter as when the agent has been sued to judgment. Here, however, nothing was done to determine the election at the time ; this action was brought against the principal."

Martin, B., said that the fact of his name having been mentioned at the time, did not make the defendant the less a principal. **[355]** Blackburn, J., said he apprehended that, where a man is acting as agent, the principal is not the less bound because the contract is so drawn as to make the agent also liable.

Hannen, J., referred to Story on Agency where it is said : "If the agent possesses due authority to make a written contract not under seal and he makes it in his own name, whether he describes himself to be an

agent or not, or *whether the principal be known or unknown*, the agent will be liable to be sued and be entitled to sue thereon; and his principal also will be liable to be sued and be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it." The rest of the Court concurred, and the judgment was affirmed.

In *Fleet* v. *Murton* (1)—(decided in November, 1871) where one of the questions was as to the admissibility in evidence of a custom in the London print trade to make brokers, who do not name their principal in the contract note itself, personally liable on the contract—Mr. Justice Blackburn in the course of his judgment said (p. 131):—

"Then I take it that there is no doubt at all that the rule of law laid down in the case of *Higgins* v. *Senior* (8 M. & W. p. 834) and the other cases there cited, is perfectly correct; namely, that when the agent of the purchaser, though really making the contract between two principals, chooses to make the contract in writing in a form in which he addresses himself to be the contracting party, he thereby says, 'I am to be liable.' And though he has done this, yet his principal also is liable; because the agent who has made the contract does bind his principal, though he has chosen to bind himself also; and it is no answer (as was held in the recent case in the Common Pleas of *Calder* v. *Dobell* (2) which was affirmed in the Exchequer Chamber) to say on the part of the principal. 'The contract was made by my agent, and my agent is responsible.' That the agent is liable, is no answer, and no reason why the principal should not be responsible."

[356] The various cases, of which *Armstrong* v. *Stokes* (3) (decided in July, 1872) is a recent one, to the effect that a vendor who has given credit to an agent believing him to be the principal, cannot recover against the undisclosed principal, if the principal, has *bona fide* paid the agent at a time when the vendor still gave credit to the agent and knew of none else as principal, are inapplicable to the present one.

In the considered judgment of the Court in *Armstrong* v. *Stokes* delivered by Blackburn, J., it is said (p. 607): "As is laid down in *Higgins* v. *Senior* (8 M. & W., p. 844), it is always competent, notwithstanding this form of agreement, to show who the person was for whom the broker acted as agent in making the contract 'so as to give the benefit of the contract on the one hand to, and to charge with liability on the other, the unnamed principals.' In every case, therefore, where the sale is to a broker, the vendor knows that there is or ought to be a principal, between whom and himself there is established a privity of contract, and whose security he has in addition to that of the broker; and the principal also knows that the vendor is aware of this, and to some extent trusts to his liability. This is, therefore, a very different kind of case from that of a person selling goods to a person whom at the time of the contract he supposes to be a principal."

In *Heald* v. *Kenworthy* (4) Parke, B.—in commenting on the *dictum* of Bayley, J., in *Thompson* v. *Davenport*, to the effect that if the state of accounts between the agent and the principal, would make it unjust that the seller should call on the principal, such a state of accounts

(1) L.R. 7 Q.B. 126.
(2) L.R. 6 C.P. 486.
(3) L.R. 7 Q.B. 598.
(4) 10 Ex. 739.

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would be an answer to an action brought by the seller where he had looked to the responsibility of the agent—said (p. 746): "The expression 'make it unjust' is very vague; but, if rightly understood, what the learned Judge said is no doubt true. If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent the money, or the faith that the agent and seller have come to a settlement on the matter, or if any, [357] representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. It would be unjust for him to do so. But I think there is no case of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant, or to induce him to alter his position."

I have quoted from the two earliest of the above cases at some length, as the law laid down in *Thompson* v. *Davenport* and in *Calder* v. *Dobell* appears to have formed the groundwork of ss. 230, 233 and 234 of the Indian Contract Act (the sections most applicable to the present case), which Act received the Governor-General's assent on the 25th April, 1872, long before which time the report of the decision of the Court of Common Pleas in January and of the Exchequer Chamber in June, 1871, in the latter case must have reached Mr. Fitz James Stephen, who is supposed to have framed, and who carried the Indian Contract Act, 1872, through the Legislative Council.

What are the liabilities of an undisclosed principal under the Indian Contract Act, the provisions of which, so far as they extend to the present case, must, no doubt, be held applicable?

The material sections are the three just referred to, *viz.*, ss. 230, 233 and 234. (His Lordship read the sections).

Mr. Pollock in his Principles of Contract (p. 237, 2nd ed., 1878) says that s. 230 of the Indian Contract Act, which he quotes, is based upon English law; but it does not exactly represent it, as it omits to provide any fixed rule for the treatment of contracts made by an agent in writing.

Sub-cl. 2 of that section makes an agent personally liable who does not disclose the name of his principal. In the present case Nursey made himself personally liable by his written agreement of the 11th November, 1878; and his liability on that agreement has never been disputed. Sub-cl. 2 is inapplicable here, as there is no necessity, and, indeed, it would be incorrect to presume a contract on Nursey's part when he has made an express contract on which he is liable.

Sub-cl. 3 of that section appears to me not to apply here, as the principal, the New Fleming Company, was not disclosed at [358] the time of the contract; and as such principal, when subsequently disclosed, could and can be sued.

Section 233 is the one most applicable to the present case, as here the agent Nursey is, or rather was until he filed his schedule in the Insolvent Court, personally liable on his contract with Purmanundass, and, therefore, Purmanundass, the person dealing with him, may hold either him or his principal, the New Fleming Company, or both of them, liable. The illustration to that section distinctly applies to the present case.

The latter portion of s. 234 is evidently based on the law laid down by Lord Tenterden, C.J., in *Thompson* v. *Davenport* (1) already cited by

(1) 9 B. & C. 78.

me. That section provides that when a person who has made a contract with an agent . . . induces the principal to act upon the belief, that the agent only will be held liable, he cannot afterwards hold liable the principal.

I consider that section to be wholly inapplicable here, as Purmanundass previously to, and at the time of, lending his money to Nursey did not know for what principal Nursey was acting, and did not ask, and was not in any manner bound to ask, who that principal was ; and, according to the evidence, he never then or at any subsequent period induced the directors of the New Fleming Company to act upon the belief that Nursey only would be held liable. The loan, too, was for six months, and would not be repayable until May, 1879. Purmanundass has never taken any steps against Nursey, who became insolvent in December, 1878, and, as already stated, filed his petition in the Insolvent Court on the 10th January, 1879 ; on the contrary, he, at once, as soon as he had reason to suspect that his money was in danger, and when he knew that the New Fleming Company were the real principals, by his solicitors' letters of the 30th December, 1878, 11th January, 1879, and 4th February, 1879, did all in his power to assert his claim against the company—a claim which he has never abandoned up to the present moment.

In his affidavit (in reply to Mr. De Quadros's affidavit) affirmed on the 6th April, 1881, and filed on the 15th July, 1881, Purnanundass says :—

[359] " It was never my intention to waive my claim against the said company, but, on the contrary, I also intended to make my claim against it, and for such purpose in January, 1879, actually employed counsel, Mr. Macpherson, to draw a plaint for me in respect of my said claim, in which plaint the said company was made one of the defendants."

That statement was not contradicted or sought to be impeached in any manner by the official liquidators.

The official liquidators of the New Fleming Company in resisting Purmanundass' claim derived no assistance, that I can see, from any of the provisions of the Indian Contract Act.

Then, how do the facts stand as to election—

In *Curtis* v. *Williams* (1) it was held that the mere fact of filing an affidavit of proof against the estate of an insolvent agent to an undiscovered principal, after that undiscovered principal is known to the creditor, is not a conclusive election by the creditor to treat the agent as his debtor.

In delivering the considered judgment of the Court, Mr. Justice Quain said (p. 60) :—

" Whether, in regard to proceedings taken against the agent by action at law, anything short of judgment and satisfaction would be sufficient to exclude resort to the principal, was the point raised in the case of *Priestly* v. *Fernie* (2)."...The Court there held that where an agent has made a contract in his own name, has been sued on it to judgment, even without satisfaction, no second action would be maintainable against the principal ; but it is clear from the language used by Bramwell, B., in delivering the judgment of the Court, that whilst it was considered that judgment against agent, even without satisfaction would constitute a conclusive election, yet that no legal proceedings short of judgment would

(1) L.R. 10 Q.B. 57.

(2) 3 H. & C.

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have that effect, for he distinctly points out that by the word "sue" he means "sue to judgment."

Here no action was ever commenced against the agent, and every effort was made to intercept and withhold the affidavit in [360] bankruptcy which had been made, as it would seem without due consideration and without any intention whatever to discharge the present defendants from responsibility. We think it would be going much too far to hold that this was, in point of law, a binding election to deal with the agent as alone liable, and abandon all right to take proceedings against his principals.

It will be recollected that in the judgment of Kelly, C.B., in *Calder* v. *Dobell* (1) in the Exchequer Chamber, he said: "I think the plaintiffs had a right to sue either the agent or the principal, at their election. No doubt, the election being once determined, there is an end of the matter, as where the agent has been sued to judgment."

In the present case, Purmanundass, directly he knew who the principals really were, elected to proceed against them, and in no way and at no time can be said to have elected to proceed against Nursey Kessowji.

An election once validly made is final, and cannot be opened or altered and a fresh election made.

In *Smethurst* v. *Mitchell* (2)—where the price of the goods being due in October, 1857, the plaintiff in November was informed that the defendant was the principal, but took no proceedings against him until September, 1858, and had by his conduct lying by for those months induced the defendant to alter his position in regard to his agent to his prejudice, and was, therefore, held not entitled to recover the price of the goods from the defendant—Hill, J., said (p. 979): "All the authorities concur in settling the principle by which this case is to be decided for the defendant. A vendor cannot hold the principal liable where there is any circumstance in the case which renders it not right or equitable that he should do so; for instance, by lying by, and by his conduct inducing the defendant to change his position. That is a true and correct principle, and this case falls directly within it. Here the plaintiff has by his conduct induced the defendant to alter his position, and having done so, he cannot now make his election and sue the defendant."

[361] Mr. Justice Crompton concurred in the remark of Hill, J., and said (p. 980): "I am inclined to say that in a case of this kind to charge the principal, the vendor must make his election within a reasonable time after he has been disclosed to him, and the election once made cannot be altered. In this case, if I may say so, the election was the other way. When did the vendor elect to look to during the year? His conduct clearly shows that he elected to take the agent as his debtor."

Although the decision there was in favour of the defendant, the grounds on which that decision was rested, and the views expressed by those learned Judges, each of whom, when at the bar had had very great experience in commercial cases, especially at Liverpool, are extremely applicable to the present case.

Purmanundass no doubt afterwards sued Kessowji Naik, the guarantee, but he did not sue him to judgment, *i.e.*, he did not obtain judgment against him, as the suit was dismissed with costs. No case has been cited, nor I believe does any exist, which shows that suing a person, who has guaranteed a loan, or the price of goods sold to an agent, and,

(1) L.R. 6 C.P. 499.

(2) 5 Jur. N.S. 978 = 1 E. & E. 622.

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moreover, suing him without success is a binding election to deal with the agent as alone liable, and abandon all right to take proceedings against his principals. Here the election to go against the company and to charge them as principals had been duly and finally made long before proceedings were commenced against Kessowji Naik.

The various accounts in the books of Purmanundass, of Nursey Kessowji and Company, and of the New Fleming Company, do not appear to me to stand in the way of the claimant. Dealing, as he did, with Nursey, who was acting for an undisclosed principal, Purmanundass would naturally debit Nursey in his books, and the entries would, of course, appear as if the loan had been made to Nursey, especially as Nursey, by his agreement with Purmanundass dated the 11th November, 1878, rendered himself personally liable to repay the money. Immediately he paid the money to Nursey, Purmanundass' responsibility, in my opinion, ceased, and the manner in which Nursey dealt with the money and the state of accounts between Nursey Kessowji and Company and the company of which he was the secretary, treasurer, **[362]** and agent, were to Purmanundass matters on which, under the circumstances of this case, he had not and could not be expected to have any knowledge whatever. He had no access, and had no right to demand access to any of their books. The entries, too, in Nursey Kessowji and Company's books would appear to have been all made on or about the 11th, 12th, and 13th November, *i.e.*, immediately after the loan, or a month more before Purmanundass discovered who the principals were. Such entries were so made without his knowledge or consent, and are in no way binding on him. Except in the company's journal there is no entry of the loan in any of the company's books. Such loan was not reported by Nursey to the directors on the 29th November, 1878, as it ought to have been.

The evidence, too, appears to be almost conclusive that such journal entry was not, and, indeed, could not have been, made until on or after the 20th December, as the total amount credited to the account of the New Fleming Company, aggregating Rs. 1,52,850, included Purmanundass' loan of Rs. 1,00,500, and also a loan of Rs. 8,000 from Ardasir Hormasjee Chinoi; and that person's original loan of Rs. 10,000 was not reduced to Rs. 8,000 until the 20th December, 1878.

The accounts in Nursey Kessowji and Company's books show that his firm had paid out for the three other mills, of which Nursey was the secretary and treasurer, and for the purposes of his firm's transaction, various sums from the moneys held by the firm.

His firm's cash-book shows that on the 12th November, the day after that on which the loan was made, a sum of Rs. 33,000, apparently part of Purmanundass' loan, was paid by Nursey Kessowji and Company to the New Fleming Company; but the official liquidators, in their zeal for the interests of their insolvent company, do not allow Purmanundass credit for a single pie of that by no means small sum; on the contrary they ask the Court to dismiss his entire claim with costs.

For the above reasons, I am of opinion that Purmanundass Jivandass is entitled to rank as a creditor of the company for the sum of Rs. 1,00,500, with interest thereon from the 11th **[363]** November, 1878, at 9 per cent., until the 28th December, 1878, the date of the presentation of the petition to wind-up the company, less the sum of Rs. 800, the amount of the promissory note, with interest thereon at the above rate up to the 28th December, 1878. He must return the 385 shares to the official liquidators if they desire to have that absolutely worthless paper.

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Purmanundass must have his costs of, and incidental to, his claim and of the hearing thereof, and of this day, out of the estate of the company; such costs to be paid by the official liquidators in full and in priority to any claims of shareholders.

The official liquidators will have their costs, to be taxed as between attorney and client, out of the estate of the company.

All the above costs to be taxed as if this were a long cause in Court.

NOTE.—An appeal was filed by the official liquidators against the above decision, but was not proceeded with.

Attorneys for the claimant.—Messrs. *Hearn, Cleveland and Little.*

Attorneys for the company.—Messrs. *Ardasir and Hormasjee.*

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Before Mr. Justice West.

BAI MANECKBAI (*Plaintiff*) *v.* BAI MERBAI AND OTHERS (*Defendants*).*

[15th December, 1881.]

Parsis—Statute of Frauds—Stat. 29, Charles II, c. 3—Trust—Resulting trust.

The plaintiff, who was the widow of G., sued the defendant, the executrix of J., to recover a sum of Rs. 7,394-9-6, part of the purchase-money of a house which had been sold by J. in his lifetime, and which the plaintiff alleged had been, shortly before his death, conveyed by her husband G. to J. in trust to sell and hold the proceeds in trust for G.'s family. The defendant denied the trust, and insisted that J. had purchased the house from G. for valuable consideration. Both J. and G. were Parsis.

Held that, even assuming that no consideration was given by J. to G. for the house, the plaintiff was not entitled to succeed.

In the absence of consideration, the trust of the house, which was admittedly conveyed by G. to J., would have resulted to G. unless, under the provisions [364] of s. 7 of the Statute of Frauds (29 Charles II, c. 3), he (G.) had declared in writing some other trust which was to supersede the resulting trust in his own favour. No such declaration of trust in writing was proved. If, on the other hand, the trust did result to G., he, no doubt, might, as equitable owner of the house, have disposed of his interest by will. If he did so, the plaintiff had not qualified herself to sue as his representative. Probate had not been obtained of the will, and until the will was proved, it could not be said that G. had made a particular declaration of trust by it. Nor without probate could the plaintiff take up the position of legal representative of her deceased husband entitled to enforce his rights, and, amongst others, his rights under the supposed resulting trust. Except as executrix or as administratrix the plaintiff could not recover property, or enforce rights equitably vested in her deceased husband.

The Statute of Frauds (29 Charles II, c. 3), except so far as it has been repealed, applies to Parsis in India.

[R., 33 B. 122=10 Bom. L.R. 417; 33 B. 509=11 Bom. L.R. 85=2 Ind. Cas. 701=5 M.L.T. 301.]

THE plaintiff was the widow of one Gustadji Bhikaji Dantra, and the first defendant was the widow and executrix of one Jamsetji Burjorji Mestry.

The plaint alleged that, in 1865, Gustadji bought a house in Bombay for Rs. 17,000, which sum was made up of a sum of Rs. 10,500 of his own and the dowries of his three daughters, Putlibai, Jaiji and Bhikaiji,

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Shortly after effecting the said purchase, Gustadji became ill, and during his illness he conveyed the house to Jamsetji Burjorji Mestry. The conveyance, though in form a sale, was really made and accepted as a trust, the said Jamsetjj undertaking to hold the said house in trust to dispose of the same, and to hold the proceeds in trust to pay the abovenamed three daughters of Gustadji their dowries, and then to pay the marriage expenses of Gustadji's son, Dadabhoy, and of his daughter Awabai, and to invest the balance for the maintenance of the family.

In January, 1867, Gustadji died, leaving the plaintiff Maneckbai (his widow) and four daughters, *viz.*, Putlibai, Jaiji, Bhikaiji and Awabai, him surviving. His son Dadabhoy had died a few days previously. Up to the time of his death, Gustadji and his family resided in the said house, and after his death the family continued to reside there, and to pay the taxes, &c., thereof.

On the 20th April, 1868, the house was sold for Rs. 13,000 to one Pestonji Rustomji Sethna, and out of the purchase-money Jamsetji Burjorji expended Rs. 5,605-6-6, and the balance of Rs. 7,394-9-6 remained in his hands.

[365] In 1871 Jamsetji died, leaving a will, appointing the first defendant, Bai Merbai, his executrix. She thereupon took possession of his estate, including the said sum of Rs. 7,394-9-6.

The plaintiff prayed that the trust might be declared and established, that a trustee might be appointed, and the first defendant might be ordered to pay over the said balance of Rs. 7,394-9-6.

The first defendant filed a written statement, in which she pleaded that the suit was barred by limitation, and, further, that the plaintiff was not entitled to sue, not having obtained letters of administration to her husband Gustadji. She also denied that the house had been conveyed to Jamsetji in trust; but stated, on the contrary, that Jamsetji had paid Rs. 17,000 to Gustadji for the property.

The material issues raised were—

Whether the claim was barred by limitation.

Whether the plaintiff could maintain the suit, she not having taken out letters of administration to Gustadji, and not being joined as plaintiff by the other beneficiaries.

Whether the plaintiff was entitled to the relief sought.

Jardine (with *Inverarity*), for plaintiff.—There is no reported authority showing that s. 7 of the Statute of Frauds (Stat. 29, Car., c. 3) is applicable to Parsis. This is a trust of the proceeds of sale of immoveable property, not immoveable property itself. As to limitation, we rely on s. 10 of the Limitation Act, XV of 1877. The trust, if it exists at all, is one for a specific purpose. A specific purpose merely means a purpose that is specified, and a purpose can be specified as well orally as by writing.

Lang (with *Latham*, Acting Advocate General), for defendants.

The claim is made thirteen years after the sale of the house, and fifteen years after the trust is said to have been declared. It is alleged the trusts were orally declared: *Saroda Pershad* v. *Brojo Nath* (1); *Petre* v. *Petre*(2); Lewin on Trusts, chap. 29, para. I **[366]** *Dyer* v. *Dyer*(3). An oral agreement at the time of the purchase cannot be proved, but the furnishing of the purchase-money may be proved. Here, if the transfer of the house by Gustadji to Jamsetji was gratuitous, there was a resulting

(1) 5 C. 910. (2) 1 Dr. 371 (393). (3) 1 White and Tudor 223 (5th ed.).

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trust for the transferor. The law implies no other trust. Sections 91 and 92 of the Evidence Act exclude oral evidence of the trust: *Daimoddee Paik* v. *Kaine Taridar* (1); *Banapa* v. *Sundardas* (2); *Adrishappa* v. *Gurushidappa*(3); *Kronheim* v. *Johnson* (4). Apart from objections founded on the Evidence Act, the alleged trust has not been validly created. English law applies to Parsis: *Navroji* v. *Rogers* (5). The Statute of Frauds is in force in India, except so far as it has been repealed: Morley's Digest, 594. No administration has been taken out to Gustadji's estate.

JUDGMENT.

WEST, J.—The first issue in this suit raises the question of limitation, and the fourth that of the capacity of the plaintiff to maintain the present suit without being joined by the other beneficiaries under the alleged trust in virtue of which the claim is made, and without having taken out letters of administration to her deceased husband Gustadji. In dealing with either of these issues, however, the other principal questions between the parties will be disposed of. I will first consider the fourth.

There is no serious doubt as to the conveyance of the house in question by Gustadji to Jamsetji, both now deceased. For the defendant Merbai it is contended that the evidence as a whole shows that this conveyance was one for value; and no distinct and direct acknowledgment on the part of Jamsetji, that he took the property otherwise than as full owner and free from any trust, has been put forward by the plaintiff. There are circumstances proved in evidence which are consistent with a trust held for her benefit. Perhaps it may be said that they are more easily reconcileable with such a trust than with the counter theory of Merbai's counsel. But the property being primarily, and as to the legal estate that of Jamsetji and his representatives, it lies on those who would establish any right in it, to make this out, not [367] only by proving facts consistent with it, but by facts inconsistent with any other state of the relations between the parties, or, at least, so nearly inconsistent as virtually, for practical purposes, to exclude any other hypothesis than that of the trust relied on.

Now, though there are some facts in this case which, so far as appears, we must account for either by the consciousness on Jamsetji's part that Gustadji and his family had a legal claim upon him, or else by a strong feeling of kindness and generosity on his part towards his less fortunate friend, I do not, on the whole evidence, find myself able to refer what took place so certainly to the former cause as to say decidedly that Jamsetji was, and must have been, under a legal obligation, much less that he had accepted the particular trust here relied on. It is not a thing altogether unknown that a friend should make to a friend or to the family of a dead friend concessions which, had they been insisted on, would have afforded evidence of rights contradictory of his own. The safer assumption generally is, no doubt, that people act from selfish motives, stand at arm's length from their acquaintances, and give nothing but what they are obliged to give. Thus from a concession we infer a right to it on the other side, and rely on a general presumption that each party to a transaction has done the best for himself. But this, though a useful presumption, derived from general experience, is, after all, but a presumption, and here it has to meet the contrary presumption of ownership resting

(1) 5 C. 300. (2) 1 B. 333. (3) 4 B. 494.
(4) 7 Ch. D. 60. (5) 4 B.H.C.R. 1.

on the legal and formal acts of the parties. To overcome this, it should be of the strongest kind. On the contrary, I find that the testimony is loose and contradictory, and the indications it affords are, by no means, decisive. In such circumstances, I should, at least, find great difficulty in pronouncing in favour of the alleged trust. Some of the facts rather point to it, but so many more are wanting, which ought to exist and to point to it, had it really been created, that on a balance of probabilities I might have to say that Jamsetji's ownership was unburdened; but it is not necessary for me to go into a minute examination of the evidence which leads to such a conclusion. Accepting, for the sake of argument, the truth of the general story told by the plaintiff's witnesses, I must still declare her incapable of maintaining this suit.

[368] Evidence was given that a portion of the money expended by Gustadji in buying the house in question was furnished by his wife and daughter. His wife may, as she says, have saved a certain sum from her house-keeping allowance, and she may have been permitted to retain it as her own and separate property. One would naturally expect some more convincing evidence of this than has been laid before the Court, and the evidence that the marriage gifts of Gustadji's daughters Putlibai and others formed a palpable fund which went with their mother's savings towards the purchase of the house, is of the weakest character. But, however the truth may be in this respect, Gustadji took the house by conveyance to himself as owner. As owner he disposed of it by a registered conveyance to Jamsetji. His family do not assert—at least the plaintiff does not assert—that this was done furtively. She knew of it, and it does not appear that Jamsetji in taking the conveyance had any notice of an equitable co-ownership with Gustadji, of Manekbai and her daughters, or of any trust held by Gustadji for them. If there were direct and credible evidence of such a trust, no doubt several facts in the case might properly be referred to it; but we must not invent it for that purpose. We must go by the evidence as it is, not as it might have been, had circumstances been different. Gustadji, so far as appears, dealt as owner with Jamsetji and the members of his family who, having equitable rights stood by and allowed this, are bound by the transaction.

Jamsetji either gave consideration for the house or he did not. If he did, as Merbai says he did—then there is an end of the controversy. The continued residence, for a few years, of Gustadji and his family in the house must be referred simply to Jamsetji's kindness. If, however, the consideration, though solemnly acknowledged by Gustadji, was a fictitious one and the transaction a colourable one intended to enable Gustadji to keep the property out of the reach of his creditors, yet the immediate legal ownership of the house undoubtedly passed to Jamsetji by the registered conveyance. There might be a right in Gustadji to make him reconvey; but until the reconveyance was made, the property was his, by whatever personal obligation he was bound with regard to it.

[369] But Gustadji, it is said, made a declaration of trust in parting with the property to Jamsetji in favour of his wife and daughters, and Jamsetji took it subject to this trust. No declaration on Jamsetji's part is established or even relied on. No declaration merely acquiesced in by him but made by Gustadji could be effectual unless made in writing. Supposing that Jamsetji took the property without consideration, a resulting trust immediately arose in favour of Gustadji, and to this, as constituted by the law itself, the Court would be bound to give effect. To

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any other trust a manifestation in writing was necessary, and this had to be made by Gustadji. It is the beneficial owner only who can declare the trust which is to supersede the resulting trust in his own favour (*Kronheim* v. *Johnson* (1)) and under the Statute of Frauds, s. 7, this must be in writing. It was contended that Parsis are not subject to the Statute of Frauds, but for this contention no authority was produced. The powerful and exhaustive judgment in *Naoroji* v. *Rogers* (2) establishes the general subjection of the inhabitants of Bombay, as such, to the English law introduced here with regular Courts, and of that law the Statute of Frauds was an integral part. If it were necessary under such circumstances to resort to general reasoning on the subject, it might not be hard to show that the public benefit and the checking of fraud are likely to be furthered as much amongst Parsis as amongst Englishmen in Bombay by the salutary provisions of that Statute; but, whether for good or evil, these provisions apply, I think, to Parsis. A Calcutta case to which I referred at the hearing (*Sarkies* v. *Prosonomoyee* (3)) shows that the English law even of dower may be applied to Armenians, who, though Christians, had never had the institutions out of which dower sprung in Western Europe. The Statute of Frauds applies to transactions not having necessarily any religious character or governed by family law. The Parsis are, I think, as subject to it as any inhabitants of Bombay, to whose circumstances it is indeed in its 7th section particularly applicable.

Gustadji, if recognized as equitable owner in virtue of a resulting trust, might have disposed of his interest by will. Perhaps **[370]** he did; but, if he did, the plaintiff has not qualified herself as his representative. Probate has not been taken out of the will, and till the will is proved it cannot be said that Gustadji has made a particular declaration by it. Nor without probate can the plaintiff Manekbai take up the position of legal representative of her deceased husband entitled to enforce his rights, and, amongst others, his rights under the supposed resulting trust. If there is a will but it is invalid, Manekbai might still possibly be made her husband's representative as administratrix, but this she has not had done. It was not contended, nor could it be contended that, except as executrix or as administratrix, she could recover property or enforce rights equitably vested in her deceased husband. The effort has been to make out a declaration on Gustadji's part, and an acceptance of a trust by Jamsetji under which the plaintiff and her daughters became beneficiaries to whom Jamsetji was directly responsible, and whose equitable rights adhered to the estate or followed it into the hands of his widow Merbai. This suggestion is, as I have said, consistent with some of the facts proved; but the negative facts are strong on the other side—too strong to be overcome by such testimony as has been placed before me. But here again the Statute of Frauds would prevent the success of the plaintiff, unless not a declared but a resulting trust in her favour could be made out through knowledge on Jamsetji's part in taking the conveyance of her equitable co-ownership. It is impossible, I think, to say that this is proved.

If it were proved, or a trust were in any way established, it would be necessary to find on the first issue whether the enforcement of the right is or is not barred by limitation; but, finding that the right itself is not existent or, if existent, is not at present vested in the plaintiff in such a

(1) 7 Ch. D. 60. (2) 4 B.H.C.R. 1. (3) 6 C. 794.

character as enables her to enforce it by a suit, I find for the defendant on the fourth issue, and reject the claim with costs.

Attorneys for the plaintiff.—Messrs. *Tobin and Roughton.*

Attorney for the defendant.—Mr. *Pestonji Kavasji.*

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6 B. 371=6 Ind. Jur. 533=Chitty's S. C. C. R. 102.

[371] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice, and Mr. Justice Melvill.

OODEYCHAND BOODAJI AND OTHERS (*Plaintiffs*) *v.* BHASKAR JAGONNATH AND ANOTHER (*Defendants*).* [10th December, 1881.]

Promissory note—Negotiable instrument—Material alteration.

An alteration which vitiates an instrument must be such as to cause the instrument on the face of it to operate differently from the original instrument. The alteration of the rate of interest in one of the clauses of a promissory note *held* to be a material alteration vitiating the note, although the clause so altered was a penal clause to which, even if unaltered, the Court would not give effect.

[F., 10 B. 487 ; R., 12 C.P.L.R. 33.]

THE following case was stated for the opinion of the High Court, under s. 7 of Act XXVI of 1862, by W. E. Hart, First Judge of the Court of Small Causes at Bombay :—

"1. This was an action on a document, written in the Marathi language and character, of the nature of a promissory note for Rs. 600 and interest, dated 15th October, 1877, and payable ten months after date.

"2. The portion of this document that is material for the purposes of this reference is to the following effect :—

"'In respect of these rupees we will continue to pay interest at the rate of *annas eight per month* per cent. ; as to the fixed period in respect of these rupees, we will pay off your rupees within ten months. Should the rupees remain unpaid beyond the fixed time, we will pay interest at the rate of rupees *two* (2) per cent. per month.'

"3. Both the word '*two*' and the figure '(2)' italicised in the last para. seem to have been altered from *one* and (1) respectively.

"4. There are two endorsements on the note, of payments made on account, to the following effect :—

"'Two hundred on the 9th day of June in the year 1888 Rs.(200) two hundred have been paid on account of this bond *on account of principal; the handwriting of S.M.O.*'

"'200 on the 10th day of August in the year 1880 rupees two hundred have been paid on account of this bond *on account of* [372] *interest on this bond ; the handwriting at the request of the party is of Sakharam Maroba.*'

"5. The words above italicised are in each case noted by the translator as presenting the appearance of having been written subsequently to the rest of each endorsement.

"6. The plaintiffs instituted this action on the 15th August, 1881, for Rs. 605-9-7. Giving credit for Rs. 200 paid on account of the principal moneys of the note for Rs. 600, they charge Rs. 205-9-7 as interest, calculated at 6 per cent. *per annum* for ten months from 15th October,

* Suit No. 18212 of 1881.

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1877, to 14th August, 1878, and at 24 per cent. *per annum* from 15th August, 1878, to the filing of the suit.

"7. The defendants at the hearing by their pleader admitted the making of the note on 15th October, 1877, but contended that it was now void by reason of material alterations having been made in it without their knowledge and consent. They also pleaded limitation (which plea was subsequently withdrawn), and contended that they were not liable to pay penal interest at an enhanced rate.

"8. The material alterations of which they complained were, *first*, the alteration of the enhanced rate of interest from *one* to *two* per cent. per month, as shown above in paras. 2 and 3; and, *second*, the addition to the second endorsement which made it appear that the Rs. 200 paid on 10th August, 1880, had been paid on account of *interest*, whereas they contended it had been paid on account of *principal*.

"9. The plaintiff by his pleader consented to allow both the payments endorsed on the note to be taken as having been made on account of principal, and to admit (for the purposes of this suit only) that the alteration in the amount of the enhanced rate of interest from *one* to *two* per cent. *per mensem* had been made without the authority of the defendants.

"10. On these facts and admissions I held that the note was not void as against the defendants, first, because the alteration in the amount of the enhanced rate of interest was not a material alteration of the contract; and, second, because the endorsements evidencing payments on account were no part of the contract.

[373] "11. I considered that a material alteration sufficient to avoid a contract must be such an alteration as materially alters not only the wording of a term in the contract, but its legal effect: *Suffell* v. *The Bank of England* (1). In the present case the alteration was in a term of the contract to which no effect could have been given, even in its unaltered state; for, as originally written, it provided for the increase of the rate of interest from 6 per cent. *per annum* to 12 per cent. *per annum*, as a penalty for the non-payment of the amount due on the note within ten months of its execution. The defendants in contending generally that they could not be called on to pay penal interest at an enhanced rate, virtually compelled me to strike out of the note the whole clause providing for it, and the legal effect, or rather non-effect, of that clause was not, in my opinion, changed by the alteration of an inoperative provision for the payment of interest at the increased rate of 12 per cent. *per annum*, into an equally inoperative provision for the payment of interest at the increased rate of 24 per cent. *per annum*.

"12. With regard to the endorsements, I was of opinion that, as they were no part of the note originally executed by the defendants, an alteration in them could not be said to be such a material alteration in the contract as would entitle the defendants to avoid the note. These endorsements are evidence merely of the payment of certain sums on account of the note. Assuming the endorsements to have been subsequently altered, so as to make it appear that money paid as principal had been paid as interest, this might entitle the defendants to insist upon having the money applied as it was originally paid, but it would not, in my opinion, entitle them to decline to make any further payment on account of the note.

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(1) 7 Q.B.D. 270 *per* Lord Coleridge, C.J., at p. 271.

"13. I, therefore, passed a verdict for the plaintiffs for Rs. 200, with interest at 6 per cent. *per annum*, to be calculated, taking both payments endorsed on the note to have been made on account of principal at the dates shown in the endorsements, and I certified the plaintiff's pleader's costs Rs. 15.

"14. At the request of the defendant's pleader, and because [374] I felt myself some doubt on the first point, the above verdict was made, subject to the opinion of the High Court on the two following questions :—

"(1) Is the alteration of the penal rate of interest in the note from one per cent. to two per cent. *per mensem* such a material alteration as to avoid the whole note ?

"(2) Are the endorsements of payment part of the contract between the parties ?

"15. The defendants have lodged in this Court the amount of the verdict and costs and the sum of Rs. 50 to meet the costs of this reference."

The parties did not appear in person or by counsel.

JUDGMENT.

SARGENT, J.—The conclusion to be drawn from the English authorities is that an alteration which vitiates an instrument must be such as to cause the instrument on the face of it to operate differently from the original instrument (*Davidson* v. *Cooper* (1), *Gardner* v. *Walsh* (2)), or, as it is expressed in *Suffell* v. *Bank of England* (3), "must be one which alters or attempts to alter the character of the instrument itself, and which affects or may affect the contract which the instrument contains or is evidence of."

In the present case the alteration effects a material change in the contract as it appears on the face of the instrument. But it is said that being in a penal clause to which the Court would not give effect, however intrinsically material it may be, it cannot be said to effect a change in the operation of the instrument. The clause, however, is not void *ab initio*. It operates according to its plain language until relieved against by a Court of Equity or possibly treated as a penalty by a Court of Law in an action brought on the instrument. It is further to be remarked that the relief in such cases turns upon very fine distinctions, and is, therefore, necessarily uncertain, as at once appears from a comparison of the cases reported in 6 Bom. H. C. Rep , pp. 8, 9 ; 2 Mad H. C. Rep., 451; 2 Calc. L.R., p. 202 and L. R. 2 Eq. 221.

To hold that the alteration under such circumstances is immaterial would, we think, be contrary to the spirit of the rule as [375] stated by Lord Denman in delivering the judgment of the Exchequer Chamber in *Davidson* v. *Cooper* (1). "The strictness of the rule," he says, "on this subject as laid down in Pigot's case can only be explained on the principle that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind and the rule adhered to. The party who may suffer, has no right to complain, since there cannot be any alteration except through fraud or laches on his part."

(1) 13 M. & W. 343. (2) 5 E. & B. 83. (3) 7 Q.B.D. 270.

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The reasoning of the Court in *Anandji Visram* v. *Nariad Spinning and Weaving Company* (1), where the circumstances were analogous to those under consideration, has a close bearing on the present case. The Court was there asked to hold an alteration in the Memorandum of Association of the Company, which was in its nature material, to be immaterial on the ground that the alteration was illegal. The Court, however, refused to do so on the ground that the plaintiff's position was practically altered by the fact that he would have to resort to legal proceedings to be protected from it if attempted to be enforced against him; and, further, that the nature of his remedy was far from clear. The nature of the remedy, it is true, is not open to doubt in the present case, but the result of its application can scarcely be said to be otherwise. We think, therefore, that the first question referred to us should be answered in the affirmative, which renders it unnecessary to answer the second question.

Plaintiff to pay costs of reference.

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6 B. 376 = 6 Ind. Jur. 535 = Chitty's S. C. C. R. 106.

[376] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice, and Mr. Justice Melvill.

VENU (*Plaintiff*) *v.* COORYA NARAYAN (*Defendant*).*

[10th December, 1881.]

Malicious prosecution, action for—Reasonable and probable cause—Effect of order of discharge of a person accused of an offence before a Magistrate—Presidency Magistrates' Act IV of 1877, *ss.* 87, 121, 122.

The discharge of an accused person by a Presidency Magistrate, under s. 87 of the Presidency Magistrates' Act IV of 1877, is such a termination of the prosecution as entitles the accused to maintain an action for malicious prosecution.

[R., 19 B. 717.]

THE following case was stated for the opinion of the High Court under s. 7 of Act XXVI of 1864, by W. E. Hart, First Judge of the Court of Small Causes at Bombay:—

"1. This was an action to recover the sum of Rs. 505 as damages for the malicious prosecution of the plaintiff by the defendant.

"2. The defendant in this case charged the plaintiff, her mother, and sister, with the theft of a golden watch-chain from the room of the defendant, and with theft of nine copper pots, a bed, a sheet and a piece of red cloth from the room of his daughter in the opposite house.

"3. The police after investigating this charge declined to take up the matter themselves, and referred the defendant to the Magistrate, who eventually granted a summons against the plaintiff alone for being in possession of property reasonably suspected of having been stolen and failing to account satisfactorily for her possession of it.

"4. The case was heard by Mr. Cooper, Senior Magistrate of Police, who, after taking the evidence of the defendant and all his witnesses, for the prosecution, ordered the plaintiff to be discharged without calling on her to go into evidence, in her defence, or framing a charge against her, in the manner provided in ss. 121 and 122 of the Presidency Magistrates' Act IV of 1877.

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* Suit No. 737 of 1881.

(1) 1 B. 320.

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"5. It does not appear, on the face of the Magistrate's notes (which were put in evidence before me), under what section of the Presidency Magistrates' Act (IV of 1877) the order was made; **[377]** but I presume it must have been under s. 87, which occurs in Chap. VIII, headed 'Of inquiry into cases triable by the High Court.' Explanation II of this section provides that a 'discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.'

"6. The present action was then instituted in the Small Cause Court. I found that there was no reasonable or probable cause for the prosecution of the plaintiff by the defendant, inasmuch as all the articles, which he had accused her first of having stolen and then of having in her possession unlawfully, were her own, and had, in fact, been presented by him to her while she was in his keeping. I also found that there was express malice, as it appeared to me that the prosecution had been instituted in consequence of the plaintiff having left the protection of the defendant on account of a severe beating inflicted on her by him in the course of a quarrel which took place between them shortly after the defendant had brought home his newly-married bride.

"7. The pleader for the defendant, however, contended that no action for malicious prosecution would lie, as the Magistrate's order of discharge had not finally disposed of the prosecution and could not, therefore, be said to be a determination in the plaintiff's favour of the proceedings before him. I was of opinion that such an order was analogous to the throwing out of a bill by the grand jury in England when an action for malicious prosecution can be maintained, though there is nothing to prevent another indictment being preferred at the next assizes: Roscoe's N. P. Evidence (12th ed.), p. 770. I also considered that such an order was, in fact, a final determination in the plaintiff's favour of *that* prosecution, especially if regard be had to the fact that up to the present time no attempt has been made nor intention alleged to 'revive' the prosecution. The 'revival' contemplated in the explanation above cited could not now take place without the issue of a fresh summons, or of a notice equivalent to a summons to the plaintiff; and no Magistrate who had once discharged a prisoner on the ground that no sort of *prima-facie* case had been made against him on the evidence then adduced for the prosecution, would after so long an interval issue such fresh **[378]** summons or notice without a satisfactory explanation by the prosecutor, detailing the additional evidence he was prepared to adduce, and showing why he was not able to adduce it before. Such a 'revival' would, therefore, be, in fact, another prosecution in which the prosecutor might or might not be successful, but, at any rate, until he succeeded in it, he would still remain liable for having recklessly instituted the former prosecution in which he so signally failed under circumstances that raised a strong presumption that in instituting it he had no reasonable or probable cause, and was actuated by malice. Lastly, it seemed to me that the effect of the contention by the defendant's pleader was virtually this: The more utterly groundless and malicious the criminal charge may be, the less chance shall the person injured thereby have of his civil remedy. According to the argument of the defendant's pleader, there could be such a final determination of the prosecution as would entitle the accused person to maintain an action for malicious prosecution only in one of two cases, *viz.*, on withdrawal of the prosecution by permission of the Magistrate under s. 125, or on acquittal under s. 126.

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In the case of a malicious prosecution there would, of course, be no withdrawal. So that according to the defendant's pleader it can only be on 'acquittal' under s. 126 of a case 'tried' by the Magistrate that an action could be maintained in respect of a prosecution maliciously instituted before him. Section 126 occurs in Chap. X of the Act, which is headed 'Of the trial of cases by Presidency Magistrates.' Section 116 in the same chapter provides that in cases in which the Magistrate has power to impose imprisonment for a term exceeding six months (as he had in this case(1)), there shall be a formal charge to be drawn up in accordance with the terms of Chap. IX; but s. 122 seems to justify the postponement [379] of the drawing up of the final charge until the Magistrate is of opinion that a *prima facie* case has been established against the accused. Until the charge has been drawn up, and the prisoner has pleaded to it, as provided in s. 122, it seemed to me no 'trial' could be said to have commenced; and the 'order of acquittal' contemplated in s. 126 can only be made in case of a 'trial.' Where, therefore, as in the present instance, the case never reaches the stage of 'trial', because the Magistrate is of opinion that no sufficient *prima-facie* case has been made out to warrant the framing of a 'charge', it seemed to me the Magistrate's only course, after having once granted the summons (2), was to 'discharge' the prisoner. It appeared, then, absurd to say that because he did not frame a 'charge' for which he saw no *prima-facie* ground and go through the farce of 'trying' a 'charge' which in his opinion was unsustainable, for the sake of recording 'an order of acquittal,' the person injured by the preferment of a baseless accusation was to have no remedy in the shape of an action for malicious prosecution. On the same principle, a malicious prosecutor might put his victim to all the disgrace, expense and trouble of a criminal prosecution, and then avoid the consequence of his own ill-doing by absenting himself from the Magistrate's Court on the day of an adjourned hearing, when under s. 118 or s. 124 the complaint would simply be 'dismissed.'

"8. I accordingly passed a verdict in favour of the plaintiff for Rs. 280 and costs, and certified her pleader's costs Rs. 51; but at the request of the defendant's pleader, and on the deposit by the defendant in this Court of the amount of the verdict and costs, and Rs. 50 as costs of the reference, the verdict was made subject to the opinion of the Judges of the High Court on the following question:—

"Was the discharge of the plaintiff by the Magistrate such a termination of the prosecution as entitles her to maintain an action for malicious prosecution?

"9. If the answer to this question is in the affirmative, the present verdict will stand; if in the negative, the verdict for the plaintiff will be set aside and an order for non-suit be entered."

[380] The defendant did not appear in person or by counsel.

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(1) If he proceeded under the Indian Penal Code, s, 411, see Presidency Magistrates' Act, s. 10. The fact that the summons appears to have originally issued under the Police Act (XIII of 1856), s. 35, whereby the Magistrate could only inflict a fine of Rs. 100 or three months' imprisonment, would not apparently deprive him of the power to commit to the High Court or to inflict the greater punishment provided by s. 411 of the Indian Penal Code as modified by s. 10 of the Presidency Magistrates' Act; see Presidency Magistrates' Act, ss. 98 and 117.

(2) Presidency Magistrates' Act IV of 1877, ss. 32, 33.

JUDGMENT.

SARGENT, J.—We answer the question in this case, *viz.*, was the discharge of the plaintiff by the Magistrate such a termination of the prosecution as entitled her to maintain an action for malicious prosecution, in the affirmative.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill, Mr. Justice West and Mr. Justice Pinhey.

BAISURAJ, WIDOW OF SANMUKRAM (*Original Defendant*), *Appellant v.* DALPATRAM DAYASHANKAR (*Original Plaintiff*), *Respondent.** [2nd February, 1882.]

Vendor and purchaser—Hindu law—Necessity of possession—Vendor without possession—Ejectment—Sale of right of entry—Right of purchaser—Construction—Intention of parties.

A Hindu, whose estate is in the possession of a trespasser or a mortgagee, may sell his right of entry as such, or his equity of redemption as such, and the purchaser may thereupon sue to eject the trespasser or to redeem the mortgage; but a bill of sale by a Hindu vendor, purporting to convey *the estate itself*, executed by a person who is not in possession, cannot operate as a present conveyance, nor enable the purchaser to sue in ejectment.

Raja Saheb Prahlad Sen v. *Baboo Budhusing* (1) and *Ronu Bhobosundree Dassah* v. *Issurchunder Dutt* (2) followed.

Bikan Singh and others v. *Mussamut Parbutty Kover and others* (3), *Gangahurry Nundee* v. *Raghubram Nundee* (4), and *Lokenath Ghose* v. *Jugobundhoo Roy* (5), referred to.

Cases will often arise in which, though a bill of sale may in terms purport to convey the property itself, yet it is clear upon the face of the instrument that the intention of the parties was to convey the right of entry or the equity of redemption, and nothing more. In such cases the Court should not lay stress on the mere terms of the instrument, but give effect to the intention of the parties, and recognize the purchaser's right of action.

[N. F., 9 B. 324; F., 29 B. 42; Appr., 6 B. 387 (389); R., 6 B. 645; 27 B. 31 (38).]

THIS was a special appeal from the decision of A. D. Pollen, Acting Assistant Judge of Surat, reversing the decree of the Second Class Subordinate Judge of Broach.

[381] The facts of the case are fully stated in the order of reference.

The case first came before Westropp, C.J., and Kemball, J., who, on the 18th August, 1877, referred it to a Full Bench with the following statement:—

WESTROPP, C.J.—The plaintiff Dalpatram brought this suit against the first defendant Bai Suraj, a widow, to obtain possession of 32 bighas and a fraction of *vazifa* land in the village of Vejulpore, then in the possession of the second defendant Mahomed Dussoo, who claimed to hold the land as sub-tenant of the first defendant Bai Suraj. There were two other defendants, who did not appear at the original hearing, and who are not parties to this special appeal. They were averred in the plaint to be sub-tenants of Bai Suraj.

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* Special Appeal, No. 292 of 1874.

(1) 12 M.I.A. 275 (307) = 2 B. L.R.P.C. 111.
(2) 11 B.L.R. 36.
(3) 22 W. R. 99.
(4) 14 B. L. R. 307.
(5) 1 C. 297.

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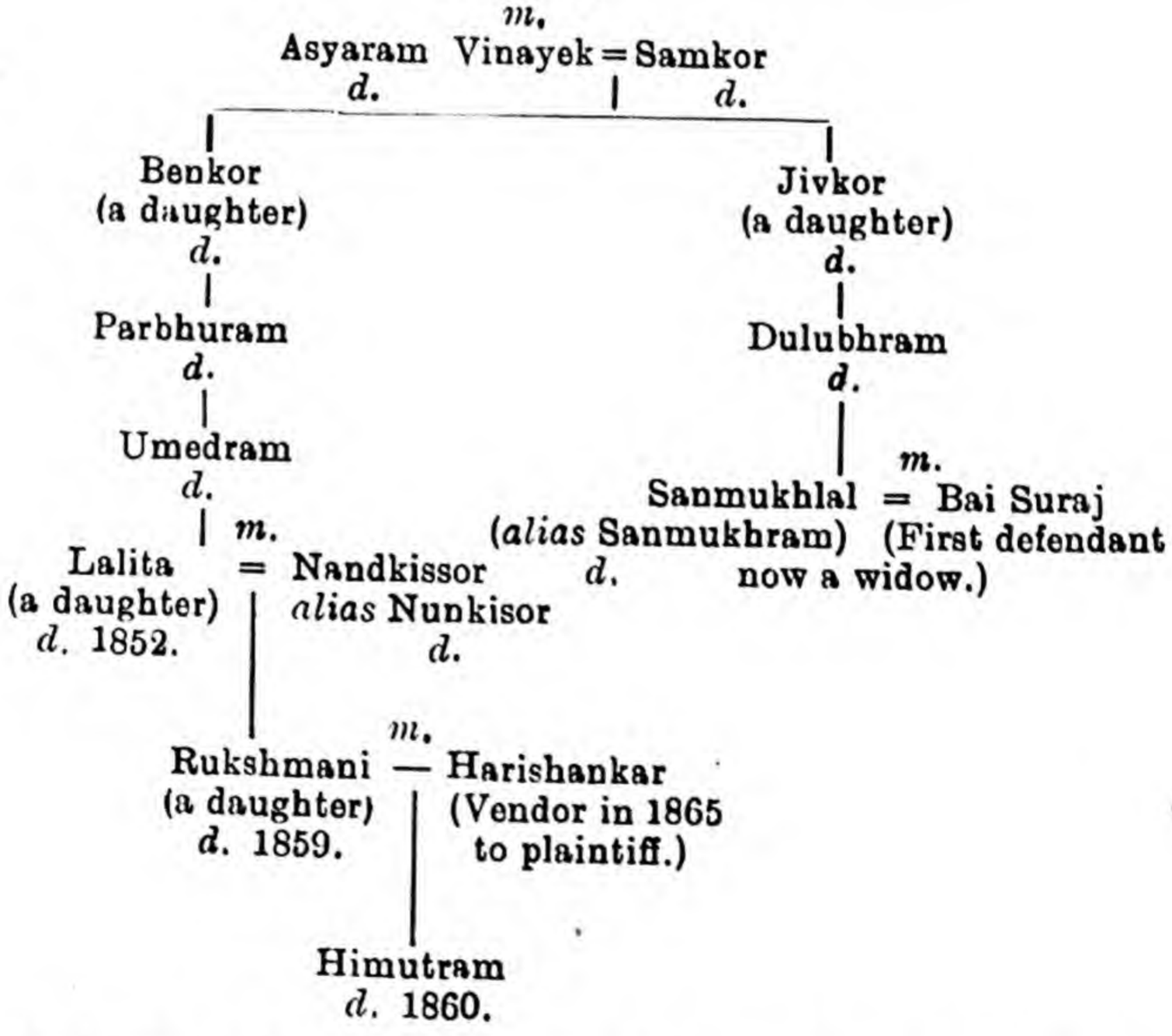
The plaintiff's title rested upon a deed of conveyance executed to him on the 21st June, 1865, by Harishankar, the husband of a woman named Rukshmani, whom he had survived. That deed (Ex. No. 3), rendered into English *viva voce* by the Court Interpreter, is as follows :—

"I have taken from you Rs. 2,995 in ready cash of the company's currency. In consideration of the same, I have sold to you property situated at Broach, &c., &c., known as the property of Asyaram, obtained by me by inheritance. I have sold the same to last so long as the sun and moon endure, and I have given up my claim to the whole of this property (property here specified in detail). The whole of the above-mentioned property was distributed in the time of Parbhuram Asyaram, and there were deeds of partition accordingly. The Haveli lands, buildings thereon, and other lands are entered in the Government records mentioned above. The same, as well as open land, all these from this day I have given possession of to you. You may occupy, use, mortgage, let, or sell the same. I have now nothing to do with those properties. I have executed this deed of my own will and pleasure."

It is found as a fact by the Assistant Judge that the plaintiff's vendor, Harishankar, was not in possession at the time of the execution of the above deed.

[382] Asyaram Vinayek, in whom the property was originally vested in possession, had four wives : but as only one of them, namely, Samkor, appears to have left any issue by him, she alone is mentioned in the following pedigree, which may be usefully introduced here :—

Pedigree.



The *vazifa* land in dispute originally belonged, as already stated, to Asyaram Vinayek, and eventually descended upon his great-great-grand-daughter Lalita through her father Umedram. From Lalita it descended upon her daughter Rukshmani, and upon her death in 1859 it descended upon her son Himutram, and, upon his death in 1860, it would appear to have descended upon his father Harishankar, husband of Rukshmani. At

least this course of descent from Lalita to Rukshmani, from Rukshmani to Himutram, and from Himutram to Harishankar, was determined by the High Court with respect to another portion of the property of Asyaram Vinayek consisting of a house and land in Broach (see the judgment of Forbes, J.—Arnould, Acting C. J., **[383]** and Warden, J., concurring—in *Navulram Atmaram* v. *Nandkishore* (1). The *vazifa* land in dispute in the present suit was, as a matter of fact found by the Assistant Judge, enjoyed by Lalita and her daughter in succession, the *kabulayats* given by the under-tenants being executed in favour of Lalita and Rukshmani successively, and the rent being paid to them. We gather from the judgment of the Assistant Judge, Mr. Pollen, in the Regular Appeal in this case, that he also held * Himutram to have been in possession from the death of his mother Rukshmani in 1859 until his own death in 1860 —at which time it would appear that the first defendant, Bai Suraj, the widow of Sunmukhlal (*alias* Sunmukhram), who was a great-great-grandson of Asyaram Vinayek, induced the sub-tenants to attorn to her by executing *kabulayats* in her favour, and paying rent to her. Hence it is that Harishankar was not in possession when, in 1865, he conveyed the *vazifa* land to the plaintiff by the deed above set forth.

The Subordinate Judge, relying on *Girdhar* v. *Daji* (2), has held that Harishankar, not being in possession at the time of the execution of the deed, the plaintiff, as his vendee, cannot recover the land in this action.

The Assistant Judge, referring to the first passage in the judgment of Couch, C. J., in *Girdhar* v. *Daji*,—*viz.*, "although, according to Hindu law, transfer of possession is not essentially necessary to give validity to a sale of immoveable property, yet it is essential that the vendor should have possession at the date of the sale,"—proceeds to comment on it thus: "This doctrine, if applied literally to the present case, would decide the suit against the plaintiff, because his vendor Harishankar became by operation of law the owner of the property, and the power of alienation is **[384]** a necessary incident of ownership. It seems evident to me, then, that the suit in question was not determined with reference to this doctrine. I am certain that the decision in question has been misunderstood, at-least by many of the pleaders and Subordinate Judges. After quoting with approval a Privy Council case (12 Calc. W. R. P. C. 6), which only shows that a purchaser may claim a performance of the contract whenever his vendor becomes in a position to perform it, as, for instance, on the happening of a certain contingency, Chief Justice Couch proceeded to say 'the vendor could not sell property of which he had been dispossessed at the date of the sale. *The sale under such circumstances could only, at the utmost, give a right to sue for the land of which the vendor had been dispossessed.*'† In most cases this is all the purchaser wants: this is all he wants in the present instance. If the purchaser cannot get all he wants from Bai Suraj, he may then sue his vendor for damages. It is not pretended that all the property cannot be reached by suing Bai Suraj, for it is in the possession of tenants paying rent to her. If she, before the sale to the plaintiff, had

* NOTE.—There may be a shade of doubt whether the Assistant Judge positively found this to be so. But, even assuming that the sub-tenants did not pay rent to Himutram, the presumption of law would, until they repudiated tenancy under him, be that after the death of Rukshmani they continued to be the tenants of her son Himutram, who was her only child and undoubted heir; and the Assistant Judge must be regarded as finding that Bai Suraj did not obtain possession until after Himutram's death in 1860, when the sub-tenants or sub-tenants in occupation attorned to her.

† The italics are those of the Assistant Judge.

(1) 1 B.H.C.R. 209.

(2) 7 B.H.C.R.A.C.J. 4.

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destroyed any of the property, or made its delivery impossible, then, perhaps, the doctrine might have applied; but here we have the case of Harishankar succeeding to certain property, and selling his right to it to a third party. The third party seeks to enforce his right by ousting a trespasser; and as he can reach all the property by doing so, he is, I think, entitled to the relief he seeks. The difficulty of possession may be got over from another point of view. Though Harishankar himself never had possession, those through whom he claims by inheritance had possession, namely, Lalita and Rukshmani. His claim as heir being established, their possession may be regarded as his, and this being so, he has a right to sell the property." The learned Assistant Judge then reversed the decree of the Subordinate Judge, and made a decree for the plaintiff with all costs against Bai Suraj.

There being some conflict of authorities as to the effect of absence of possession on the part of a vendor, we submit to a Full Bench the question, whether, under the circumstances above related, and especially the fact that Harishankar was not in **[385]** possession in 1865 when he executed the conveyance to the plaintiff, the latter can maintain this suit against Bai Suraj and her sub-tenants?

The question argued before the Full Bench was whether the sale, under which the plaintiff claimed, was invalid, because his vendor was not in possession of the property sold at the time of the sale.

Nagindas Tulsidas, for the appellant, relied upon, *Raja Sahib Prahlad Sen* v. *Baboo Budhusing* (1); *Ranee Bhobosoondree Dasseah* v. *Issurchunder Dutt* (2); *Mathews* v. *Girdharlal Fatechand* (3); and *Kachu Bayaji* v. *Kachoba Vithoba and another* (4).

Gokaldas Kahandas, for the respondent, contended that a sale was not void merely because the vendor was not in possession of the property sold. If he had a right to it, the sale was valid. The learned pleader cited *Bikan Singh* v. *Mussamut Parbutty Kooer* (5); *Gungahurry Nundee* v. *Raghubram Nundee* (6); and *Lokenath Ghose* v. *Jugobundhoo Roy* (7).

The following is the judgment of the Full Bench delivered by—

JUDGMENT.

MELVILL, J.—In *Raja Sahib Prahlad Sen* v. *Baboo Budhusing* (1) and in *Ranee Bhobosoondree Dasseah* v. *Issurchunder Dutt* (2) the Judicial Committee have clearly stated their view of the law to be that the execution of a bill of sale by a Hindu vendor does not pass an estate, unless there be a transfer of possession actual or constructive, and that, consequently, the sale of an estate by a person who is not in possession cannot operate as a present conveyance, nor enable the purchaser to sue in ejectment. This decision has been followed in two reported cases by this Court—*Mathews* v. *Girdharlal Fatechand* (3), *Kachu Bayaji* v. *Kachoba Vithoba* (4), and the question, therefore, appears to us to be, so far as this Court is concerned, concluded by authority.

[386] There are, indeed some Calcutta cases in which the Privy Council rulings seem to have been evaded or disregarded—*Bikan Singh and others* v. *Mussamut Parbutty Kooer* (5), *Gungahurry Nundee* v. *Raghubram Nundee* (6), and *Lokenath Ghose* v. *Jugobundhoo Roy* (7); but those

(1) 12 M.I.A. 275 (307) = 2 B L.R.P.C. 111.
(2) 11 B L.R. 36.
(3) 7 B.H.C R. O.C.J. 1.
(4) 10 B.H.C. R. 491.
(5) 22 W. R. 99.
(6) 14 B.L.R. 307.
(7) 1 C. 297.

rulings are couched in terms so clear and authoritative, that we think we must hold ourselves bound by them, until the law be differently stated by the Judicial Committee.

It may, indeed, be taken as established that a Hindu, whose estate is in the possession of a trespasser or a mortgagee, may sell his right of entry, as such, or his equity of redemption, as such, and that the purchaser may thereupon sue to eject the trespasser, or to redeem the mortgage. It must be confessed that it savours somewhat of technicality to insist that the result shall be wholly different, merely because the bill of sale purports to convey the estate itself, and not the right of entry, or the equity of redemption. It is not, however, a disadvantage that persons in this country should be compelled to do what they seem very unwilling to do, namely, to state the truth, and express their real intentions, in the instruments which they execute. It would tend to honest dealing if, in such documents as that relied on by the plaintiff in this case, the vendor were to admit that he was out of possession, and was merely selling his right of action, instead of falsely pretending that he sold an estate of which he was in possession, and that he put the purchaser in possession at the time of the sale. We do not, therefore, see that we need be astute to find arguments for explaining away the Privy Council decisions; and we are quite prepared to follow them to the full extent to which, we think, they were intended to go.

Cases will, no doubt, often arise in which, though a bill of sale may, in terms, purport to convey the property itself, yet it is clear upon the face of the instrument that the intention of the parties was to convey the right of entry, or the equity of redemption, and nothing more. *Vasudev Hari* v. *Tatia Narayan*(1), which was referred to the Full Bench at the same time with the present case, is an instance in point. In such cases we should not, we **[387]** think, lay stress on the mere terms of the instrument, which follow a certain established usage, but should give effect to the intention of the parties, and recognize the purchaser's right of action. But there is nothing to take the present case out of the operation of the rule laid down by the Judicial Committee; and we, therefore, reply to the Division Bench that the plaintiff cannot maintain his suit against Bai Suraj and her sub-tenants.

On the return of the case by the Full Bench, it came for final disposal before Melvill and Kemball, JJ., who, on the 14th February, 1882, reversed the decree of the Assistant Judge, and restored that of the Subordinate Judge, with all costs on the plaintiff throughout.—(*Note* : see next case.)

Decree reversed.

(1) 6 B. 387.

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6 B. 387 (F.B.).

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APPELLATE CIVIL—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill, Mr. Justice West, and Mr. Justice Pinhey.

VASUDEV HARI PATVARDHAN (*Original Plaintiff*), *Appellant v.* TATIA NARAYAN, SON AND HEIR OF NARAYAN HAIBUTRAV, DECEASED, AND OTHERS (*Original Defendants*), *Respondents.** [2nd February, 1882.]

Vendor and purchaser—Hindu law—Possession—Sale of land by a Hindu—Vendor without possession—Sale of right of entry—Conveyance of right of action—Right of purchaser.

Where a Hindu vendor sold his share in certain land, but expressly stated in the deed of sale that he was out of possession; that the land was in the hands of a third party, to whom it had been mortgaged without the vendor's authority, and that he (vendor) empowered the purchaser to bring a suit against the person in possession in order to recover the vendor's share in the land, with mesne profits,

Held that what the deed contemplated was nothing more than the transfer of the right of entry, although, according to the invariable mode of expression in such documents, the vendor professed, in terms, to convey the property itself.

Held further that the purchaser acquired the same right of action which his vendor possessed, notwithstanding that the vendor was not in possession at the date of the sale.

Bai Suraj v. *Dalpatram* (1) referred to.

[Appr., 6 B. 380 (396) ; **R.,** 9 B. 324.**]**

THIS was a special appeal from the decision of W. M. Coghlan, Judge of the District Court of Thana, affirming the decree of Naro Mahadeo, Second Class Subordinate Judge of Mahad.

[388] The case first came before Westropp, C.J., and West, J., who referred it to a Full Bench on the 20th August, 1877. The facts are fully stated in the following order of reference :—

WESTROPP, C.J.—The plaintiff brought this suit to obtain possession of three-fifths of a field situated at Birvadi, within the jurisdiction of the Subordinate Judge of Mahad, in the Southern Konkan. He alleged that he had purchased one-third of the field from Ganpatrav Narayan and four-fifths of the same field from Tukaram Haibutrav and other persons, which shares in the field were respectively conveyed to him by deeds of assignment respectively dated the 28th August 1867, and the 4th September, 1868. The plaintiff also claimed mesne profits for six years. The plaint alleged that Narayan Haibutrav, the father of the first defendant Tatia, though entitled only to a fifteenth of the field, mortgaged the whole of the field to Kaloji Jivba, the father of the second defendant, Dayaram Kaloji.

The first defendant, Tatia Narayan, son of Narayan Haibutrav, in his written statement alleged that the field belonged to him and Bandhu Vithalrav, the third defendant, and had been duly mortgaged by Bandhu Vithalrav, and Narayan Haibutrav to Kaloji Jivba on Shake 1783 for Rs. 60, and was further mortgaged by the same mortgagors to the same mortgagee on Shake 1788 for Rs. 46. Kaloji Jivba, the mortgagee, was the father of the second defendant, Dayaram Kaloji, who in his written statement contended that the first and third defendants were the owners of the

* Special Appeal, No. 80 of 1877.

(1) See 6 B. 380.

field ; that it had been duly mortgaged as aforesaid and that the mortgages, upon a partition which had taken place in the family of the mortgagees, had been allotted to the fifth defendant, Sitaram Jivba, uncle of the second defendant, Dayaram Kaloji. This Sitaram Jivba in his written statement relied on the law of limitation, denied the title of the plaintiff, and alleged title in the mortgagors.

Neither the third defendant Bhandhu Vithalrav, nor the fourth defendant Khashaba Narayan appeared.

The plaintiff's vendors not being in possession at the dates of the respective assignments by them to the plaintiff, the **[389]** Subordinate Judge (who held the suit to be within time) made a decree against the plaintiff on the authority of *Girdhar* v. *Daji* (1).

On regular appeal by the plaintiff, the District Judge directed the Subordinate Judge to try, as an issue, the question whether the field in dispute, called Kamath, had been partitioned. That issue the Subordinate Judge found in the negative, and he found also that the family of owners was still undivided.

The District Judge thereupon expressed his opinion to be that the suit should have been constituted a suit for partition against all the members of the undivided family, and that he would have been willing to allow an amendment of the plaint for that purpose and the necessary addition of parties as defendants, were he not of opinion that, the vendors of the plaintiff not having been in *actual* possession at the sales made by them respectively A. D. 1867 and A.D. 1868 or at any subsequent time, the sales to the plaintiff were void by Hindu law, and accordingly he affirmed the decree of the Subordinate Judge.

The question for consideration by the Full Bench is whether, on the ground alone of absence of possession by the plaintiff's vendors at the respective times of sale of the above-mentioned shares in the said field to the plaintiff and their subsequent want of possession, the plaintiff is debarred from maintaining this suit if the mortgages above mentioned were not executed for the benefit or with the authority of the undivided family.

The case was argued before the Full Bench along with the case of *Bai Suraj* v. *Dalpatram* (2).

Manekshah Jehangirshah appeared for the appellant.

R. S. Tipnis appeared for the respondents.

JUDGMENT.

The following is the judgment of the Full Bench delivered by

MELVILL, J.—In *Bai Suraj* v. *Dalpatram* (2) we have expressed our opinion that a Hindu vendor cannot by a bill of sale pass corporeal property of which he is not in possession, but that he may convey a right of action, either in express terms or by the use of such language as indicates that that, and nothing else, was the intention of the bill of sale. We think that in the present case the Exs. Nos. 3 and 4, on which the plaintiff's right to sue **[390]** depends, ought to be construed as conveying a right of action, and nothing more. The vendors expressly state that they are out of possession, and that the property is in the hands of a third party, to whom it has been mortgaged without their authority ; and they thereupon empower the purchaser to bring a suit against the person in possession, in order to recover their shares in the land, with mesne profits. What is contemplated appears to be nothing more than

(1) 7 B.H.C.R.A.C.J. 1 (4).

(2) See 6 B. 380.

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the transfer of the right of entry, although (in accordance with what we believe to be the invariable mode of expression in such documents) the vendor professes, in terms, to convey the property itself.

Our reply, therefore, to the reference is that the plaintiff has acquired the same right of action which his vendors had, notwithstanding that the vendors were not in possession at the date of the sale.

On the return of the case to the Division Bench, Melvill and Pinhey, JJ., on the 28th April, 1882, reversed the decrees of the Courts below, and remanded the case for the determination of the shares of the different parties in the land in dispute.

Decrees reversed and case remanded.

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6 B. 390.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Justice.

ASHABAI AND ANOTHER (*Plaintiffs*) *v.* HAJI TYEB HAJI RAHIMTULLA AND OTHERS (*Defendants*).* [23rd February, 1882.]

Practice—Misjoinder—Cause of action—Civil Procedure Code (Act X of 1877), s. 44, Rule (b).

The plaintiffs, who were the widow and daughter of A, sued the executors of the will of A's father (B) for administration and account. There were four distinct subjects of claim in the plaint, *viz.*, (1) the estate of A's great grandfather, (2) the estate of A's grandfather, (3) the jewels and ornaments which formed the *stridhan* of A's mother which were in A's possession at the time of his death, (4) a sum of Rs. 1,90,000 which it was alleged that B had settled on A at the time of his marriage. Subsequently to the filing of the suit the first plaintiff amended the plaint and claimed the jewels and ornaments, which formed the subject-matter of the third claim, as her own property, alleging that they had been presented to her on the occasion of her marriage. The plaint prayed (1) for a declaration that a **[391]** certain portion of the estate in the hands of the first three defendants (the executors of B) had been ancestral property in B's hands, (2) for an account and administration, (3) that the jewels and ornaments should be delivered up.

Held that there was a misjoinder of causes of action having regard to the provisions of rule (*b*), s. 44 of the Civil Procedure Code (Act X of 1877). Part of the claim in the plaint was to a portion of A's estate, and was founded upon the plaintiffs' alleged rights as heir of A. The other portion of the claim in the plaint, *viz.*, that relating to the ornaments, had no reference to A's estate, and was personal to the first plaintiff herself.

[Diss., 18 A. 256=16 A.W.N. 52; 31 B. 105=8 Bom. L.R. 734; Rel., 10 Ind. Cas. 737=7 N.L.R. 43; R., 16 B. 608.]

THE plaintiffs Ashabai and Emnabai were the widow and infant daughter of one Haji Adam Haji Esmail who died intestate in May, 1878. The first three defendants were the executors of the will of one Haji Esmail Haji Habib, who was the father of Haji Adam Haji Esmail. The fourth defendant Tyeb Haji Joonas was not originally a defendant to the suit, but was subsequently added as a party by an order of Court.

There were four distinct subjects of claim in the plaint—

(1) In respect of the estate of one Haji Joosub Bulladina, the great-grandfather of the said Haji Adam Haji Esmail, which comprised moveable and immoveable property. This property was alleged to have come into the testator's hands as ancestral estate.

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* Suit No. 616 of 1879.

(2) In respect of the estate of one Haji Habib Haji Joosub the grandfather of the said Haji Adam Haji Esmail, which was of the value of ten lakhs or thereabouts. This was also alleged to have come to the testator as ancestral property.

(3) In respect of jewels and ornaments of the value of Rs. 75,000, portion of which, it was alleged, formed the *stridhan* of one Jamboobai, the deceased mother of the said Haji Adam Haji Esmail, which, with the remainder thereof, it was alleged had been presented to Haji Adam on his marriage with the first plaintiff. The plaint alleged that the said jewels and ornaments were in the possession of Haji Esmail Haji Hajib at the time of his death in September, 1878. In respect of these jewels and ornaments the plaint was amended after it was filed. As amended it contained the following additional clause:—"*The said jewels and ornaments were presents made to the first plaintiff in contemplation of her marriage and on the occasion of her marriage with* **[392]** *the said Haji Adam Haji Esmail, and the same were and are the property of the first plaintiff.*"

(4) In respect of a sum of Rs 1,90,000 which the said Haji Esmail Haji Habibs ettled as and for the benefit of the said Haji Adam Haji Esmail shortly after his marriage.

The plaint prayed for declaration that the share of the estate of Haji Joosub Bulladina (the great-grandfather) come to the hands of Haji Esmail Haji Habib and the estate of Haji Habib Haji Joosab (the grandfather) which came to the hands of the said Haji Esmail Haji Habib were ancestral property, and unaffected by his will.

(2) That an account should be taken of the said estates, and the defendants ordered to pay their shares to the plaintiffs.

(3) That the defendants be ordered to deliver up the said jewels and ornaments.

(4) That the estate of Haji Esmail Haji Habib should be administered.

Hon. *F. L. Latham* (Acting Advocate General) and *Inverarity*, for plaintiffs.

Starling and *Jardine*, for the first three defendants.

Pigot and *Long*, for fourth defendant.

Starling objected.

There is a misjoinder of causes of action having regard to rule (*b*) of s. 44 of the Civil Procedure Code (X of 1877), which provides that no claim against an executor, administrator or heir, as such, shall be joined with claims against him personally, unless the personal claims arise with reference to the estate of which he is executor, administrator or heir.

The plaint was originally filed by the plaintiffs as heirs of Haji Adam against the executors of Haji Esmail. The fourth defendant was added under an order of Court. The first plaintiff then amended the plaint by adding claims in respect of ornaments which she claimed in her own right.

Pigot in support of the objection.

The plaint was originally framed on the supposition that the original gift was to Haji Adam. The amendment has changed **[393]** the character of the plaintiff's claim. Here both plaintiffs at first claim the ornaments as representatives of Haji Adam, and then the first plaintiff by amendment claims the ornaments in her own right.

Latham, contra.—All the claims in the plaint are personal claims. We sue for individual rights, not as heirs. The test is the right of the defendant to set off personal claims against the plaintiff. You must read "heirs" in the section as meaning persons suing as such in a representative

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capacity, *e.g.*, as holding certificate of heirship. Here we are not described as heirs in the plaint. Refers to rule 5, Order XVII of the English orders. In the Civil Procedure Code "heir" is causelessly added without distinguishing between representative and personal character equally included in the word. This suit is not a suit by the plaintiffs *qua* heirs.

Starling in reply.—An heir never does or can sue purely in a representative capacity. He is always beneficially interested in subject-matter of suit. The word "heir" was inserted in the Act, because in this country heirs and legal representatives can in many cases sue without having obtained letters of administration or any other like authority, and the Legislature intended that the rule which in England applies only to executors and administrators should also apply to cases in which representatives of any kind could sue.

JUDGMENT.

SARGENT, J.—The objection made to this plaint is that it infringes the provisions of rule (*b*), s. 44 of the Civil Procedure Code (Act X of 1877). This section states certain exceptions to the general rule laid down in s. 45, which permits a plaintiff, subject to the discretion of the Court, to join several causes of action in the same suit. Rule (*b*) of s. 44 explicitly declares that no claim by a person suing as heir shall be joined with a claim by him personally, except in a certain case. Now, when can it be said that a claim is made by "an heir as such?" Plainly such a claim is made when the plaintiff rests his claim entirely on the allegation that he is the heir of another, and, as such, asserts a right against the defendant. In the present case the first plaintiff claims as heir of Haji Adam to recover part of his estate. **[394]** With this claim, however, is included another claim personal to the first plaintiff herself. Nor does the case fall within the exception, for the one claim is to a portion of Haji Adam's estate; the other has no reference to that estate at all.

It appears to me, therefore, that there is a misjoinder in view of the provision of rule (*b*) of s. 44, and that one of the claims made by the first plaintiff in this plaint must be struck out.

Attorneys for the plaintiffs.—Messrs. *Jefferson, Bhaishanker, and Dinsha.*

Attorneys for the defendant.—Messrs. *Macfarlane and Edgelow* and Messrs. *Payne and Gilbert.*

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6 B. 394=6 Ind. Jur. 537.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

SAMAT AND OTHERS (*Original Plaintiffs*), *Appellants v.* AMRA AND OTHERS (*Original Defendants*), *Respondents.**

[28th February, 1882.]

Hindu law—Inheritance—Rule of succession as between relatives of the whole-blood and half-blood—Brothers—Brothers' sons—Collaterals—Practice—Plaintiffs entitled to more than they claim in plaint.

The plaintiffs (along with others not parties to the suit), were relations of the half-blood to the *propositus*, and the defendants were his relations of the whole blood; but, counting from the ancestor, the plaintiffs were *sapindas* of the fifth

* Second Appeal, No. 91 of 1880.

degree, and some of the defendants *sapindas* of the sixth, and the rest *sapindas* of the seventh degree of the *propositus*.

Held that there not being any special provision in the Mitakshara or the Mayukha in respect of persons of the half-blood other than brothers and their sons, the general rule applies, that the nearest *sapinda* succeeds in the absence of special local custom to the contrary, and, therefore, the plaintiffs were the heirs of the *propositus* to the exclusion of the defendants or any of them.

The plaintiffs having sued for a smaller share than they were entitled to, the High Court limited its decree to that amount only.

[N.F., 19 A. 215=17 A.W.N. 53 (F.B.); 6 C.L.J. 190; F., 24 B. 317.]

THIS was an appeal from the decision of A. L. P. Larken, Acting Assistant Judge of Ahmedabad, reversing the decree of the Subordinate Judge (Second Class) of Dhandhuka.

The plaintiffs and the defendants were descendants of one Chella, whose great-great-grandson Lakha Lunvir held a two-anna **[395]** share in the village of Sundariana. The plaintiffs alleged that they were entitled to a third of this share in preference to the defendants, who, they prayed, should be directed to pay to the plaintiffs Rs. 200, being the equivalent of the third claimed.

The defendants, among other things, contended that the plaintiffs were descendants of the *propositus* of the half-blood, and they themselves descendants of the whole-blood, and, as such, better entitled to succeed. They also contended that the suit was time-barred.

The Subordinate Judge decided both these contentions in favour of the plaintiffs, whose claim was consequently allowed. This decree was reversed, and the claim rejected by the appellate Court. The plaintiffs appealed to the High Court.

Nanabhai Haridas, for the appellants.

Shantaram Narayan, for the respondents.

The second appeal was heard by Westropp, C.J., and F. D. Melvill, J., who directed the appellate Court at Ahmedabad to prepare a full and detailed pedigree of the family, commencing from Chella, the common ancestor of the plaintiffs and the defendants, and to show in such pedigree whether the sons of the said Chella were by different wives, and which of them were so, and to set forth their names and the names of all the persons through whom the parties claimed title. The appellate Court was also directed to show in the pedigree what members of the family were living at the time of the death of Lakha Lunvir, and what members had died since, and what members were now living. The Court was further directed to find whether the suit was barred by the law of limitation.

These directions were complied with by the appellate Court, which supplied to the High Court the pedigree required, and found that the suit was not barred.

The second appeal was then re-heard by WESTROPP, C.J., and PINHEY, J., and the following judgment was delivered :—

JUDGMENT.

WESTROPP, C.J.—This is an appeal from the decree of Mr. Larken, Acting Assistant Judge of Ahmedabad. On the 26th July, 1880, this Court directed the Acting Assistant Judge to prepare and submit to it a fuller pedigree than that originally **[396]** furnished, and also to determine whether or not this suit was barred by the law of limitation. A fuller pedigree has been supplied by Mr. Unwin the successor of Mr. Larken, as Acting Assistant Judge, and Mr. Unwin has also found

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that this suit is not barred by the law of limitation. On the 15th November last, being the second day of the hearing of this cause before us upon the new materials supplied by Mr. Unwin, we stated our opinion to be in accordance with that of Mr. Unwin on the question of limitation, *viz.*, that while the property, the subject of dispute, was in the possession of the mortgagee, the defendants could not be considered as holding adversely to the plaintiffs; the possession of Lakha Lunvir's mortgagee being, after the death of Lakha Lunvir, a possession (subject to the mortgagee's rights) for the heirs of Lakha Lunvir whosoever they might be, and not a possession for the defendants in particular, unless they were exclusively such heirs. Lakha Lunvir died in A.D. 1857. The mortgage was not satisfied until Samvat 1931 (A.D. 1874-75), and this suit having been commenced in A.D. 1876, was in time.

We reserved the question of succession for further consideration, and now proceed to dispose of it.

The suit is one to recover Rs. 200, being the third share of Rs. 600, which latter sum was the produce of the two-annas' share of Lakha Lunvir in the village of Sundariana. That two-annas' share the plaint treated as divisible into three shares, whereof the plaintiffs were entitled to one share, the defendants to another share, and one Vishaman Samla to the remaining third share. The plaint alleged that the defendants had, since the redemption of the mortgage, appropriated the whole of the produce of the two-annas' share. Such of the defendants as appeared, alleged that the plaintiffs being of the half-blood and the defendants of the whole-blood in relation to Lakha Lunvir, the plaintiffs were not entitled to succeed to any share of his property. The correctness of the pedigree, as found by Mr. Unwin, has not been disputed. It shows that the common ancestor of Lakha Lunvir (the deceased *propositus*) and of the plaintiffs and the defendants was Shelar (or Chelar) who had two wives, namely, Tolibai and Punamti. By Tolibai he had two sons Godad (whose great-grandson was Lakha Lunvir) and Chela, from whom the defendants [397] Khoda and Nathu are descended, as also Sura, their deceased brother, represented by his widow, the defendant Hirabai. The defendants Amra, Oghad, Desha, Lakha, and Alegh (Alingh) are also descended from Chela. By Punamti, Shelar had two sons, Lakshman and Jiva. From Lakshman, the three plaintiffs are descended. From Jiva, Vishaman Samla above mentioned and his three brothers Jiva, Meram, and Surig appear to have been descended.

These facts show that the plaintiffs and Vishaman Samla and his three brothers (none of whom are parties to this suit) are relations of the half-blood only to Lakha Lunvir, whereas all of the defendants are his relations of the whole-blood. But, counting inclusively from the common ancestor Shelar, the plaintiffs are *sapindas* of the fifth degree of Lakha Lunvir. Vishaman Samla and his three brothers and the defendants Khoda, Nathu, Amra and Oghad are *sapindas* of the sixth degree of Lakha Lunvir and the defendants Desha, Lakha and Alegh (Alingh) are *sapindas* of the seventh degree of Lakha Lunvir.

Neither the Mitakshara nor the Mayukha takes any distinction between persons of the whole-blood and persons of the half-blood, except in the cases of brothers and sons of brothers. Legitimate sons by different mothers succeed equally to the property of their father (1). The Mitakshara, in the succession of brothers, places uterine brothers—*i. e.*, brothers

(1) West and Bühler (2nd ed.), pp. 45, 336, 337.

of the whole-blood—before brothers of the half-blood. It then brings in brothers of the half-blood next after brothers of the whole-blood (Mitakshara, chap. II, sec. iv, pl. 5, 6,) and places the sons of brothers respectively in the same order as their respective fathers, pl. 7. The Mayukha also prefers brothers of the whole-blood to brothers of the half-blood, and next to brothers of the whole-blood brings in their sons (Mayukha, Chap. IV, sec. viii, pl. 16.). It names, as next in succession, the paternal grandmother, and after her the sister, and after the sister introduces together the paternal grandfather and the half-brother, and after them the paternal great-grand-father, the father's brother, and the sons of brothers of the half-blood (Mayukha, chap. IV, sec. viii, pl. 18, 19, 20.).

[398] There not being any special provision in either of these two treatises of authority in this Presidency in respect of persons of the half-blood other than brothers and their sons, and there not being any allegation or proof of a special custom in the locality whence this case comes, or any precedents cited to show that further distinction is taken between the whole-blood and half-blood than the two classes already mentioned, we think that we must fall back on the general rule that the nearest gotraja sapinda succeeds(1). That being so, and the plaintiffs having shown themselves to be one degree nearer to the common ancestor Shelar than some of the defendants and two degrees nearer than the other defendants, we think that the plaintiffs are the heirs of Lakha Lunvir; but, as the plaintiffs have only sued for one-third of the produce of his share, we must limit our decree in their favour to that amount, as the Subordinate Judge also seems to have done. The objection, made in his Court by the defendants, that Vishaman Samla was not a party, has not been repeated in the District Court or here. We reverse the decree of the Acting Assistant Judge Mr. Larken, restore the decree of the Subordinate Judge, and direct such of the defendants as have resisted the claim of the plaintiffs to pay the costs of the suit and of both appeals.

Decree reversed.

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6 B. 398.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

ARDESIR JEHANGIR FRAMJI BANAJI, ELDEST SON AND MANAGER OF THE LATE JEHANGIR FRAMJI BANAJI (*Original Plaintiff*), *Appellant v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Original Defendant*).* [15th March, 1882.]

Bombag Abkari Act V of 1878, *ss.* 14, 20, 64, 65, 66 *and* 67—*Tree—Toddy-producing tree.*

The words "any tree" in s. 14 and "every toddy-producing tree" in s. 20 of the Bombay Abkari Act V of 1878, mean all trees in the Bombay Presidency to which the Act applies, from which toddy is drawn or produced, **[399]** and not merely those in regard to which no special rights of drawing toddy previously existed.

THIS was a regular appeal from the decree of J. W. Walker, Judge of Thana.

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* Regular Appeal, No. 83 of 1881.

(1) Mitak., Ch. II, s. v, pl. 1; Mayukha, Ch. IV, s. vii, pl. 21; Manu, Ch. X, pl. 167; Colebrooke Dig., Bk. V, Ch. VIII, pl. 434.

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The plaintiff sued on 3rd January, 1881, to establish his right to draw toddy from the date-trees in his gardens in the village of Uran in the Panval Taluka of the Thana district, and to make vinegar therefrom, on payment of a fixed sum merely, and to remove the defendant's obstruction to the enjoyment of his right. The plaint set forth that the cause of action arose on the 28th of August, 1880, when the Bombay Government gave its second and final answer rejecting the plaintiff's application to compensation or a continuance of his right.

The defendant contended that the Government of Bombay rejected the plaintiff's petition on the 24th of March, 1880; that, under s. 67 of the Abkari Act, an action against the Government should be instituted within four months from this date, and that, consequently, this suit was brought too late. The defendant also contended that the rates leviable under the Abkari Act superseded those agreed upon before its enactment.

The Judge raised two issues: 1*st*, is the suit barred by limitation? 2*nd*, is the suit maintainable under the provisions of the Abkari Act? and decided both of them in the negative and rejected the plaintiff's claim. The plaintiff appealed to the High Court.

Manekshah Jehangirshah, for the appellant.—The claim of the plaintiff is founded on a lease, dated 24th of June, 1802, granted to Balaji Dadaji, through whom he claims, by the East India Company, which in consideration of a sum of money agreed not to tax his trees to an extent greater than that fixed in that lease. The District Judge having decided the case on preliminary issues, this lease has not been produced, and the case must be argued on the basis that it is genuine and contains provisions as above. [MELVILL, J.—Granting that to be so, what is there to show that the plaintiff is exempted from the operation of the Abkari Act?] There is no provision which authorizes Government to put an end to existing rights, which should not be extinguished by mere implication. Sections 14 and 20 of the Abkari Act should be so **[400]** construed as to mean that Government could tax toddy trees where special rights did not exist. The plaintiff has, under the lease, the right of drawing toddy without a license, and the Government could not force him to take out a license.

As to limitation; the prohibitions enacted in cl. 1 of s. 67 does not apply, for it contemplates suits to which the Act applies. That clause relates to actions for damages; whereas the plaintiff's claim here is for a declaration of his right and for nominal damages merely. The principle ruled in *Asmal Saleman* v. *The Collector of Broach* (1) in regard to the Broach Talukdars' Relief Act, is analogous to this.

Hon. *F. L. Latham*, Acting Advocate-General, with Hon. *V. N Mundlik*, Government Pleader, for the respondent.

Assuming the alleged rights to have existed, they were taken away by the Abkari Act. The preamble of the Act shows that it is intended to apply to liquor. The plaintiff can scarcely manufacture vinegar from toddy without manufacturing liquor in the sense of the Act. The definitions of the words 'toddy' and 'liquor' in s. 3 seem to point to that conclusion. Section 14 is clear and peremptory. It peremptorily enacts "no toddy shall be drawn from any tree" without a license. This distinctly means any tree whatever. Section 20 authorizes the levy of a duty on "every toddy-producing tree." There is in this or in s. 14 no reservation of special rights, which, if they existed, must be taken to have

(1) 5 B. 135.

been extinguished by the Act. Special rights and immunities in the Poway Estate and certain villages are dealt with in ss. 64 and 65. The Legislature puts an end to them on payment of compensation. In s. 66 the Legislature makes the provisions of the above sections extendible to holders of other villages in the island of Salsette. The plaintiff is not a holder of such village or any village. He has gardens in Uran, a village in quite a different taluka, and has not made any application to Government within three months of the Abkari Act coming into operation.

The suit is, moreover, barred by cl. 2 of s. 67. The contention founded on cl. 1 may be good, but the plaintiff's **[401]** claim is certainly barred by the former. The Government of Bombay rejected the plaintiff's petition on the 24th of March 1880, which is the date on which the cause of action, if any, arose to him. A repetition of that order on a subsequent occasion makes no difference. [MELVILL, J.—If it did, a person has only to continue to make petitions to keep his cause of action perpetually alive.]

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—Section 14 of Bombay Act V of 1878 says "no toddy shall be drawn from any tree * * * except under the authority and subject to the terms and conditions of a license to be granted by the Collector." Section 20 says: "For every toddy-producing tree from which toddy is drawn, there shall, if Government so direct, be levied, for any period during which such tree is tapped, such duty as Government from time to time directs." There is no ambiguity in the terms of these sections. They are clearly as wide and general as words could make them. We are asked to hold that when the Legislature spoke of "any tree" and "every tree", it only meant any and every tree in regard to which no special right of drawing toddy previously existed. It would be a strong measure, even if the Act were wholly silent as to the reservation of rights, to assume that the Legislature, when it used such general terms, intended to limit them in the manner suggested. But, in fact, ss. 64, 65, and 66 of the Act show that, when the Legislature intended to recognize such rights over toddy-producing trees, it thought it right and necessary to introduce into the Act express provisions authorizing the grant of compensation; and it would be contrary to all rules of construction to imply a similar recognition of such rights in other cases not expressed.

For this reason we confirm the decree of the Court below with costs.

Decree confirmed.

6 B. 402=6 Ind. Jur. 538.

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[402] APPELLATE CRIMINAL.

Before Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

EMPRESS *v.* RANGO TIMAJI.* [21st December, 1880.]

The Indian Penal Code, s. 414—*Voluntarily assisting in the disposal of stolen property* —"*Believe*"—"*Suspect.*"

The word "believe" in s. 414 of the Indian Penal Code is much stronger than the word "suspect", and involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property, with which he was dealing, was stolen property. It is not sufficient in such a case to show that the accused person was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired.

[F., 29 B. 449=7 Bom. L.R. 527 (533) ; 5 Bom. L.R. 877 (878) ; Rat. Unrep. Cr. Cas. 254 (272) ; Rat. Unr. Cr. Cas. 594 ; R., 1 Bom. Cr. Cas. 55=13 Bom. L.R. 635= 12 Cr. L.J. 457=11 Ind. Cas. 993 ; Rat. Unrep. Cr. Cas. 778 (779).]

THIS was a criminal application under the extraordinary jurisdiction of the High Court.

On the 4th August, 1880, the accused was convicted by C. Wiltshire, First Class Magistrate of Dharwar, of the offence of having voluntarily assisted in the disposal of stolen property under s. 414 of the Indian Penal Code, and sentenced to suffer rigorous imprisonment for one year, and to pay a fine of Rs. 100, or, in default, to suffer imprisonment for six months more.

On the 12th October, 1878, a bullock was sold by one Rango and purchased by Basalingapa, on the guarantee of the accused that it was the property of Rango. It was in evidence that the bullock belonged to one Maharudrapa, and that it had been stolen from him. In his examination before the Magistrate, the accused stated that he knew Rango who had left his village sometime ago during the famine and gone to some other place to earn his livelihood ; that Rango had told him (the accused) that he (Rango) had purchased the bullock for Rs. 16. From that statement of the accused the Magistrate came to the conclusion that the accused knew, or had reason to believe, the bullock to be stolen property, inasmuch as he knew Rango to be so poor that the latter was obliged to leave his village in order to earn the means of his livelihood in some other place. The Magistrate, accordingly, convicted the accused of the offence charged. On **[403]** appeal, the conviction and sentence were upheld by the Sessions Judge (A. C. Watt) of Dharwar on the 4th September, 1880.

The accused thereupon made an application to the High Court for the exercise of its extraordinary jurisdiction.

The High Court (Melvill and West, JJ.,) sent for the record and proceedings of the case.

On the receipt of the record and papers, the application was heard by MELVILL and NANABHAI HARIDAS, JJ.

Manikshah Jehangirshah, for the accused.—There is no evidence in the case to show that the accused knew or had reason to believe that the bullock was stolen property. There were no circumstances connected with the sale of the bullock which would induce any reasonable man to

* Criminal Application, No. 195 of 1880, under Extraordinary Jurisdiction.

believe that it had been stolen. The lower Courts were wrong in inferring. from the acquaintance of the accused with Rango and his statement in his examination, any knowledge or belief on the part of the accused that the bullock was stolen property. The facts proved in the case do not constitute the offence of which the accused has been held guilty.

The Hon. Rao Saheb *V. N. Mandlik*, (Acting Government Pleader), appeared on behalf of the Crown.

1880 DEC. 21. APPELLATE CRIMINAL. 6 B. 402= 6 Ind. Jur. 538.

JUDGMENT.

The following is the judgment of the Court delivered by

MELVILL, J.—It lay upon the prosecution in this case to prove that the accused person knew or had reason to believe that the bullock was stolen property. It was not sufficient to show that the accused was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired. The word "believe" in s. 414, Indian Penal Code, is a very much stronger word than "suspect", and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. The only circumstance alleged in the present case is that Rango, whose honesty the accused guaranteed, had left his village during the famine to earn livelihood elsewhere. The Court find it impossible to hold that it is a legal inference from this single circumstance that the accused had reason to believe, or, in other words, that he had **[404]** sufficient reason to feel convinced, that Rango could not, during so long an interval, have acquired sufficient means to purchase a bullock of the value of Rs. 16.

On the ground, therefore, that there is no evidence on which a conviction could legally be based, the Court reverse the conviction and sentence, and order the fine, if paid, to be refunded.

Conviction and sentence reversed.

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6 B. 404 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Melvill, Mr. Justice West and Mr. Justice Pinhey.

MULCHAND KUBER (*Original Defendant*), *Appellant v.* LALLU TRIKAM (*Original Defendant*), *Respondent.** [9th March, 1882.]

Mortgage—Purchase of equity of redemption by first mortgagee — Priority—Notice—Merger.

On the 20th of August, 1870, M, the owner of a house in Gujarat, mortgaged it to the defendant's father with possession. On the 2nd of December, 1871, he made a *san* mortgage of the same house to the plaintiff. On the 20th of April, 1872, M sold the equity of redemption to the defendant's father who became the purchaser without cancelling his first mortgage. The plaintiff subsequently sued M to enforce his *san*-mortgage, and, obtaining a decree, placed an attachment on the house, which attachment, however, was removed on the application of the defendant's father. The plaintiff now sued to establish his right to levy the amount due on his *san*-mortgage. He claimed priority to the defendant on the authority of *Toulmin* v. *Steere* (1) where it was held that a purchaser of the equity of redemption could not set up a prior mortgage of his own against subsequent incumbrances of which he had notice (2).

* Special Appeal, No. 412 of 1876.

(1) 3 Mer. 210.

(2) 11 B.H.C.R. 41.

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Held, that the intention of the defendant's father when purchasing the equity of redemption having been to retain the benefit of all his rights, his son the defendant might properly require the redemption of his first mortgage as the condition of the plaintiff's enforcing the decree upon his mortgage against the property.

A mortgagee purchasing the equity of redemption may indicate his intention to keep his charge upon the property alive otherwise than by express words.

Per WEST, J.—The successive charges created by the owner of an estate may be regarded as fractions of the ownership, which embraces the aggregate of advantages [405] that can be drawn from it. Each charge in its turn constitutes a deduction from the original aggregate, and the nominal ownership may itself then be reduced to a small fraction of what it once was. Still, be it small or great, it is a possible object of sale or purchase, and there is no ground of reason for saying that an incumbrancer who is already owner of one fraction of the property may not buy this other fraction without forfeiting the former fraction in favour of other fractional owners in the remainder left after deduction of his prior share.

[F., 6 B. 561 (562); R., 13 A. 482 (F.B.); 22 C. 33; 3 C.P.L.R. 82 (84); 14 C.P.L.R. 177.]

THIS was a special appeal against the decision of S. Tagore, Judge of Ahmedabad, confirming the decree of the Subordinate Judge of Dholka.

One Mahadas Dayalji mortgaged his house at Dholka on the 20th of August, 1870, for Rs. 400 to Kuber Shivlal. That mortgage was registered. The same mortgagor mortgaged the same house to the plaintiff, Lallu Trikam, on the 2nd of December, 1871, for Rs. 99. That mortgage was not registered. Subsequently the house was sold on the 20th of April, 1872, by Mahadas Dayalji to Kuber Shivlal for Rs. 400. The deed of sale was registered. The plaintiff (the second mortgagee in point of time) obtained a decree against Mahadas Dayalji for the amount due on the *san*-mortgage of the 2nd December, 1871, and having attached the house under that decree, Kuber Shivlal, the first mortgagee (who was not a party to that suit), by application under s. 246 of Act VIII of 1859 caused the attachment to be raised. The plaintiff then brought the present suit against Kuber Shivlal to establish the plaintiff's right to levy the amount due on his *san*-mortgage of the 2nd of December, 1871. Both the Courts below held that the purchase was subject to the *san*-mortgage. The defendant, therefore, specially appealed to the High Court.

Nagindas Tulsidas, for the appellant.

Gokaldas Kahandas, for the respondent.

The case was heard by Westropp, C.J., and Nanabhai Haridas, J., who referred to the Full Bench the question whether a first mortgagee who purchased the equity of redemption could fall back on his first mortgage and retain his priority to subsequent incumbrancers, or whether the doctrine of *Toulmin* v. *Steere* (1) applied in India, *viz.*, "that one purchasing an equity of redemption cannot set up a prior mortgage of his own against subsequent incumbrances of which he had notice."

[406] WESTROPP, C. J., after stating the facts, made the following order :—

In the Courts below, much attention was given to the question whether when Kuber purchased the house he had notice of the plaintiff's mortgage. The District Judge (Mr. Tagore) has found that the *onus* was on the defendant to prove that he purchased without notice of the plaintiff's mortgage, and that the defendant has failed to prove it. But the recent decision of the Full Bench in *Sobhagchand* v. *Bhaichand* (2) would seem to

(1) 3 Mer. 210.

(2) 6 B. 193.

render that question immaterial. The plaintiff's mortgage being for a sum under Rs. 100 was optionally registrable; the circumstance that it was unregistered, is unimportant, as, until Act III of 1877, s. 50 (which is not retrospective), there was not, as has often been decided, any competition between an optionally registrable instrument and a compulsorily registrable instrument, which the plaintiff's deed of purchase was, it being for a consideration exceeding Rs. 100. The question which is hereby referred to a Full Bench is, whether the defendant can be permitted to fall back on his mortgage of the 20th August, 1870, or whether the doctrine laid down in *Toulmin* v. *Steere* (1) prevails in India, and Kuber Shivlal must be deemed to have purchased subject to the plaintiff's mortgage? In favour of the opinion that the defendant may fall back on his mortgage of 1870 is the Madras case *Rama* v. *Subbaraya* (2), and against that opinion is the Bombay case *Ichharam* v. *Raiji* (3). *Hirachand* v. *Bhasker Shende* (4) is not in point, inasmuch as Shende's deed of purchase was invalid under Reg. XVIII of 1827, s. 10, cl. 1, being unstamped, and, therefore, a nullity. In the recent Full Bench case—*Lakshmandas* v. *Dasrat* (5)—the struggle was between mortgagees, and not between a mortgagee and a purchaser. As to *Toulmin* v. *Steere*, it should be mentioned that in *Gregg* v. *Arrot* (6) Sir Edward Sugden, as Lord Chancellor of Ireland, speaking of that case said in 1835 : "That case went further than any previous authority, and Sir Samuel Romilly and I thought it at **[407]** the time wrong, and recommended an appeal, but a relative of the party charged preferred paying the money to encountering any further litigation." It is also unfavourably criticised in *Watts* v. *Symes* (7) by Knight Bruce, L.J.; and in *Walcott* v. *Condon* (8), Lord Chancellor Blackburne said: "Now as to authorities, I should scarcely venture, however high the authority of Sir William Grant, to act on the decision in *Toulmin* v. *Steere*." On a re-hearing of *Walcott* v. *Condon* before Lord Chancellor Maziere Brady, he said : "But one of the *dicta* of Sir William Grant in *Toulmin* v. *Steere* has been questioned, namely, that 'there is express authority to show that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice'; and undoubtedly, if he meant to question the right of the lender to acquire a right to stand in the place of a prior incumbrancer, his observations could not be maintained." But see his subsequent observations at page 18 of the report.

Assuming even that *Toulmin* v. *Steere* and the *dicta* in it must be considered as accepted law in the United Kingdom, which assumption the remarks above quoted show to be at least doubtful, it may be fairly questioned whether the doctrine is such as is suitable to India, or is in conformity with justice. Amongst the cases which bear more or less on *Toulmin* v. *Steere* are *Parry* v. *Wright* (9), *Garnett* v. *Armstrong* (10), *Hayden* v. *Kirkpatrick* (11), and *Unthank* v. *Gabbett* (12). In the last mentioned of these cases the facts were these : A, being owner of premises subject to a charge of £1,000, granted an annuity charged on them to the plaintiff. The premises were afterwards sold to B, who had notice of the annuity. The

(1) 3 Mer. 210. (2) 7 M.H.C.R. 229. (3) 11 B.H.C.R 41.
(4) 2 B.H.C.R. 198. (5) 6 B. 168.
(6) Lloyd and Goold's Rep. *temp.* Sugden, 246—251.
(7) 1 De G. M. & G. 240, 244. (8) 3 Ir. Chan. Rep., 1—13.
(9) 1 Sim. & St. 369, affirmed on appeal 5 Russ. 142 ; but Sir E. Sugden in his Vendors and Purchasers (11th ed.), p. 1030, note (*k*) puts *quœre* to that decision.
(10) 4 Dru. & War. 182. (11) 34 Beav. 645. (12) Beatty, 453.

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conveyance purported to be in consideration of £ 6. By another deed the £1,000 charged and the term securing it were assigned to a trustee for B. B in his answer admitted that he paid £1,006 for the purchase of the premises, of which £1,000 was paid to the owner of the charge. B went **[408]** into possession. It was held that B was entitled to hold the charge for the amount of principal and interest due on it, and the plaintiff should only be at liberty to redeem him, he accounting as a mortgagee in possession. Here the assignment of the term and charge in trust was held sufficient to enable the purchaser to fall back upon the £1,000 charge. The justice of the matter most consistent with the equity and good conscience inculcated by Reg. IV of 1827, s. 26, seems to be that, in so far as the purchaser has beside his purchase an earlier *bona fide* claim on the estate, he should to that extent be permitted to rank against the estate in priority to the incumbrancer whose charge intervenes in point of time between such earlier claim and the deed of purchase, whether or not the purchaser resorts to the technicality of obtaining an assignment of the earlier charge to a trustee for himself. The fair course here would seem to be to permit Lallu Trikam to redeem Kubar Shivlal's mortgage of the 20th August, 1870 (1).

The question on which the opinion of the Full Bench is requested, is whether Kuber Shivlal may, under the circumstances above described, be permitted to fall back on his mortgage of the 20th August, 1870.

The case having been heard by the Full Bench, the following judgments were delivered :—

JUDGMENTS.

WEST, J.—The owner of the house in dispute mortgaged it on the 20th August, 1870, to Kuber, the father—now deceased—of the defendant Mulchand. Possession was taken by the mortgagee in accordance with the terms of the mortgage. On the 2nd December, 1871, the owner made a *san*-mortgage of the same house to the plaintiff. On the 20th April, 1872, he sold his remnant of ownership or equity of redemption to Kuber. The consideration for the sale was Rs. 400, the amount of Kuber's mortgage, and the owner was credited with this amount in Kuber's accounts. But the mortgage was not cancelled. Kuber became purchaser of the equity of redemption without giving up his mortgage, or declaring, in so many words, that the debt was **[409]** satisfied or the security extinguished. What he said was: "The amount of this assurance has been received by me"—*i.e.*, apparently the amount secured by the mortgage.

The plaintiff Lallu subsequently sued the original owner to enforce his *san*-mortgage. He obtained a decree against him, and placed an attachment on the property which was raised on the application of Kuber. The plaintiff then sued to enforce his decree as against Kuber; and the question is, whether Kuber, by becoming purchaser from his mortgagor of the equity of redemption, has so annihilated his own prior mortgage that he has thereby brought Lallu into the position of first mortgagee of property of which Kuber (or now his son Mulchand) is the owner. An objection might, apparently, have been taken to Lallu's enforcing his decree to the detriment of Kuber on the ground that Kuber was not made a defendant in Lallu's suit, though Lallu had notice of his mortgage and his purchase; but this appears to have been waived, and, at any rate, is not a point referred to us.

(1) As in *Lakshmandas* v. *Dasrat*, 6 B. 168; *Naru* v. *Gulabsing*, 4 B. 83; *Shaik Abdulla Saiba* v. *Haji Abdulla*, 5 B. 8.

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"In the case of *Icharam Dayaram* v. *Raiji Jaga* (1) it was said that, "generally speaking, a purchaser of an equity of redemption with notice of subsequent incumbrances stands in the same situation as regards such subsequent incumbrances as if he had been himself the mortgagor. He can neither set up against such subsequent incumbrances a prior mortgage of his own, not consequently a mortgage which he or the mortgagor may have got in." This is the docrine of *Toulmin* v. *Steere*, which, though often doubted and questioned, has never been quite overruled. It rests on the principle that he who becomes owner for a price expended partly or wholly in paying off his own incumbrance on the property he purchases, cannot maintain the continued existence of his incumbrance as against puisne incumbrancers of whose claims he has notice at the time of his purchase. But still the purchaser who pays off a charge and at the same time gets it assigned to a trustee for himself may enforce it as against subsequently created charges, though without this precaution he would, according to *Toulmin* v. *Steere*, be merely relieving an overburdened estate for the benefit of the puisne incumbrancers. It would seem that there must be something **[410]** doubtful in a principle, the operation or inoperativeness of which rests upon so artificial and fine-drawn a distinction as that of a purchaser having become assignee, or only *cestui que trust* of the assignee, of an incumbrance; and the tendency of the decisions, especially of late years, has been to incumber the leading case with so many qualifications and deductions that it retains little or none of its original properties as a guide in such questions as may arise of a kindred nature.

One of the latest of these cases is that of *Adams* v. *Angell* (2) before Hall, V. C., and afterwards before the Court of Appeal. The plaintiff Adams was first mortgagee of a house from Angell of which one Newsom became second mortgagee. Adams sued for foreclosure, and made Newsom a defendant. A decree was obtained for successive foreclosures against Newsom and Angell. Newsom did not redeem, and Angell became bankrupt. Adams then contracted with the trustee in bankruptcy "for the absolute sale to him, subject to the claim of the said J. E. Newsom," of the property for £1,400, it being further stipulated that "£1,380, due upon the security of the said mortgage (to the purchaser Adams) should be retained by the said F. S. Adams out of the purchase money." The money retained was declared to be "in full satisfaction of the said sum of £1,380 .....remaining due.....upon the said mortgage security," and the assignment of the lease by the trustee to Adams was made expressly "subject to the aforesaid claim of the said J. E. Newsom." In the arguments all the familiar cases were cited, and the conclusion arrived at by Hall, V. C., was that "the question, after all, is one of intention." He read "the expressions in the deed as to the debt being satisfied as being a satisfaction only as between the parties to the deed." The reference to Newsom's claim the learned Judge read as one meant to be "not in any way improved or varied by the transaction of purchase, but left to be worked out and ascertained in the suit irrespective of the purchase." On the face of the deed there was no reservation whatever of Adams' right as incumbrancer, there was an express submission to the claim of Newsom; yet the intention of Adams as gathered from **[411]** his correspondence having been to keep his right as incumbrancer in force, he was allowed to do so as against Newsom.

(1) 11 B.H.C.R. 41.

(2) L.R. 5 Ch. D. 634.

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In appeal, Sir G. Jessel, M. R. said: "In a Court of Equity it has always been held that the mere fact of a charge having been paid off, does not decide the question of whether it is extinguished," and of this he gives some instances. The presumption, indeed, is that an owner paying off an incumbrance intends to extinguish it; but the intention, if expressed, governs the case. If no intention is expressed, then his Lordship says: "*Toulmin* v. *Steere* (1) says the incumbrance which is paid off is merged." No intention was *expressed* in the assignment to Adams, but still the learned Judge says: "It is a most extraordinary hypothesis to suppose that Adams could have any other intention (than to keep the charge alive against Newsom) and that he could intend to make Newsom the first mortgagee." James, L.J., rests on the fact of Adams's decree for foreclosure having defined Newsom's right as one to redeem. Newsom's right had been a right to redeem all along, in the sense that he would have to redeem Adams's mortgage before he could give effect to his own against the property. Bagally, L.J., agreed, adding that the purchase having been made pending litigatnoi, the rights of the parties other than the vendor would not be affected by it. The pending litigation, however, created no new rights; it merely fixed a term within which the recognized rights of Newsom and of Angell must be exercised. The relation of Adams and of Newsom remained what it had been that of first and second mortgagees of the same property, so that, if the purchase by Adams of the equity of redemption would have caused a merger of his mortgage before the suit for foreclosure, it would equaliy have caused it after the suit and the conditional decree.

The case decides this; that an intention otherwise manifested is equivalent to an intention expressed to keep the charge alive. All the Judges agreed that in such a case the rule in *Toulmin* v. *Steere* would not apply. There can be little or no doubt, except in very extraordinary cases, that an incumbrancer purchasing intends to do so on the terms most beneficial to himself; **[412]** and as an express statement of this intention is no longer required, the operation of *Toulmin* v. *Steere* in the English law must, for the future, be very limited, until in due course the rule embodied in it is annulled by the House of Lords or remoulded in accordance with increased experience.

The difficulties that have arisen in England in dealing with cases of this kind seem to have been equalled by the embarrassment which the same class of questions have caused the Continental jurists. These are referred to in the case of *Ramu Naikan* v. *Subbaraya Mudali* (2). Puchta thought that there was something opposed to all legal principles in a man's holding a charge on property of which he was proprietor. Other jurists have been driven to say that an antinomy arises in such cases which has to be got over by common sense or an intuitive equity. Such confessions are discreditable to the law as a science. If its received principles lead to opposite conclusions, the principles themselves need revision, and in this instance a reconciling principle is not hard to find. The successive charges created by the owner of an estate may be regarded as fractions of the ownership which embraces the aggregate of advantages that can be drawn from it. Each charge in its turn constitutes a deduction from the original aggregate, and the nominal ownership may itself thus be reduced to a small fraction of what it once was. Still, be it small or great, it is a possible object of sale or purchase, and there is no ground of reason for saying that an incumbrancer who is already owner of one

(1) 3 Mer. 210, (224.)

(2) 7 M.H. C.R. 229.

fraction of the property may not buy this other fraction without forfeiting the former fraction in favour of other fractional owners in the remainder left after the deduction of his prior share. A stranger could buy and hold the residual ownership without affecting the sequence of incumbrances. Why not one of the incumbrancers? If, instead of mental fractions of the whole estate, the incumbrances were those of A, B, C, and D on separate fields *a*, *b*, *c*, *d*, the purchase by A of the remaining one field *e* of the estate would not for a moment be supposed to affect his relations with respect to the successive incumbrancers B, C, D, though these incumbrancers by proceeding against the owner to recover **[413]** the sums due to them might have got *e* sold in execution. The principle applies equally to separate interests in the whole as to interests limited to separate physical parts of the whole. The interests are conditional or qualified interests; but when the condition is satisfied, and so far as they extend, they are fractions of the ownership as much as what remains to the so-called proprietor.

But the owner who buys in a first incumbrance cannot set it up against a second. How, then, can the first incumbrancer buying the residual ownership set up his own incumbrance? He becomes owner it is said, and as owner must satisfy out of the property all the charges created by his predecessor in title. To this there are two answers. What the purchaser bought was not really the "ownership" as an aggregate of all possible rights, but the fragment of it left after a deduction of his own and all the other interests carved out of it. His purchase of this last fraction should leave the other fractions, including his own, in precisely the same position as before. The original owner, again, would have to satisfy the subsequent charges to the whole value of the estate; but that is because of a personal obligation resting on him—a personal relation between him and each incumbrancer binding him to satisfy the charge out of the estate as he may hold it. This relation extends to a stranger purchasing the residual ownership it is said, but it does not extend to the same stranger taking a mortgage of the residue to its full value. Such a mortgagee may take an assignment of any prior mortgage without his own mortgage affecting it: then why not also if, instead of becoming residual owner under the name of mortgagee, he buys the ownership as such? The theory is plainly defective. The personal obligation resting on the original owner to pay each successive incumbrancer or to make him a participator in the ownership, has relation primarily to the ownership as it stands at the time of the transaction; it is extended to an augmented ownership partly because of the difficulty of distinguishing the part newly recovered as by paying off a mortgage, but principally because of the recognition of the debt as an obligation subsisting independently of the property pledged for it, and the justice, as regards the debtor, of enforcing payment of the debt by the means most available. Neither reason applies to a purchaser. He has not contracted **[414]** any personal obligation to an incumbrancer which should make his position worse in paying off the first incumbrance than if he had taken a last mortgage and then an assignment of the first. The enforcement of the discharge of the debts, puisne to the one which he discharges without reference to the capacity of the property to bear both or to the prior right to discharge of the first incumbrance, can only operate to prevent his taking an assignment of it, and so by lessening the demand tend to the perpetuation of separate interests in the property and to making the terms on which money can be raised more onerous by attaching disadvantage

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to the position of a purchaser who would otherwise in many instances give the best price.

It seems, then, that the position of purchaser of the owner's remaining interest and of a first incumbrance, or the position of a first incumbrancer buying the remnant of ownership where there have been several successive mortgages, is quite distinguishable from that of the owner himself on account of the absence, in the purchaser's case, of any general personal obligation which can be fixed upon the whole property so as to override his own mortgage right in it. This has been felt in the English Courts, and has led to the doctrine that, though the original owner cannot set up a prior incumbrance got in by him against a puisne charge, yet a purchaser, whose money is expended partly or wholly in discharging an incumbrance may, at his option, set up such incumbrance as still subsisting for his own benefit as against the puisne incumbrancers. It was formerly thought that the desire to keep the security in force must be expressly stated; now, as the case of *Adams* v. *Angell* (1) shows, the intention may be gathered from indications outside the deed itself.

This is the point to which the cases in the Indian Courts also have been gradually tending. The decisions have not been quite consistent in principle, but the conclusion arrived at in the case of *Ramu Naikan* v. *Subbaraya Mudali* (2) on general principles, is substantially the same as that expressed in the case of *Gopee Bandhoo Shantra Mohapattur* v. *Kale Pudo Banerji* (3). When the purchaser of the owner's residual right chooses to take the **[415]** owner's accompanying obligation, he may do so; but he is not under any compulsion to do so, no more where he happens to be a prior incumbrancer, than when he is altogether unconnected with the other parties except as purchaser. As, then, *Toulmin* v. *Steere* (4), or the apparent principle of that case, has in England been so qualified and encroached upon as to reduce the prejudice to the incumbrancer purchasing to a mere matter of intention clearly signified, and the same modification of its principle has been forced on the other High Courts in India, there does not seem to be any sufficient reason why we should continue to make it a rule here, albeit it has been accepted by the highest authorities in the past. If an incumbrancer buying, intends to retain the benefit of his charge, he must be allowed to retain it. Generally he will intend to retain it, and slight evidence will suffice to establish this. In the present instance the purchaser Kuber retained his mortgage deed uncancelled, though he gave his mortgagor an acquittance in the deed of purchase. It cannot be supposed here, any more than in *Adams* v. *Angell* (1), that the purchaser intended to part with his money or his right to money merely in order to make a present to his puisne incumbrancer; and his intention having been to retain the benefit of all his rights, his son Mulchand may properly require redemption of his own first mortgage as the condition of Lallu's enforcing the decree on his mortgage against the property. The decree of the District Court must, consequently, be reversed with costs throughout on Lallu.

MELVILL, J.—I concur. In *Icharam* v. *Raiji* (5) we applied the strict rule of *Toulmin* v. *Steere*, and I do not know that there was anything in the circumstances of Icharam's case which rendered that rule inapplicable. There was, if I remember right, no argument on the subject.

(1) L.R. 5 Ch. D. 634.
(2) 7 M.H.C.R. 229.
(3) 23 W.R. 338.
(4) 3 Mer. 210.
(5) 11 B.H.C.R. 41.

There may, however, undoubtedly be cases in which the strict rule would be productive of hardship; and I am quite willing that it should be applied with the modifications introduced by recent decisions, and adopted by the Indian Legislature in the Transfer of Property Act, 1882. Section 101 of that Act is as follows:—"Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to the property, the charge or incumbrance shall be **[416]** extinguished unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit."

PINHEY, J.—I am of the same opinion. I also was a party to the decision in *Icharam Dayaram* v. *Raiji Jaga* (1), but at the time I was not aware that the soundness of *Toulmin* v. *Steere* had been questioned. I have known it often questioned since. The rule of law enunciated in that case, though highly technical, was very clear, and had been often acted on as "authoritative." As its application completely disposed of the case before us, I preferred to rest my opinion on it in disposing of *Icharam Dayaram* v. *Raiji Jaga*, rather than discuss the other point which my brother Melvill discussed, as I had at the time been but a short time in the High Court, and my short experience in Gujarat did not qualify me to give an opinion thereon off-hand.

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Before Mr. Justice Bayley.

HARRIETTE A. KING (*Petitioner*) *v.* JAMES S. KING (*Respondent*). ALLAN F. TURNER, (*Intervenor*).* [23rd February and 4th May, 1882.]

Divorce—Intervenor—Right of third persons to intervene—Procedure in case of intervening after decree nisi—*Right to move for new trial— Practice—Procedure—Review—Motion to make absolute a decree* nisi—*Discretion of Court to refuse motion—Further inquiry ordered by Court—Indian Divorce Act IV of* 1869.

A wife sued for dissolution of marriage on the grounds of her husband's adultery and cruelty. The respondent entered an appearance through a solicitor, but did not file any written statement, and did not appear at the hearing, and a decree was made for the petitioner on the 26th July, 1881. On the 3rd October, T, who had acted as solicitor for the respondent, appeared as intervenor, and under s. 16 of the Indian Divorce Act (IV of 1869) obtained a rule *nisi* calling on the petitioner to show cause why a new trial should not be had and all further proceedings under the decree *nisi* should not be stayed. The rule was obtained upon an affidavit of T, in which he stated that since the date of the decree *nisi* he had been informed by the respondent that the petitioner had been, prior to that date, guilty of adultery with a person whose name he mentioned; that he was informed by the respondent that the reason why he (the respondent) had not defended the suit was that he wished to avoid making public the **[417]** fact of his wife's adultery and thus injuring the prospects of his children; that application had been made both to the Advocate-General of Bombay and to the Government Solicitor that they should intervene as representing the Queen's Proctor in India, but that both had declined. The respondent also filed an affidavit corroborating the statements made in T's affidavit. In showing cause against the rule it was contended on behalf of the petitioner that, under the Indian Divorce Act (IV of 1869), the proper course for a third person wishing to intervene was to file an appearance, and then to show cause on the motion to make absolute the decree *nisi*, and that the rule for a new trial was wrong in form.

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* Suit No. 195 of 1881.

(1) 11 B.H.C.R. 41.

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Held that a new trial could not be granted, there being no provision in the Civil Procedure Code (Act X of 1877) for the granting of a new trial. The respondent himself could only have applied for a review of judgment under s. 623, and, even otherwise entitled to a review, the motion of the 23rd October, 1881, regarded as an application for a review, was too late under cl. 162, sch. II of the Limitation Act XV of 1877. Assuming that a third person had the right to apply for a review of judgment, T's application of 3rd October, 1881, was also barred.

Held, also, that, under the Indian Divorce Act (IV of 1869), a third person may show cause against a decree *nisi* being made absolute, but is not at liberty to institute proceedings, *e.g.*, by obtaining a rule, as was done in this case.

Held, also, that T, who had been the solicitor to the respondent and who was in fact, acting at the instance of the respondent, was not entitled to intervene or to show cause against the decree being made absolute. A respondent has no right to show cause and he cannot do indirectly through another what he is not permitted to do himself.

Counsel on behalf of the petitioner subsequently moved to make the decree *nisi* absolute, and contended that the Court having held that T had no right to intervene or to show cause, the affidavits filed by him should be disregarded and taken off the file, and that, no cause having been shown by any other person, the petitioner was entitled, under the provisions of s. 16 of the Indian Divorce Act (IV of 1869), to have the decree made absolute. The Court, however, refused the motion, and adjourned the case, directing that the petitioner should attend personally on a day specified, in order that the matters alleged in the affidavits might be investigated.

[F., 17 C. 570 ; **R.**, 23 B. 698 (704) .**]**

ON the 23rd April, 1881, the petitioner presented a petition, praying for a decree for the dissolution of her marriage with the respondent, on the grounds of the respondent's adultery and cruelty towards the petitioner. The respondent entered an appearance through Mr. Allan F. Turner, a solicitor of the High Court ; but, though ordered to do so, did not file any written statement.

The suit came on for hearing on the 26th July, 1881. The respondent did not appear ; and, after hearing the petitioner's evidence, the Court made a decree *nisi* for the petitioner, with **[418]** costs against the respondent ; and it was ordered that the respondent should pay to the petitioner, as alimony for the maintenance of herself and for the maintenance and education of her two minor children, a monthly sum of Rs. 300 from 26th July, 1881, until the decree *nisi* should be made absolute, or until further order, and that the petitioner should have the custody of the said two children until the said decree should be made absolute, or until further order.

On the 3rd October, Mr. A. F. Turner, who had acted as solicitor for the respondent, appeared as intervenor ; and on his behalf a rule was obtained, under s. 16 of the Indian Divorce Act IV of 1869, calling on the petitioner to show cause why the decree of the 26th July, 1881, should not be set aside and a new trial had. The rule was granted on an affidavit by Mr. Turner, in which he stated that he was informed and believed it to be true that, prior to the date of the decree *nisi* (26th July, 1881), the petitioner had committed adultery with one Captain B. That affidavit set forth the facts upon which this statement was founded. In this affidavit Mr. Turner also referred to various allegations made by the petitioner in her evidence at the hearing of the suit, and stated that he was informed by the respondent that they were wholly untrue. The concluding paragraphs of the affidavit were as follows:—

"I am informed by the respondent that the reason why he did not defend this suit was that he wished to avoid making public the fact of his wife's adultery, and thus injuring the prospects of his children.

"The respondent came to Bombay from Savantvadi on the 30th of August last, and it was from him after his arrival here that I heard, for the first time, of the petitioner's adultery. I consulted the Advocate-General, and suggested that he should intervene as representing the Queen's Proctor in this country; but he was of opinion that he could not do so, as the duties of the Queen's Proctor did not belong to his office, and proposed an application to Mr. Hearn, the Government Solicitor and Public Prosecutor. I, therefore, applied to Mr. Hearn; but he stated that he could not assume the position and duties of Queen's Proctor, because they do not belong to the offices which he holds under Government **[419]** and because they would involve expense for which no provision exists.

"Under the circumstances hereinbefore stated I submit to this Honourable Court that the decree *nisi*, made in this suit on the 26th day of July last, ought to be reserved, or a new trial ordered, on the ground that the petitioner's adultery and the other material facts hereinbefore set forth were not brought before the Court."

It was agreed that, before the rule *nisi* was argued on the merits, the question as to whether Mr. Turner could intervene in the suit should first be decided.

The case now came on for argument on that preliminary point.

Inverarity for the petitioner.—There are two questions to be decided: 1st, whether Mr. Turner, who was the respondent's solicitor, or any person acting at the instance of the respondent, can intervene; 2nd, whether supposing he can intervene, he can do so in the way in which Mr. Turner has intervened in this case. As to the second point, I contend that in India the only thing a person can do after a decree *nisi* has been granted, is to show cause against the decree being made absolute. There is no power given by the Indian Divorce Act (IV of 1869) to any person to intervene by applying for a separate rule or for a new trial as has been done here. The proper course for a person wishing to intervene is for him to file an appearance, and then to show cause when the petitioner moves to make the decree absolute.

No rules have been made under the Indian Divorce Act, and there is no procedure laid down for a person wishing to intervene.

[BAYLEY, J., referred to s. 7 of the Indian Divorce Act.] That section does not apply to questions of procedure: *Abbott* v. *Abbott* (1).

In England the procedure is to ask for a new trial, and not for review See Stat. 21 and 22 Vict., c. 108, s. 18; Pritchard's Divorce Digest, p. 230; *Stoate* v. *Stoate* (2). This case is cited erroneously in Macrae on Divorce, p. 58. There is, however, no provision in the Indian Divorce Act enabling a party to move for a new trial. The proper course in India is to apply for a review **[420]** under s. 623 of the Civil Procedure Code (Act X of 1877). The respondent might have done this either within twenty days of the date of decree under cl. 162 of sch. II of the Limitation Act, XV of 1877, or within ninety days under cl. 173.

Mr. Turner here asks for a new trial. It is clear that in England a new trial would not be granted on the affidavit made by Mr. Turner, and if so, I submit no order for review should be made here. The affidavit alleges (1) that in the petition only general charges of cruelty were made which the respondent could not be expected to meet, and while at the hearing the petitioner made allegations of specific instances of cruelty which he was not prepared for, and which he says are false; (2) the affidavit alleges

(1) 4 B.L.R.O.C.J. 51.

(2) 30 L. J. P. & M. 173=2 Sw. & Tr. 384.

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the petitioner's adultery; but as this, if true, was known to the respondent before the suit was filed, this allegation affords no grounds for review.

As to the charges of cruelty, the charges in the petition are sufficiently precise. See forms annexed to Indian Divorce Act, No. 7. The petitioner was entitled to give evidence of specific instances, although the petition only alleged cruelty generally: Pritchard's Digest, p. 272 *Waddell* v. *Waddell* (1). The respondent might have asked for particulars; *Hill* v. *Hill* (2). It is clear that in this case the respondent himself would not be entitled to a new trial. Here, by inducing his solicitor to apply to the Court, he attempts to get indirectly what he could not get directly. Neither the Indian Divorce Act nor the Civil Procedure Code enables a stranger to the proceedings to apply for a new trial or review.

I contend, therefore, that the rule for a new trial should be discharged, and that we should be allowed to move to make our decree absolute.

Then the question arises whether Mr. Turner can be permitted to show cause against the decree being made absolute. There appears to be no express decision on the point. There is no Queen's Proctor in India. In England any person can intervene as well as the Queen's Proctor. It is clear that neither in India nor in England could the respondent or co-respondent show cause; s. 16 of Act IV of 1869 and s. 7 of Stat. 23 and 24 Vict. **[421]** c. 144 : *Stoate* v. *Stoate* (3). The question, then, is whether they can do so indirectly merely by putting their solicitors in motion; *Clements* v. *Clements* (4). Mr. Turner is really the respondent under another name. The person intervening must be an independant third person: Brown on Divorce, p. 301; *Forster* v. *Forster* (5); See *Latour* v. *Latour* (6).

Hon. *F. L. Latham* (Acting Advocate-General) for Mr. Turner.—In India unfortunately there is no Queen's Proctor. Mr. Turner applied both to the Advocate-General and to the Government Solicitor; but both of them declined to intervene, on the ground that it was no part of their duty. There are two questions here: (1) whether the rule is in the right form; (2) whether Mr. Turner has a right to intervene and obtain the rule.

As to the first question, there are no rules under the Divorce Act yet published in India. In England there are rules; see Brown on Divorce, p. 571. The reason for permitting an intervenor at all, is merely to prevent the Court from acting on insufficient information. In England the Queen's Proctor can only intervene on the ground of collusion; *Latour* v. *Latour* (6). After decree *nisi* he acts merely as one of the public, and may be put in motion by any one, including the parties themselves. Counsel referred to English rules 70, 71, 72, 73 and 74, showing English practice. Under s. 16 of Act IV of 1869 the intervenor may intervene at any time before the decree is made absolute. In *Pollock* v. *Pollock* (7) the Court did what we ask here, *viz.*, to stay further proceedings until the parties appear. I submit the rule is in the right form.

(2) Then, can Mr. Turner intervene? He does not appear now as the respondent's solicitor. There being no Queen's Proctor in India there can be no more proper person to intervene than a solicitor who is an officer of the Court. No private person would be so meddlesome as to intervene. *Stoate* v. *Stoate* (3) goes no further than that a respondent may not

(1) 2 Sw. &. Tr. 584. (2) 31 L.J.P. & M. 193. (3) 30 L.J.P. & M. 173.
(4) 3 Sw. & Tr. 394. (5) 3 Sw. & Tr. 151. (6) 2 Sw. & Tr. 524.
(7) 32 L.J.P. & M. 28 = 2 Sw. & Tr. 310.

intervene. In *Boulton* v. *Boulton* (1) the respondent and co-respondent put the Queen's **[422]** Proctor in motion. In that case Sir Cresswell Cresswell, although he had before him only the affidavits of the parties themselves, said: "I shall certainly not proceed until this matter has been cleared up." *Foster* v. *Foster* (2) is in our favour. *Dearing* v. *Dearing* (3) shows that the nearest relationship to a respondent does not disqualify a person from intervening. Counsel referred to *Bowen* v. *Bowen* (4); *Lautour* v. *Her Majesty's Proctor* (5).

JUDGMENT.

BAYLEY, J.—In this suit the petitioner, Harriette Achesina King, by a petition declared on the 27th and filed on the 29th April, 1881, prayed that the Court would decree the dissolution of her marriage with the respondent, James Stewart King, a captain in the Bombay Staff Corps, then Acting Assistant Political Superintendent at Savantvadi, on the grounds of his adultery and cruelty towards the petitioner, and for an order that he should pay the costs of and incidental to such proceedings.

By a summons which was dated and sealed on the 5th May 1881, the respondent was summoned to appear in the High Court of Bombay on the 27th June then following, and by it he was required to file a written statement of his defence, and serve a copy on the petitioner within four weeks from the service of the summons upon him, in default whereof it was stated that he was liable to have a decree or order passed against him *ex parte*.

The summons was duly served upon the respondent at Savantvadi on the 14th May, 1881, and by an endorsement thereon, bearing that date and signed by him, he thereby acknowledged to have received service of the summons.

By a warrant dated the 23rd May, 1881, signed by the respondent at Savantvadi, he appointed Mr. Allan F. Turner, a solicitor of the High Court, his attorney to defend the suit, and that gentleman by a præcipe dated the 25th June, 1881, requested the Prothonotary to enter an appearance for the respondent in his name, but without prejudice to the respondent's right to plead to the jurisdiction. The warrant was filed in the office of the Prothonotary on the 25th June, 1881.

[423] By a præcipe dated the 25th June, 1881, consented to and signed by Messrs. Crawford and Boevey, attorneys for the petitioner, the respondent's attorney requested the Pothonotary to postpone the hearing of the suit from the 27th June then instant to the 11th July 1881.

By a letter dated the 4th July, 1881, from the respondent's attorney to the attorneys for the petitioner he stated, in reply to their letter of that day, that he had not filed his client's written statement, and that he did not think the respondent intended to put in one; and he suggested, in order to save expense, that the attorneys for the petitioner should apply for a decree on motion for want of a written statement, adding that such a course would render two counsel unnecessary. On the 14th July, 1881, the sitting Judge in chambers, by an order of that date made up on reading the writ of the summons and upon hearing the attorneys for the petitioner, ordered the Prothonotary to set down the suit, subject to any part-heard case on the board of causes, for Monday, the 25th July, 1881, which was accordingly done.

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(1) 2 Sw. & Tr. 405. (2) 2 Sw. & Tr. 524. (3) L. R. 1 P. & D. 531.
(4) 3 Sw. & Tr. 530 (536). (5) 10 H.L.C. 685 (702).

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The suit was called on before myself for hearing and final disposal on the 26th July, 1881, when Mr. Inverarity and Mr. Jardine appearing as counsel for the petitioner, and the respondent being called, and not appearing either in person or by counsel, and upon reading the warrant to defendant filed on behalf of the respondent on the 25th June, 1881, and upon framing an issue and after hearing the evidence of the petitioner and other witnesses called on her behalf, the Court recorded its finding upon the issue in favour of the petitioner, and passed judgment for the petitioner, and ordered and decreed that, unless sufficient cause be shown why the decree should not be made absolute on or before the 26th January, 1882, the marriage had and solemnized on the 5th October, 1871, at St. George's Church at Dublin between the petitioner and the respondent be dissolved by reason of the respondent having, since the celebration thereof, been guilty of adultery coupled with such cruelty as without adultery would have entitled the petitioner to a divorce *a mensa et thoro*; and the Court further ordered and decreed that the respondent should pay to the petitioner her costs of and incidental to the **[424]** suit and of and incidental to a petition for alimony filed on the 6th May, 1881, such costs to be taxed as between attorney and client.

The decree further states that, upon the motion of Mr. Jardine, counsel for the petitioner, who moved for an order upon the said petition for alimony, and Mr. Russel, counsel for the respondent consenting to the same, the Court, by and with such consent ordered that the respondent do pay to the petitioner or her attorneys, Messrs. Crawford and Boevey, as alimony for herself and her two minor children, Isabel Maud and Mabel Caroline, the monthly sum of Rs. 300 from the 26th July, 1881, and to continue to make such monthly payment on or before the 26th day of each succeeding month until that decree *nisi* be made absolute, or until the further order of the Court. And the Court further ordered that the petitioner do have the custody of the said two minor children until such decree be made absolute, or until the further order of the Court. The decree *nisi*, which was dated the 26th July, 1881, was sealed on the 11th August 1881.

By a certificate of the Prothonotary, dated the 18th August, 1881, at the foot of the decree *nisi* it was certified that the sum of Rs. 1,042-4-6 had been allowed by the Taxing Master for the costs in the decree *nisi* mentioned payable by the respondent.

On the 1st October, 1881, Mr. Allan F. Turner, the respondent's solicitor, by warrant of that date appointed Messrs. Chalk and Walker, attorneys, to act for him as intervenor in this suit, and by præcipe dated the 3rd October, 1881, those gentlemen requested the Prothonotary to enter an appearance in their name on behalf of Mr. Allan F. Turner, as intervenor. The warrant was filed on the last-mentioned day.

On the same day, the 3rd October, 1881, the Advocate-General (the Hon. Mr. Marriott) moved before me on behalf of Mr. Allan F. Turner, as an intervenor under s. 16 of the Indian Divorce Act (Act IV of 1869), for a rule calling on the petitioner to show cause why a new trial should not be had, and all further proceedings under the decree *nisi* dated the 26th July, 1881, should not be stayed.

[425] The application was made upon an affidavit of Mr. Turner, sworn and filed on the 3rd October, 1881, and upon an affidavit of the respondent sworn at Bombay and filed on that day, in which he stated that he had carefully read over Mr. Turner's affidavit, that the statements therein made were entirely true, and that Ex. A to Mr. Turner's affidavit

was a true copy of the copy extracts which he made from an original letter mentioned in Mr. Turner's affidavit.

The most material facts alleged in Mr. Turner's affidavit are the following:—

That since the 26th July, 1881, he had been informed, and believed it to be true, that the petitioner had, prior to that date, committed adultery with a certain officer, whom he names, now holding a staff appointment in the Bombay Presidency, and whom, for brevity sake, I will hereafter designate as A.B., who was an intimate friend of the petitioner and respondent, and with whom the petitioner travelled on her return to India in February, 1881.

That the petitioner and A. B. arrived in Bombay from England in the P. & O. S. S. "Malwa" on the 1st March, 1881. He was informed that it had been previously arranged between the petitioner and the respondent that the former should leave Bombay for Vingorla on her way to Savantvadi by the B. I. S. N. Company's steamer which left on the following night, but instead of doing so she remained in Bombay, and stayed at the Esplanade Hotel until the 10th March, when she left for Vingorla by the S. S. "Rajputana." That he was informed that it was A. B.'s intention to leave Bombay for Mhow immediately on his arrival at Bombay; but, being required to give evidence at a certain Court-martial, he found orders awaiting him to remain here, and that he as well as the petitioner resided at the Esplanade Hotel.

That he was informed by the respondent that, shortly after the petitioner's arrival at Savantvadi, he had reason to believe that she had a miscarriage; and, suspecting then for the first time that she had misconducted herself with A. B., he on the 26th March, 1881, intercepted a letter which she had written to A. B., and had **[426]** given to be posted, and after copying the relevant portions of the letter he posted the original to A. B. He annexed to his affidavit a copy of such portions of the letter, which is dated Savantvadi, 26th March, 1881. [His Lordship read extracts from a letter of the petitioner to A. B., and continued.] Such a letter, if genuine, would, I need scarcely say, be very material in an investigation whether the petitioner has misconducted herself with A. B. The letter needs no further comment from me at the present stage of the proceedings.

Mr. Turner's affidavit then proceeds to state *seriatim* the allegations in the petition and what the respondent has informed him by way of denial or by way of explanation in respect thereto; and, if what the respondent has told him be true, it is to be regretted that he did not put in a written statement, as he was ordered to do by the summons, and appear at the hearing and defend the suit.

In para. 24 of his affidavit Mr. Turner states that he was informed by the respondent that on the 10th April, 1881, the day the petitioner left the respondent's house at Savantvadi, and while the ayah was packing up the petitioner's things, the petitioner and respondent conversed together, and it was during that conversation and after he had shown her a copy of the extracts from the letter to A.B. that she confessed to having committed adultery with him between his arrival in England and her departure from Bombay to Savantvadi on the 10th March, 1881.

Mr. Turner in para. 10 of his affidavit says that on or about the 14th May, 1881, the respondent received through the post office a letter dated 17th October, 1880, written by the petitioner while in London to A. B., and addressed to him at Kandahar. The letter reached Kandahar after

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A. B. had left for England, and was sent back to the petitioner to her address in London, but as she had then left for India it was sent out to the respondent. A copy of the relevant portions of the letter was annexed to his affidavit.

The letter is written in warm and affectionate language. [His Lordship read the letter.] Mr. Turner says, in para. 25 of **[427]** his affidavit, that he was informed by the respondent that, when the petitioner told him, just before leaving him on the 10th April, 1881, that she was going to sue for a divorce, he did his best to induce her to accept a deed of separation, and that he renewed his efforts by letters two or three times after she had arrived in Bombay.

In para. 31 he states that he is informed by the respondent that the reason why he did not defend the suit was that he wished to avoid making public the fact of his wife's adultery, and thus injuring the prospects of his children.

In para. 32 he says that the respondent came to Bombay from Savantvadi on the 30th August last (*i.e.*, more than a month after the date of the decree *nisi*), and it was from him after his arrival here that he heard for the first time of the petitioner's adultery. That he (Mr. Turner) consulted the Advocate-General, and suggested that he should intervene as representing the Queen's Proctor in this country; but he was of opinion that he could not so, as the duties of the Queen's Proctor did not belong to his office, and proposed an application to Mr. Hearn, the Government Solicitor and Public Prosecutor. Mr. Turner thereupon applied to Mr. Hearn; but he stated that he could not assume the position and duties of Queen's Proctor, because they do not belong to the offices which he holds under Government, and because they would involve expense for which no provision exists, and he annexed a copy of Mr Hearn's letter to him dated the 22nd September, 1881.

In the concluding para. (the 33rd) of his affidavit, Mr. Turner submitted that, under the circumstances thereinbefore stated, the decree *nisi* made on the 26th July, 1881, ought to be reversed, or a new trial ordered, on the ground that the petitioner's adultery and the other material facts therein set forth, were not brought before the Court.

The learned Advocate-General, while addressing the Court on the 3rd October, 1881, in support of the rule *nisi* which he sought to obtain for the intervenor, Mr. Turner, stated that the respondent had been to him and to Mr. Hearn, but that each had declined to be considered as or in the light of the Queen's Proctor. He cited **[428]** several cases decided in the Court in England for divorce and matrimonial causes, and also a short report of a case before Mr. Justice Phear in Calcutta in 1870—*Willis* v. *Willis* (1)—in which that learned Judge is reported to have said that he was inclined to think that the parties, against whom a decree *nisi* under the Indian Divorce Act, was made, could not come in to show cause against it, and that it was only intended that any party other than the parties to the suit should do so.

Upon the above facts being thus brought to the notice of the Court, I then granted a rule calling on the petitioner to appear and show cause, if any she had, on the 10th January, 1882, why the decree *nisi* made on the 26th July, 1881, should not be set aside and a new trial had, or why the Court should not make such order in the premises as the nature and justice of the case might require, and it was ordered that copies of the affidavits of

(1) 4 B.L.R.O.C.J. 52.

Mr. Turner and the respondent filed on the 3rd day of October, 1881, be served with the rule upon the petitioner.

On the 10th January, 1882, the Acting Advocate-General (the Hon. Mr. Latham) on behalf of Mr. A. F. Turner, the intervenor, moved absolute the rule *nisi* granted on the 3rd October, 1881.

The gentleman whom I have designated as A. B., appeared in Court in obedience to a *subpœna duces tecum* directing him to appear on the day and produce the original letter written to him by the petitioner, and dated the 25th and 26th March, 1881.

He was sworn and examined by the Acting Advocate-General, and gave the following evidence :—

"I received a *subpœna* directing me to produce a letter from Mrs. King, dated the 25th and 26th March, 1881.

"I do not produce such letter.

"I have received letters from Mrs. King, but I cannot say whether I received one of that date or dates.

"I received letters from her after her arrival in India last year.

"I destroyed every one of them.

"I have not got one now in my possession."

Mr. Jardine then addressed the Court; but whether under instructions from Messrs. Crawford and Boevey, the solicitors for **[429]** the petitioner, or as *amicus curiæ*, I did not quite collect, and suggested that the petitioner, who had admittedly left India for Europe several months previously, had not received actual notice of the rule *nisi* of the 3rd October, 1881, or of the affidavits of Mr. Turner and the respondent filed on that day.

Messrs. Crawford and Boevey were and still are the attorneys on the record for the petitioner. Section 45 of the Indian Divorce Act enacts that, subject to the provisions therein contained, all proceedings under that Act between party and party should be regulated by the Code of Civil Procedure. That Code (Act X of 1877) by s. 39 enacts that the appointment of a pleader (which word by the interpretation clause, s. 2, includes an attorney of a High Court), to make or do any appearance, application or act should be in writing and be filed in Court, and when so filed should be considered to be in force until revoked with the leave of the Court by a writing signed by the client and filed in Court ; and, by s. 40, processes served on the pleader of any party or left at his office or ordinary residence relative to a suit, and whether the same be for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes in relation to the suit as if the same had been given to or served on the party in person.

The Court, however, having regard to the language of the rule *nisi* of the 3rd October, 1881, and feeling a doubt whether the petitioner had received in Europe actual notice of the same, and bearing in mind the novel character of the proceedings taken by Mr. Turner, as intervenor, declined to make the rule absolute, and ordered that the time for showing cause against the rule *nisi* of the 3rd October, 1881, be extended to the 10th April, 1882. That copies of such rule *nisi* and of the affidavits therein referred to be served forthwith upon Messrs. Crawford and Boevey, solicitors for the petitioner, and that such service be deemed good service upon her, and it ordered that no application should be made to make absolute the decree *nisi* dated the 26th July, 1881, until after the disposal

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of that rule. The Court reserved all the costs of and incidental to such motion of the 10th January, 1882.

[430] On the 23rd February, 1882, Mr. Inverarity, by arrangement with the learned counsel for the intervenor, showed cause on behalf of the petitioner on a preliminary point against the rule *nisi* of the 3rd October, 1881, and incidentally against so much of the order made on the 10th January, 1882, as prohibits the petitioner from moving absolute the decree *nisi* dated the 25th July, 1881, until after the disposal of the rule *nisi* of the 3rd October, 1881, after which the Acting Advocate-General (Mr. Latham) was heard on behalf of the intervenor.

Mr. Inverarity stated that, so far as he was aware, this was the first case of the kind, and that the questions were—1st, whether a person acting at the instance of the respondent can intervene at all; and, 2ndly, if he can intervene, whether he can do so as Mr. Turner had intervened in this case?

He contended that a third person has no power, under the Indian Divorce Act, to intervene by applying for a new trial, or by calling on the petitioner to show cause why a decree *nisi* should not be set aside; that, by s. 16 of the Indian Divorce Act, a person not a party to the suit may show cause, but cannot initiate proceedings, and that the proper course for the person who intervenes to take is to file an appearance, and an affidavit in support of what he alleges, and then to appear and show cause when the petitioner moves the decree absolute.

He also contended that, under the Indian Divorce Act, a party—petitioner, respondent or co-respondent—cannot move for a new trial; that although under the English Matrimonial Causes Act of 1858, 21 and 22 Vict., c. 108, s. 18, the Judge Ordinary may grant a rule *nisi* for a new trial to be made absolute only by the full Court, in India such a person can only apply for a review of judgment under s. 623 of the Civil Procedure Code, which he must do within twenty or ninety days as provided by the Indian Limitation Act, 1877, 2nd Schedule, cl. 162 or 173; that here the respondent put in no written statement, and made no defence, and that had the case been tried in England there would have been no new trial granted on the application of the respondent himself: and Mr. Inverarity asked whether his solicitor could now make such application for him. He contended that **[431]** there is no provision in the Indian Divorce Act, by which a person can apply for a review of judgment or a new trial through the instance of a third person; that the English decisions showed that an independent third person only could come forward and show cause against a decree *nisi* being made absolute; that, although there was no express decision on the point, Mr. Turner, as intervenor, was not entitled to show cause against the decree *nisi* being made absolute, and that it was clear, both in England and in India, that a respondent cannot show cause against such decree being made absolute, citing for such proposition *Stoate* v. *Stoate* (1) (decided in April, 1861), where the Judge Ordinary, Sir Cresswell Cresswell, upon Dr. Swabey, moving that the respondent might be allowed under s. 7 of the 23rd and 24th Vict., c. 144 (from which s. 16 of the Indian Divorce Act is taken) to show cause against the decree *nisi* for the dissolution of marriage, rejected the motion, saying "The respondent has no right, under that section, to show cause against the decree *nisi* being made absolute. She should have applied for a new trial."

(1) 2 Sw. & Tr. 384.

Mr. Inverarity lastly contended that it was intolerable that the respondent, who had filed no written statement (which would have justified the Court in making, under s. 113 of the Civil Procedure Code, a decree against him for want of a written statement), and who made no defence while his wife was in India, could now set up his attorney, and, through him, make a defence which he had never made himself when he had the opportunity of doing so; that the Court ought to hold that it was improper for Mr. Turner, as intervenor, to have taken out the rule *nisi* of the 3rd October, 1881; that no new trial could be moved for by any one, that the petitioner ought to be at liberty to move absolute the decree *nisi* of the 26th July, 1881, and that Mr. Turner ought not to be allowed to show cause against such decree *nisi* when the same is moved.

After considering the arguments used and the authorities cited by Mr. Inverarity, as well as the arguments used and the cases cited by the learned acting Advocate-General, I will now proceed to state the conclusion at which I have arrived and the reasons therefor.

[432] The points at issue turn principally upon s. 16 of the Indian Divorce Act (Act IV of 1869), which is as follows:—[His Lordship read the section.] That section is in part copied, in part adapted or modified from s. 7 of the English Matrimonial Act, 23 and 24 Vict., c. 144, which received the Royal assent on the 28th August, 1860. Section 7 of that Statute contains the following provision for the intervention of the Queen's Proctor:—[His Lordship read the section (1).]

These provisions for the intervention of the Queen's Proctor are not, it will be seen, introduced into the Indian Divorce Act. Mr. Macrae in his "Law of Divorce in India," published at Calcutta in 1871, says (p. 55) that the omission is one of considerable importance, as it gives no opportunity to intervene in cases in the High Court until after the decree *nisi*. It is true, says Mr. Macrae, that, before passing the decree, the Court may call any witnesses it pleases to inquire whether relief should be refused on any of the grounds specified in ss. 13 and 14, and in certain cases it will always be expedient for the Court to examine at least the woman with whom adultery is said to be committed, but that it is evident that this power is not sufficient to meet numerous cases where the Court alone without a suggestion will not be able to raise the facts from which collusion may be proved. The omission, he says, is the more marked as the next section (s. 17) contains ample provisions to enable persons to intervene during the progress of the suit where originally brought in a District Court, although it, on its side, is wanting in provisions to enable persons to intervene between the decree of the District Court, which is equivalent to a decree *nisi*, and the confirmatory decree **[433]** of the High Court. Mr. Macrae states that, as this section stood in the original draft of the Bill, it gave full power to any person to intervene through the Advocate-General at any time during the progress of the suit,

(1) "And at any time during the progress of the cause or before the decree is made absolute any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient; and if from such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case he may, under the direction of the Attorney-General and by leave of the Court, intervene in the suit, alleging such case of collusion and retain counsel and *subpœna* witnesses to prove it, and it shall be lawful for the Court to order the costs of such counsel and witnesses and otherwise arising from such intervention to be paid by the parties or such of them as it shall see fit, including a wife if she have separate property."

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but a difficulty as to who might be the proper person to represent the Advocate-General or Queen's Proctor under the English Act in the various districts to which the Indian Act was to be made applicable, caused the section in question to be struck out by the Select Committee.

It is, I think, to be regretted that such provision was not retained in the section when the Indian Divorce Act received the assent of the Governor-General on the 26th February, 1869. I held the office of Advocate-General of this Presidency, but I have no recollection of having been consulted by Government during the progress of the Bill through the Legislative Council upon the subject of the Bill or of any of its intended provisions. I do not think that I should then have seen, nor indeed can I now see any reason why the provision as to the Advocate-General intervening should not be applied, at least, to matrimonial causes brought, as was the present one, on the Original Side of the High Court. Had such provision been allowed to remain in the Bill, the difficulty which is felt in the present case would probably not have arisen, as I can scarcely doubt that, if the allegations made in Mr. Turner's affidavit and the extracts from the petitioner's letters had been duly brought to the Advocate-General's notice he would have thought it his duty to intervene for the purpose of bringing material facts before the Court, and relieve it from being misled by the petitioner, and from making a decree absolute under circumstances where the petitioner was not entitled to such a decree. Such was the course adopted by the Queen's Proctor in the case of *Latour* v. *Latour* (1) where that officer, two months after the decree *nisi* filed a plea, and six months after the decree *nisi*, filed affidavits alleging that when the petitioner, General Latour, presented his petition for the dissolution of his marriage, on the ground of his wife's adultery, he was and had been for many years cohabiting with a female other than the respondent, and habitually committing adultery with **[434]** her, to which affidavits none were filed in answer; whereupon the Judge Ordinary, Sir Cresswell Cresswell, upon motion by the Attorney-General on behalf of the Queen's Proctor for a decree, reversing the decree *nisi* and after argument on behalf of the petitioner, rescinded the decree *nisi*, and dismissed the petitioner and the House of Lords held he was right in so doing. As against so much of the rule *nisi* obtained on the 3rd October, 1881, by Mr. Turner as intervenor as calls upon the petitioner to show cause why the decree *nisi* should not be set aside and a new trial had, the cause shown must, in my opinion, clearly be allowed. The respondent himself could not have moved for a new trial, there being no provision for such a motion in the Civil Procedure Code (X of 1877). He could only have applied for a review of judgment under s. 623 of that Code; but such application might possibly have been unsuccessful as it is only to be granted to a person who from the discovery of new and important matter on evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. Here the respondent admits his knowledge of his wife's adultery as early as the 10th April 1881, before she left Savantvadi for Bombay and before she instituted the present suit.

The motion of the 3rd October 1881, if it could be regarded in the light of an application for a review of judgment by or on behalf of the respondent, would be too late, not having been made within twenty days, the

(1) 2 Sw. & Tr. 524 = 10 H.L.C. 625.

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time fixed by the Indian Limitation Act, XV of 1877, sch. 2, cl. 162, for an application by any person considering himself aggrieved by a decree for a review of judgment by a High Court in the exercise of its original jurisdiction.

Then, neither the Indian Divorce Act nor the Civil Procedure Code gives any power to a petitioner, respondent or co-respondent to apply for a review of judgment or new trial through the instrumentality of a third person. And, assuming that Mr. Turner had the power of applying for a review of judgment, his application on the 3rd October, 1881, was not made within the period prescribed by the Limitation Act. By s. 12 of that Act, where a decree is sought to be reviewed, the time requisite for obtaining a copy of the **[435]** decree sought to be reviewed shall be excluded. The decree *nisi* dated the 26th July, 1881, was, as already stated, sealed on the 11th August, 1881, and from endorsements on the draft decree I see that notice of the decree was sent to Mr. Turner, and a copy of it was taken by him on the 1st August, 1881, from which day the twenty days within which an application for a review of judgment must have been made by are to run, and expired on the 21st August. The application, therefore, made by him on the 3rd October following was too late.

The rule *nisi* of the 3rd October also called on the petitioner to show cause why the Court should not make such order in the premises as the nature and justice of the case may require.

By s. 16 of the Indian Divorce Act any person during the interval between the decree *nisi* and the making of it absolute (which is not to be less than six months from the pronouncing thereof) shall be at liberty, in such manner as the High Court by general or special order from time to time directs, *to show cause* why the decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not being brought before the Court, and on cause being so shown the Court shall deal with the case by making the decree absolute or by reversing the decree *nisi*, or by requiring further inquiry or otherwise as justice may require.

The High Court of Bombay has not as yet made any rules or orders under the above section, or under the provisions of s. 62 of the Act, which gives authority to the High Court to make such rules under the Act as it may from time to time consider expedient, with power to alter and add to the same, provided such rules, alterations and additions are consistent with the provisions of the Act and the Code of Civil Procedure.

The powers given by the Indian Act and the procedure therein indicated must be strictly followed.

"Any person" may show cause, but, in my opinion, is not at liberty to initiate proceedings, as has been done by Mr. Turner in the present case.

I think, therefore, that this Court has not the power to make any order in the premises as asked in the rule *nisi* of the 3rd **[436]** October last, and that such rule must on these preliminary points be discharged.

I will now consider the question, which was fully argued on the 23rd February last, whether Mr. Turner will be entitled to show cause against the decree *nisi* being made absolute.

That appears to depend upon whether Mr. Turner can be considered as being "any person" within the meaning of s. 16 of the Indian Act, and, as such, entitled to show cause why the decree should not be made absolute by reason of a material fact not having been brought before the

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Court, *viz.*, that the petitioner has during her marriage been guilty of adultery, in which case s. 14 provides that the Court shall not be bound to pronounce a decree declaring such marriage to be dissolved if it finds that the petitioner has during the marriage been guilty of adultery.

The portion of s. 16 which contains the provision as to any person being at liberty to show cause, and what the Court can do on cause being so shown is copied almost *verbatim* from s. 7 of the 23rd and 24th Vict., c. 144.

The decisions in England upon the corresponding portion of s. 7 may, therefore, well be looked at to aid in the construction of s. 16 of the Indian Act; and I find that, although there is no direct decision upon the point, there are expressions in some of the English authorities which seem to be in favour of treating the words "any person" as applying to some independent third party.

In *Clements* v. *Clements* (1) the head-note states—though the language which the Judge Ordinary is reported to have used scarcely goes to that extent—"*Semble*, that the Court will not act upon an intervention when satisfied that it is made at the instance of the respondent or co-respondent."

The Judge Ordinary said: "I am satisfied that, if James did intervene, he was virtually intervening for the respondent and co-respondent. *Stoate* v. *Stoate* (2) is an authority that they have no right to show cause against the decree being made absolute. Can they put forward a third person for that purpose? It is not **[437]** necessary to decide that question, because I am satisfied, upon the affidavits, that James never interfered, and never intended to intervene. The decree, therefore, will be made absolute."

In *Forster* v. *Forster and Berridge* (3) during the course of the argument of Mr. Coleridge, Q.C., (now Lord Chief Justice of England) for the intervenor, upon his saying that he thought it right to inform the Court that the Queen's Proctor had been asked to intervene and had declined, and that Mr. Graham, the intervenor, was a personal friend of the co-respondent, Mr. Berridge, the Judge Ordinary (Sir Cresswell Cresswell) asked: "Does he intervene at the instance of Mr. Berridge?" Mr. Coleridge said: "No." Upon which the Judge Ordinary said: "Does he swear that? I am rather curious to know how the fact is, although it is immaterial."

That passage was strongly relied upon by the Acting Advocate General on behalf of Mr. Turner.

Mr. Coleridge proceeded to say that the fact that Mr. Graham's motive for intervening was his personal friendship for Mr. Berridge could not affect the decision of the Court upon the question whether there were good grounds for his intervention. Some motive must be acting upon the mind of every person not the public officer who intervened under the Statute, and Mr. Graham's motive was not a discreditable one. The Judge Ordinary said (p. 154): "It was the intention of the Legislature to allow an independent third person to intervene for the purpose of giving information to the Court which the parties themselves had wilfully withheld."

In *Lautour* v. *Her Majesty's Proctor* (4) the Lord Chancellor (Lord Westbury) in moving the judgment of the House said (p. 699):

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(1) 3 Sw. & Tr. 394.
(2) 2 Sw. & Tr. 384.
(3) 3 Sw. & Tr. 151.
(4) 10 H.L.C. 685.

"The question which arises is, whether the learned Judge in the Court below" (Sir Cresswell Cresswell) "had power, under the words of the Statute" (23 and 24 Vict., c. 144, s. 7), "to direct costs to be paid by the petitioner to the Queen's Proctor. The Queen's Proctor is not regularly a party to the suit. The Queen's Proctor becomes a party to the suit under the circumstances and in the manner defined by the Statute of the 23 and **[438]** 24 Vict., c. 144. Now that Statute has two objects: one to give to the whole of the public the power to give information to the Court in the interval between the decree *nisi* and the decree absolute, which should relieve the Court from being misled by the petitioner and from pronouncing a decree under circumstances where the petitioner is not entitled to such a decree. Another and a special power is contained in the section that where the Queen's Proctor has the power to intervene in a case of collusion, he may intervene and become a party to the suit to prove that case of collusion, and then, it says, that the Queen's Proctor shall be entitled to his costs.

"In the present case he intervened, and alleged not only a case of collusion, but alleged also the existence of material facts under circumstances contemplated in the first part of the clause, which circumstances had not been brought before the Court, and the Court made an order that he should give the particulars of those material facts. Those particulars were embodied in affidavits filed by the Queen's Proctor. But there was no attempt on his part to make out that case of collusion which was the subject of his first allegation. The Queen's Proctor, therefore, I submit to your Lordships, must be treated here as one of the public, coming in to bring before the Court material facts for the Court's information which had not been presented to it either by the petitioner or by the respondent.

"I must, therefore, submit to your Lordships that, in affirming this decree upon the merits, you will pronounce that that part of it which gave the costs" (to the Queen's Proctor) "was pronounced as in the exercise of a power with which the Court was not invested by the Statute, and that that part of the decree must be reversed."

Lord Chelmsford agreed both with regard to the merits of the case and also upon the question of costs.

A short extract from his judgment will suffice. It has an important bearing upon the position of the petitioner in the present case.

He said: "As to the decree itself, there can be no doubt that the fact of the adultery of the husband" (who was the petitioner) "after the divorce *a mensa et thoro* was a material fact of which the **[439]** Court ought to have been informed. It was properly admitted by Sir Hugh Cairns that the Queen's Proctor has the same right as any other of Her Majesty's subjects to inform the Court of any facts which upon the original hearing may have been withheld from it. Accordingly the Queen's Proctor intervening, affidavits were presented to the Court by which the adultery of the petitioner was clearly proved. Under these circumstances the learned Judge of the Divorce Court unquestionably, as it appears to me under the 31st section of the 20 and 21 Vict., c. 85, had a discretion to refuse a decree for a divorce, because the words are that 'the Court shall not be bound to pronounce such decree if it shall find that the petitioner has, during the marriage, been guilty of adultery.' Now, adultery was proved during the marriage, and it appears to me to be a very wholesome exercise, by the learned Judge, of the discretion which he is invested with by the Act of Parliament to say that if a person who has obtained a divorce *a mensa et*

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thoro and who is contemplating a complete divorce cannot abstain in the interval, but will be guilty of adultery, he ought not to be permitted to obtain that which he is seeking for, and which undoubtedly he might have been entitled to, but for that intervening misconduct."

In *Boulton* v. *Boulton* (1), where, on application to make absolute a decree *nisi* for dissolution at the suit of the husband, it appeared that affidavits had been filed by the respondent which alleged the husband's bigamy and conviction thereof, the Judge Ordinary refused to make the decree absolute, and directed the Registrar to inform the Queen's Proctor that such affidavits had been filed, and permitted the petitioner to file affidavits in answer.

From the report of the case in the same volume at p. 638 it appears that the Queen's Proctor obtained leave to intervene and show cause against the decree *nisi* being made absolute, and filed pleas alleging the petitioner's bigamy and adultery. The petitioner filed a replication in which he admitted the bigamy and adultery charged by the Queen's Proctor.

Upon motion being made by counsel that, as sufficient of the facts pleaded by the Queen's Proctor were admitted by the **[440]** petitioner, the Court should reverse the decree *nisi* and dismiss the petition, the Judge Ordinary said: "A man guilty of bigamy who sues for a divorce must take the risk of the Queen's Proctor intervening. I have nothing to do with the conduct of the wife; it is the conduct of the husband that I have to deal with. The decree must be reversed, the petition dismissed, and the petitioner condemned in the costs of the intervention."

In *Bowen* v. *Bowen* (2) it was held that any person and the Queen's Proctor as one of the public may enter an appearance and file affidavits in opposition to a decree *nisi* being made absolute at any time before it is made absolute.

The Judge Ordinary said that the obvious intention of the Legislature was that, up to the last moment, an opportunity should be given to every person, and especially to the Queen's Proctor, of preventing a decree *nisi* for dissolution of marriage being made absolute if there were grounds for rescinding it.

On a subsequent day the Attorney General moved that the petition might be dismissed, the affidavits establishing that the petitioner had been living in adultery with one Sarah Hughes, and had had a child by her since the decree *nisi* was passed. Counsel for the petitioner said he could not resist the motion, and the Judge Ordinary rescinded the decree *nisi*, and dismissed the petition.

In *Drummond* v. *Drummond* (3), where the wife petitioned for dissolution by reason of the husband's cruelty and adultery, the husband did not appear; but the Queen's Proctor obtained the leave of the Court to intervene and pleaded collusion and adultery of the petitioner. At the hearing, evidence was given of the cruelty of the respondent and of the adultery of the petitioner subsequently to the filing of the petition. The Judge Ordinary dismissed the petition, saying that he thought that a wife guilty of adultery was not entitled to petition in that Court on the ground of any matrimonial offence committed by the husband.

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(1) 2 Sw. & Tr. 405. (2) 3 Sw. & Tr. 530. (3) 2 Sw. & Tr. 269.

Lastly, there is the opinion of Mr.Justice Phear in *Willis* v.*Willis*(1), in which case he said that he was inclined to think that **[441]** the parties, against whom a decree *nisi* was obtained, could not, under s. 16 of the Indian Act, come in to show cause against it. That it was only intended that any party, other than the parties to the suit, should do so.

The above are the principal authorities upon the point now under consideration.

Mr. Macrae in his work on the "Law of Divorce in India" says, at p. 59, that the application to make the decree *nisi* absolute should be made on affidavits showing that there has been a recent search for an appearance by any person, and that there has been no appearance, or, if there has been an appearance, that no affidavits have been filed in opposition to the decree. Where the search had not been recent, the case of *Stone* v. *Stone* (2) shows that the Court in England refused to make the decree absolute, but directed a later search to be made, and the affidavit to be re-sworn.

In the present case an appearance was entered for Mr. Turner on the 3rd October, 1881, and the affidavits of that gentleman and of the respondent were sworn and filed on that day.

Boulton v. *Boulton* (3) shows that, upon an affidavit filed by the respondent, the Court refused to make the decree absolute until the matter was satisfactorily explained.

Section 16 of the Indian Act says that, "on cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry or otherwise as justice may demand;" and s. 14 provides that the Court shall not be bound to pronounce a decree declaring a marriage to be dissolved if it finds that the petitioner has during the marriage been guilty of adultery.

The object of this Court is, of course, to do justice between the parties according to the provisions of the Indian Divorce Act; and by s. 7 of that Act it is provided that, subject to the provisions contained in such Act, the High Courts shall in all suits and proceedings thereunder act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court **[442]** for divorce and matrimonial causes in England for the time being acts and gives relief.

It would, of course, be of great assistance to the Court, in the further inquiry which must take place in this suit, if Mr. Turner were permitted to act as intervenor and to instruct counsel and *subpœna* witnesses for the purpose of enabling it to arrive at a conclusion as to whether or not the petitioner has during her marriage been guilty of adultery.

But even if the Court felt that it would not be authorized by the existing law in allowing Mr. Turner to actively intervene and to show cause against the decree *nisi* being made absolute, it is, to my mind, clear that, with the affidavits filed by him in October last and now among the records of this Court, and which, according to *Boulton* v. *Boulton* (3), even the respondent had authority to file, and having regard to the extracts of the two letters said to have been written by the petitioner mentioned in and annexed to the affidavit of Mr. Turner, the Court would be bound to make further inquiry as to the alleged adultery of the petitioner as best it could,—the law officers of the Crown in this Presidency having declined to interfere in the matter, believing that they had no power to do so.

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(1) 4 B.L.R. O.C.J. 52. (2) 3 Sw. & Tr. 113. (3) 2 Sw. & Tr. 405.

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By the Indian Evidence Act, 1872, s. 165, the Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant, and may order the production of any document or thing, subject to the provisions mentioned in that section. And by s. 171 of the Civil Procedure Code, the Court may of its own accord summon, as witnesses, strangers to the suit, and cause such persons to produce any documents in their possession. The new Code of Civil Procedure (Act XIV of 1882)—which contains the same number of sections (652) as the existing Code (Act X of 1877), and which received the assent of the Governor-General on the 17th March, 1882, and which by s. 1 is to come into force on the 1st June next, but by s. 3 is not to affect any proceedings prior to decree in any suit instituted before the 1st June, 1882—contains in s. 171 provisions similar to those in s. 171 of the existing Code.

[443] Looking at the definition of "decree" in s. 1 of that Act, it would not, I think, include a decree *nisi* under the Indian Divorce Act, as such decree *nisi* does not "decide the suit."

It will be a futile task for petitioner or her legal advisers to endeavour to obtain from this Court an order making the decree *nisi* of the 26th July, 1881, absolute as long as the allegation that she has since her marriage committed adultery remains undetermined. Justice demands that further inquiry should take place, and, if she does not admit it, that the issue aye or no whether such adultery did take place should be decided one way or other.

Mr. *Inverarity* spoke of the hardship which would be practised on the petitioner if the respondent, who filed no written statement and made no defence while she was in India, were allowed now to set up his attorney, and make a defence which he never made himself when he had an opportunity of doing so.

Mr. Turner in para. 31 of his affidavit states that he was informed by the respondent that the reason why he did not defend the suit was that he wished to avoid making public the fact of his wife's adultery, and thus injuring the prospects of his children, and (para. 32) that it was after the respondent's arrival in Bombay from Savantvadi on the 30th August last that he heard from him, for the first time, of the petitioner's adultery, whereupon he consulted the Advocate-General and the Government Solicitor, with the result already noticed.

If the petitioner really did commit adultery as alleged, that most material fact was concealed from the Court, which made the decree *nisi* in her favour in the belief that she was a virtuous wife; and, to quote again the words of Sir Cresswell Cresswell in *Drummond* v. *Drummond*(1), "I think that a wife guilty of adultery cannot be a petitioner in this Court on the ground of any matrimonial offence of the husband." Notwithstanding the broad and unqualified language of s. 16 of the Indian Act, the decision of the Judge Ordinary in *Bowen* v. *Bowen* (2) that any person and the Queen's Proctor as one of the public may enter an appearance and file affidavits in opposition to a decree *nisi* being **[444]** made absolute and so prevent a decree *nisi* for dissolution of marriage being made absolute if there were grounds for rescinding it; notwithstanding the refusal of the Judge Ordinary in *Clements* v. *Clements* (3) to decide whether a respondent can put forward a third person to show cause

(1) 2 Sw. & Tr. 269. (2) 3 Sw. & Tr. 530. (3) 3 Sw. & Tr. 394.

against a decree for dissolution of marriage being made absolute; and bearing in mind the language, already quoted, of Lord Chancellor Westbury and Lord Chelmsford in *Lautor* v. *Her Majesty's Proctor* (1) and the opinion expressed by Sir Cresswell Cresswell in *Forster* v. *Forster* (2) who, when he asked Mr. Coleridge whether Graham intervened at the instance of Berridge, the co-respondent, said he was rather curious to know how the fact was although it was, immaterial; and his subsequent statement, reported in the same page, that "it was the intention of the Legislature to allow an independent third person to intervene for the purpose of giving information to the Court which the parties themselves had wilfully withheld"—I am of opinion that Mr. Turner has not been able, either under the provisions of the Indian Act, or according to the principles and rules on which the Court for divorce and matrimonial causes in England has been in the habit of acting and giving relief, to discharge the burden which his action in this suit cast upon him, *viz.*, of proving clearly to the satisfaction of this Court that it will be bound to allow him to show cause against the decree *nisi* being made absolute.

Upon the best consideration that I have been able to give to the matter, I think the point, to say the least, is far too doubtful to justify me in allowing him to show cause when the proper time for doing so arrives. What little expression of opinion there is in the English cases appears to be against the right or the power of a respondent to put forward a friend to intervene on his behalf. *Clements* v. *Clements* (3) and *Stoate* v. *Stoate* (4) are a direct authority that a respondent himself has no right to show cause against a decree being made absolute. *Qui facit per alium facit per se* is an old maxim which has a very general application in legal and mercantile matters; or, to borrow the words of Tindal, **[445]** C.J., in *Cuming, Appellant*; *Toms, Respondent* (5), "I can see no reason why the maxim which is of almost universal application, *qui facit per alium facit per se*, should not accommodate itself to this case."

In the present case I am of opinion that that which the respondent clearly cannot now do himself he cannot indirectly get his solicitor to do for him, such person being still his solicitor on the record. Serious inconveniences might follow and much injustice be done in this country to a petitioner if a respondent were to be allowed, several months after a decree *nisi* had been passed against him, to instruct his solicitor to make allegations against a petitioner which he himself with ample time and opportunity had abstained from bringing forward before the decree *nisi* was passed.

For the above reasons I shall feel compelled, when application is made to me to make the decree *nisi* absolute, to refuse to allow Mr. Turner, as intervenor, to show cause against it. But, as already stated, I shall decline to make that decree absolute until the point as to the alleged adultery of the petitioner since her marriage is cleared up.

The costs of Mr. Turner's intervention and the costs of and incidental to the rule *nisi* of the 3rd October, 1881, to the motion and order made on the 10th January, 1882, the costs of and incidental to the argument on the 23rd February, 1882, and of this day must be reserved.

Rule discharged.

23*rd April*, 1882. *Inverarity*, for the petitioner moved to make absolute the decree *nisi* in this case made on the 26th July, 1881.

(1) 10 H.L.C. 685. (2) 3 Sw. & Tr. 154. (3) 3 Sw. & Tr. 394.
(4) 2 Sw. & Tr. 384. (5) 8 Scott's N.R. 830.

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Lang, appeared for the respondent to watch the case.

The following affidavit had been filed by Mr. Crawley-Boevey, partner in the firm of Messrs. Crawford and Boevey, the attorneys for the petitioner:—

"1. I did on Saturday, the 22nd day of April instant, carefully search the records in this suit.

"2. That, on making such search, I find that no appearance has been entered or any affidavits filed by any person to show cause [446] against the decree *nisi* made therein being made absolute, save that an appearance was entered by Messrs. Chalk and Walker, attorneys for Allan F. Turner, as intervenor in this suit, on the 3rd day of October last, and that two affidavits were filed on his behalf.

"3. That on the 10th day of April instant this Honourable Court by an order of that date decided that the said Allan F. Turner cannot intervene in this suit, or show cause against the said decree *nisi* being made absolute, and I, therefore, submit that the said two affidavits are not properly on the file of this Honourable Court, and that they should be directed to be taken off the file.

"4. I say that no cause has been shown by 'any person' within the meaning of s. 16 of the Indian Divorce Act, IV of 1869, why the decree *nisi*, which was passed in this suit on the 26th day of July last, should not be made absolute, and I, therefore, submit, on behalf of the abovenamed petitioner, that the said decree *nisi* should be made absolute with costs."

Inverarity, for the petitioner.—I contend that the petitioner is entitled to have the decree made absolute. No doubt there have been affidavits filed in which certain allegations have been made by Mr. Turner. But the Court has decided that Mr. Turner is not entitled to intervene; so the affidavits are no longer before the Court, and the Court must consider itself as ignorant of the matters therein stated. The Court cannot consistently decide, as it has done, that Mr. Turner had no right to intervene, and yet give effect to what he says. That would be practically to allow him to intervene while deciding that he had no right to do so. In order to justify the Court in refusing to make the decree absolute, cause must be shown in a certain prescribed manner. No cause has been thus shown, and, consequently, the petitioner is entitled to have the decree made absolute. The Court cannot take judicial notice of information given to it by a person not authorized to give it. It could not refuse to make absolute the decree upon information contained in a private letter addressed to the Judge or conveyed in a private conversation. Such communications would not be regarded as before the Court. Similarly, the affidavits in this case made by a person who has been declared by the Court incapable of intervening are *coram non judice*, and the [447] Court is judicially ignorant of what they contain. The case of *Pavey* v. *Pavey* (1),

(1) The report of the case cited by counsel was contained in the *Times* newspaper of the 26th March, 1882. The following is the report:—

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PAVEY *v.* PAVEY AND SBAHN.

In this case evidence was given of the adultery of the wife, and there was no appearance for either her or the co-respondent; but the learned Judge said he had been informed that she was in Court, and asked whether that was so. The respondent having come forward, the President asked her whether she would like to be examined. She replied in the negative, and added: "I have no objection to a divorce. The sooner he gets it the better. He has been a rogue all through the piece. What I say is that he was cohabiting with other women before he left me, and here is a letter showing how he left me." The President, on this, observed that the respondent had not entered an

heard only three weeks ago in England, is a strong authority in favour of my contention. There the husband was the petitioner, and the respondent had not filed an appearance in the suit. She was, however, present when the case came on for hearing, and accused the petitioner of having committed adultery, and produced a letter which she said would prove it, but the Court refused to look at the letter. The petitioner's counsel was so ill-advised as to call the respondent as a witness, which gave an opportunity of proving the letters; but, if this had not been done, they could not have been used.

By the decree *nisi* the petitioner has been declared entitled to a divorce, unless cause be shown under s. 16 of the Indian Divorce Act.

These affidavits must be disregarded. No cause has been shown, and the petitioner is entitled, under this section, to have the decree *nisi* made absolute. If this is refused, the decree *nisi* must remain on the record for ever. The Court cannot reverse the decree, nor can it order further inquiry; for by s. 16, cl. 3, that can only be done "on cause being shown," and that has not been done here. The Court cannot itself act as Queen's Proctor. There is no one in India to act in that **[448]** capacity. In *Boulton* v. *Boulton* (1) the Court directed the information to be given to the Queen's Proctor, who thereupon might intervene if he pleased. That cannot be done here.

JUDGMENT (CONTINUED).

4th May, 1882, BAYLEY, J.—On the 24th April counsel for the petitioner in this case moved to make absolute the decree *nisi* for the dissolution of the petitioner's marriage with the respondent. In support of that application he read the affidavit of Mr. Crawley-Boevey, one of the firm of Messrs. Crawford and Boevey, who were the attorneys for

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appearance, and was not a witness, and he could not read the letter, which was not in evidence before him. But the learned counsel for the petitioner put the woman in the witness box, and asked her whether there was any collusion between her and her husband in respect of these proceedings. She replied that there was not, but added that her husband had deserted her, and she then handed in a letter written by him on the occasion of his leaving her. In his evidence he had stated that he had left her in consequence of her misconduct, but allowed her through his mother 10s. a week for two years, when he heard of the adultery with which he now charged her. The letter handed in by the wife was, however, addressed to her as "Dear Tilly," and in it the petitioner announced affectionately that he was going in search of work, and would return in a few weeks.

The President said he did not doubt that the respondent's adultery was proved, and if he had to act only upon the evidence in respect of that, the petitioner would be entitled to a decree, *nisi*; but by a witness whom counsel for the petitioner thought fit to call—namely, the respondent—it was now stated on oath that the husband left her, as he confessed in a letter which she had handed in. That letter, which was his last communication to her, instead of bearing out his statement that he had left her in consequence of her misconduct, was written in affectionate terms, and stated that he was going in search of work and would be back in a few weeks. Instead of that, he never came back at all, and his wife did not hear of him for two years. That established desertion on the part of the petitioner. It was a misapprehension to suppose that the payment of money by way of allowance to a wife covered desertion. It was the duty of the husband, not merely to pay money to keep the wife alive, but also to give her the protection which his society alone afforded; and it was extremely likely that the woman, as she herself stated, had been thrown on her own resources in consequence of his desertion, and had by reason of that desertion thrown herself into the arms of another man. The facts as to this matter have been proved in a somewhat peculiar manner, no doubt; but they satisfied him that the petitioner was not entitled to a verdict, and the Court must, therefore, reject the petition.

(1) 30 L.J.P. & M.

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the petitioners. [His Lordship read the above affidavit.] Counsel contended the affidavits which had been made by Mr. Turner should be taken off the file; that the Court could not look at them, or pay any attention to the statements contained in them; that there was, therefore, nothing before the Court which could be regarded as cause shown under s. 16 of the Indian Divorce Act why the decree *nisi* should not be made absolute.

[449] The case of *Pavey* v. *Pavey*, a report of which is contained in a recent copy of the *Times* newspaper, was relied upon in support of the contention that the Court could not look at the affidavits to which I have referred. In that case it appears that the President of the Matrimonial Court in England refused to look at a letter produced by the respondent in Court, because she had not formally appeared at the hearing. I do not think, however, that that case is an authority for the contention here. In the present case both parties are formally before the Court. The petitioner has duly entered an appearance, and has given her evidence at the trial, and upon that evidence she has obtained a decree *nisi* which she now seeks to have made absolute. These circumstances, I think, distinguish this case from *Pavey* v. *Pavey* and justify me in refusing to regard it as an authority applicable to the question now before me.

It was also contended that this Court is empowered to "require further inquiry" into matters which have been brought to its notice only where cause has been shown under the provisions of s. 16 of the Indian Divorce Act. [His Lordship read the section.] That section is almost word for word the same as s. 7 of the English Matrimonial Causes Act (Stat. 23 and 24 Vict., c. 145); and in *Boulton* v. *Boulton* (1), which was a case tried under that Statute, Cresswell, J., although he held that a respondent was not entitled to show cause against a decree *nisi* being made absolute, said: "Does it require any act of the Court to make a decree *nisi* absolute? If you ask me to make the decree absolute, I refuse to do so till this matter is satisfactorily explained."

Now, it is to be observed that the learned Judge in that case did not undertake to decide on the matters disclosed in the affidavits of the respondent, but he acted upon them to this extent. He said: "I will not make the decree absolute until these matters are explained." According to Mr. Inverarity's argument, he ought to have ordered the affidavits to be taken off the file. He did not, however, do this, but he ordered the Registrar to inform the Queen's Proctor that the affidavits had been filed in order that he **[450]** might inquire into the truth of the matters alleged. In doing this, and in refusing to make the decree absolute until the Queen's Proctor was communicated with, he was surely acting upon the affidavits, inasmuch as it was by reason of the allegations contained in these affidavits that he felt bound to refuse the motion then before the Court.

In the case of *Gray* v. *Gray* (2) an application was made by a petitioner to be allowed to take a petition off the file. In that case a wife had sued for a dissolution of marriage and had obtained a decree *nisi*. Subsequently, however, the Queen's Proctor intervened, and delivered pleas charging the petitioner with adultery. She then sought to have her petition taken off the file, and it was urged that it would not be for the interests of public morality that the details of such a case should be published. The Judge, however, refused the application, and said that he considered that public morality was concerned that a sham case founded on collusion should be exposed. The petitioner appealed, but the Court of

(1) 2 Sw. & Tr. 405.

(2) 2 Sw. & Tr. 263.

Appeal (1) confirmed the order of the Court below; and Wightman, J., said: "It is apparently wholly in the discretion of the Court to permit such a step or not."

Now, this Court is bound, in cases like the present, to act upon the principles, and to be guided by the decisions of the Courts in England; and I find that in *Drummond* v. *Drummond* (2) the Judge said: "A wife guilty of adultery cannot be a petitioner in this Court, on the ground of any matrimonial offence of the husband." Keeping in view that statement of the law, we have to ascertain whether the petitioner in this case is entitled to the assistance of the Court. I am clearly of opinion—and I think *Boulton* v. *Boulton* (3) is an authority for the course which I am adopting—that I should not be justified in making this decree absolute until the very grave and serious charges which are made in these affidavits against the petitioner are cleared up.

Suppose a husband had obtained a decree *nisi* in a suit against his wife, and that he had been subsequently tried and convicted in this Court, under the Penal Code, of adultery committed **[451]** after his marriage. It is not unreasonable to presume that this Court would come to know, perhaps informally and indirectly, of the fact of his trial and conviction. If Mr. Inverarity's argument be correct, this Court would be bound to ignore the fact of such conviction, however notorious it might be; would be incapable of itself ordering inquiry into the matter; and would be bound at the end of the period prescribed by the Act, if no cause were formally shown under s. 16 to make the decree *nisi* absolute. That, I think, can hardly be seriously contended. There is a case alluded to in Taylor on Evidence (4) in which a Judge acted upon information given to him in Court by a grand juror. "At York a grand juror, hearing a witness swear in Court contrary to the evidence which he had given before the grand jury, told the Judge, and the witness was committed for perjury to be tried upon the testimony of the gentlemen of the grand jury." The grand jury, I may remark, are sworn to secrecy (5). In this case, then, it appears that the Court acted upon information informally conveyed, and upon that information directed a criminal prosecution. That case is, in my opinion, an authority, if authority were needed, to justify me in requiring some investigation into the serious charges which have been made in these affidavits against a person who comes as a petitioner before this Court, and upon the merits of whose case I have to decide.

And I think further that, having regard to the fact that the Courts in India are without the assistance of a Queen's Proctor, they are bound to exercise, in cases like the present, more than ordinary caution. I consider that, in view of the allegations contained in these affidavits, the Court would be disregarding its plain and obvious duty if it now blindly made absolute the decree *nisi* which has been obtained in this case. I, therefore, am unable to do so at present. I am of opinion that further inquiry is necessary as to whether the petitioner has been guilty of adultery. That inquiry cannot be effectually made merely by requiring affidavits to be filed by the petitioner or on her behalf. Her simple denial would be of little value, and I think, therefore, that, **[452]** for the proper investigation of this case as it now presents itself, it is indispensably necessary that

(1) 2 Sw. & Tr. 266. (2) 2 Sw. & Tr. 269. (3) 2 Sw. & Tr. 405.
(4) Vol. I. (ed. 1868), p. 833, note 1.
(5) 'The king's counsel, your fellows' and your own you shall keep secret.' See the oath in 4 Chitty's Criminal Law 133 (ed. of 1816).

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the petitioner should in person be present in Court for examination, and I accordingly make an order to that effect, and adjourn the case to the 4th August next.

Motion adjourned to 4th August next.

Attorneys for the petitioner.—Messrs. *Crawford and Bocvey.*
Attorney for the respondent.—Mr. *A. F. Turner.*

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6 B. 452.

TESTAMENTARY.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Sir C. Sargent, Justice.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF HAJI ISMAIL HAJI ABDULA, CUTCHI MEMON MAHOMEDAN, DECEASED. [10th September, 1882.]

Probate in cases not governed by the Indian Succession Act—Power of High Court to grant probate in such cases—Probate to take effect throughout India—Limited probate—Probate duty—Cutchi Memon Mahomedan—Succession Act X of 1865, s. 331—Act XIII of 1875—Hindu Wills Act, s. 2—Act XX of 1841—Act, XXVII of 1860, s. 18—Court Fees Act, VII of 1870, sch. I, art. 11.

In cases not governed by the Indian Succession Act (X of 1865), probates and letters of administration granted by the High Court of Bombay in respect of Hindus, Mahomedans and other persons not usually designated as British subjects take effect only, and can only be granted, for the purpose of recovering debts and securing debtors paying the same, except so far as is otherwise provided in Act XXVII of 1860; and probate duty is only payable on the amount of such debts.

Cutchi Memons are not Hindus within the meaning of s. 2 of the Hindu Wills Act (XXI of 1870), and, therefore, probate to take effect throughout India cannot be granted in the case of a will of a Cutchi Memon testator.

Cutchi Memons are Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established.

[Appr., 6 B. 703 (710); **R.**, 8 B. 241 (252); 8 B. 474 (480); 9 B. 158 (162); 10 B. 1; 19 B. 783; 20 B. 53 (57); 31 C. 11 (**P.C.**)=5 Bom. L. R 845=7 C.W.N. 895=30 I.A. 249=13 M.L.J. 381=8 Sar. P.C. J. 543; P.L.R. 1900, 251 (263)].

THIS was an application for probate. The applicants were Haji Ahmed Haji Abdula and Haji Hussan Haji Abdula, brothers of the deceased, who in his will had nominated them together with a third brother (who had predeceased the testator) as his "trustees and executors."

The testator, who was a Cutchi Memon, died on the 16th June, 1878, leaving a widow, two sons, two daughters, and three grandsons him surviving. His will was dated the 19th February, 1873, and by it he disposed of all his property, which amounted to **[453]** upwards of Rs. 5,83,000. The greater portion of this property consisted of the testator's share of the capital stock, immoveable property and securities belonging to the firm of Haji Abdula Nur Mahomed in which he and his brothers were partners. His share of the immoveable property of the firm amounted in value to the sum of Rs. 1,50,000. All the property in question had been acquired by the deceased himself.

Certain ships belonging to the partnership were registered in the name of the testator, whose share therein amounted in value to the sum of

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Rs. 38,000, and there were also two Government promissory notes, for Rs. 1,000 each, belonging to the firm which stood in the testator's name. In order to deal with the ships and with these notes it was found necessary to apply for probate. The application was in the alternative (1) that probate should be granted to take effect throughout India ; or (2), if such probate could not be granted, then that probate should be issued limited only to the above-mentioned ships and Government notes, and that probate duty should only be payable in respect of the value thereof.

Kirkpatrick, for the applicants.—The power to grant probate to take effect throughout India is given by s. 2 of Act XIII of 1875, which adds a proviso to s. 242 of the Indian Succession Act (X of 1865). Such extended probate cannot be granted in this case, unless the Court holds that the testator belonged to a class to which the Indian Succession Act applies. Section 331 of this Act excludes Hindus from its operation; but by s. 2 of the Hindu Wills Act (XXI of 1870), subsequently enacted, that portion of the Indian Succession Act which relates to grants of probate is made applicable to Hindus. The question, then, is whether the testator, who was a Cutchi Memon Mahomedan, can be included within the term "Hindus" as used in this section. The Cutchi Memons, although Mahomedans by religion, are Hindus by race, and they observe the Hindu law of inheritance. They are classed in this respect with the Khojas ; *Rahimatbai* v. *Haji Jussap* (1). In that case Sir. E. Perry says they "were originally Loannas, a Hindu commercial caste in Cutch. No records are forthcoming to indicate the period of their conversion." **[454]** As to Khojas, see *Shivji Hasan* v. *Datu Mavji* (2) and *Hirbai* v. *Gorbai* (3).

If, then, they are Hindus as regards their law of inheritance, I submit that they are "Hindus" within the meaning of the word in s. 2 of the Hindu Wills Act, and that, therefore, the Indian Succession Act and Act XIII of 1875 apply. The word has not apparently the same signification here that it has in s. 331 of the Indian Succession Act. In the notes to Stokes' edition of the Indian Succession Act it is stated that the word "Hindu" in s. 331 is used as a theological term, and, therefore, includes Jains and Sikhs. But s. 2 of the Hindu Wills Act mentions Jains and Sikhs as well as Hindus. This would be superfluous if it was intended that religion should be the test. We contend that race and usage are the tests, and not religion, which may vary from time to time. A Hindu may discard all creeds, and become an infidel, but he does not thereby cease to be a Hindu. The testator was a Hindu by race and usage of inheritance, and, therefore, ought, by s. 2 of Act XXI of 1870, to be entitled to the rights given by the Indian Succession Act, s. 242, as amended by s. 13 of Act XIII of 1875. Counsel referred also to Mayne's Hindu Law (1st ed.), paras. 53, 55 and 56 ; and *Abraham* v. *Abraham* (4).

But, if the Court decides against us on this point, then we ask for probate limited only to the Government promissory notes and the testator's share in the ships. No probate is needed in the case of a Mahomedan : see cases cited in *Lalchand Ramdayal* v. *Gumtibai* (5). Probate duty is to be paid on property in respect of which probate is granted : Court Fees Act VII of 1870, sch. I, art. 11. We cannot be asked to pay duty upon the whole property when probate is only required for a small

(1) Perry's Oriental Cases, 110.
(2) 12 B.H.C.R. 281.
(3) *Ibid.* 294.
(4) 9 M.I.A. 195.
(5) 8 B.H.C.R. 140, see pp. 144-5-8-9.

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portion of it. Counsel referred to Act XX of 1841; Act XXVII of 1860, s. 18; *In the goods of Ramchand Seal* (1); *Maniklal Atmaram* v. *Mancher-shi Dinsha* (2).

The Hon. *F. L. Latham* (Acting Advocate-General), for the Crown.—We do not contest the first part of this application. **[455]** In addition to the points already urged, it may be argued that the sections of the Indian Succession Act, which refer to the granting of probate, relate merely to procedure, and, as such, apply to all cases. So far as that Act deals with the *effect* of probate, it is substantive law, and does not apply to Hindus and Mahomedans; but, so far as it relates to the extent to which probate is to operate, it is a law of procedure. This view of the Act appears to have been taken in Calcutta: *In the matter of Kokya Dine* (3).

As to the second point, we say that, if probate is obtained, duty must be paid upon the whole property with which the will deals. The probate, if once obtained, can be used for any purpose. It establishes the will. Limited probate is almost unknown in England. Counsel referred to the Charter of the Supreme Court, 1823, Act XXVII of 1860.

JUDGMENT.

WESTROPP, C.J.—In this case the two surviving executors, appointed by the will of Haji Ismail Haji Abdula, apply for probate. Their application is, in the alternative, *viz.*, either that probate should be granted to them to take effect throughout the whole of India, or (in case such grant should be refused) that they should be granted probate limited only to the share of the testator in certain ships which form part of the partnership property, and to certain Government promissory notes which stand in the testator's name. We will deal with the second branch of this application first.

The testamentary and intestate jurisdiction conferred on the Supreme Court of Bombay by the Charter of 1823 was in some respects more extensive than the jurisdiction given to the Supreme Court at Fort William. The latter Court was established in 1774, and by the 22nd clause of its Charter (which is dated the 26th March in that year), it was created a Court of Ecclesiastical Jurisdiction, with power and authority to administer and execute within the provinces of Bengal, Behar and Orissa "*towards and upon our British subjects there residing* the ecclesiastical law as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasions of the **[456]** said provinces and people shall admit or require," and power is thereby given to the Court to proceed in all causes, suits, &c., "and also to grant probates under the same seal of the said Supreme Court of Judicature at Fort William in Bengal of the last wills and testaments of all or any of *the said British subjects* of us, our heirs, and successors dying within the said three provinces, countries or districts of Bengal, Behar, and Orissa; and to commit letters of administration, under the same seal, of the goods, chattels, credits and all other effects whatsoever *of such British subjects as aforesaid*, who shall die intestate within the said three provinces, &c." By that Charter, then, the power of the Supreme Court at Fort William to grant probates and letters of administration was limited only to the case of British subjects within the three named provinces.

The Supreme Court of Madras was established twenty-six years later. Its Charter is dated the 26th December, 1800, and by the 37th clause,

(1) 5 C. 2. (2) 1 B. 269. (3) 2 B.L.R.A.C.J. 79

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power is given to the Court to administer "within and throughout Fort St. George and the limits thereof and the factories subordinate thereto, and all the territories which now are, or hereafter may be, subject to or dependent upon the said Government and towards and upon all persons so described and distinguished by the appellation of British subjects as aforesaid there residing the ecclesiastical law as the same is now used and exercised in the Diocese of London;" and power is given to the Supreme Court "to grant probates of the last wills and testaments of all or any of the said subjects of us, our heirs and successors dying and leaving personal effects within the said territories or districts respectively, *and of all persons who shall die or have effects within the places aforesaid*, and to commit letters of administration, under the seal of the said Court, of the goods, chattels, credits and all other effects whatsoever, *of the persons aforesaid* who shall die intestate." The Supreme Court of Madras had, therefore, under this clause power to issue probates and letters of administration to persons other than British subjects.

The Charter to the Supreme Court of Bombay was not granted until December, 1823. The 47th clause of that Charter gives to the Supreme Court powers similar to those given to the Court at **[457]** Madras. It empowers the Court to administer "within the town and island of Bombay and the limits thereof and the factories subordinate thereto, and all the territories which now are or hereafter may be subject to or dependent upon the said Government, and *towards and upon all persons so described and distinguished by the appellation of British subjects as aforesaid* there residing, the ecclesiastical law as the same is now used and exercised in the Diocese of London in Great Britain;" and full power and authority is given to the Court to grant probates "of the last wills and testaments of all or any of *the said subjects* of us, our heirs and successors dying and leaving personal effects within the said town, island, territories or districts respectively, *and of all persons who shall die or have effects within the places aforesaid*, and to commit letters of administration, under the seal of the said Court, of the goods, chattels, credits and all other effects whatsoever *of the persons aforesaid* who shall die intestate, &c."

The provisions of Stat. 21 Geo. III, c. 70, s. 17 preserved to Hindus and Mahomedans their laws of inheritance and succession, and it was formerly considered doubtful whether this enactment (s. 17) did not prevent the Supreme Court of Fort William from granting probates or letters of administration to the estates of Hindus and Mahomedans. That enactment applied to the Supreme Court of Fort William only. A similar provision was, however, introduced into the charter of the Recorder's Courts at Madras and Bombay, and into the charters of the Supreme Court at Madras (cl. 22) and at Bombay (cl. 29).

The cases in which this subject has been discussed will be found collected in the reported case of *Lalchand Ramdayal* v. *Gumtibai* (1). It was eventually held in Calcutta that, with the consent of all the next of kin of the deceased, letters of administration to such estates might be granted: *In the goods of Beebee Muttra* (2).

In 1844, Peel, C.J., said: "In granting administration to native estates the interference of the Court originally proceeded upon the supposition of the consent of the parties interested "(3), and in **[458]** the case of

(1) 8 B.H.C.R.O.C.J. 140 (144.)
(2) 1 Morton 75; 1 Morley's Dig. 245, pl. 60. and p. 384, pl. 195.
(3) *In the goods of Shaik Nathoo*, Fulton's Rep. 485—6.

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Sumbhoochander Mitter (1) the same learned Judge said: "A Hindu is not bound to apply for probate. . . . We have several times been applied to for administration of Hindu and Mahomedan estates on consent of some of the next of kin, but have always refused it, as it would be establishing indirectly a compulsory jurisdiction over Hindus and Mahomedans. *It can only be done on the consent of all, and then the jurisdiction is founded on their consent.* But, if done with the consent of some only, *it would be an interference with their law of inheritance, by breaking the descent and making one representative, whereas the Hindu law says all representatives.* Such an interference would be a violation of the Statute (21 Geo. III, cl. 71, s. 17), which says 'that Hindus and Mahomedans are to have their own law of inheritance and succession.'"

Section 14 of Act XX of 1841 [which Act related only to "Hindus, Mahomedans and others not usually designated as British subjects" (2)] "declared and enacted that all probates and letters of administration granted by any Court in cases in which any of the assets of the deceased were within the local jurisdiction of the Court granting the probate or letters of administration should have the effect of probates and letters of administration granted in respect of the property of British subjects, *but for the purpose of the recovery of debts only and the security of debtor paying the same*, except so far as in this Act provided." (3)

Act XX of 1841 was repealed by Act XXVII of 1860, the Act by which these matters are now governed. It recites that "it is expedient to consolidate and amend certain Acts now in force which provide greater security for persons paying, to the representatives of deceased Hindus, Mahomedans, and others not usually designated as British subjects, debts which are payable in respect of the estates of such deceased persons, and which facilitate the collection of such debts by removing all doubts as to the legal title to demand and receive the same." It relates to the persons above specified only (4), and it re-enacts many of the provisions of Act XX of 1841, including s. 14. The section re-enacting that section is s. 18, which runs thus: "All probates and **[459]** letters of administration granted by any Supreme Court of Judicature in cases in which any effects belonging to deceased persons were, at the time of their deaths, within the local jurisdiction of the Court granting the probate or letters of administration, shall have the effect of probate and letters of administration granted in respect of the property of British subjects, *but for the purpose of the recovery of debts only*, and the security of debtors paying the same except so far as is in this Act provided"(5).

Under the High Court Charters of 1862 and 1865 the testamentary and intestate jurisdiction of this Court remained the same as it was at the time when the Supreme Court Charter was granted—qualified, however, by Act XXVII of 1860, s. 18, with respect to Hindus, Mahomedans and others not usually designated as British subjects in the manner already stated; and the result is this in cases to which the Indian Succession Act does not apply, that probates and letters of administration granted by this Court in respect of such persons take effect only for the purpose of recovering debts and securing debtors paying the same, except so far as is otherwise provided in Act XXVII of 1860. It is therefore, only

(1) 1 Taylor & Bell, 39-40. (2) Secs. 1 & 15. (3) *Vide* s. 7.
(4) Preamble and s. 23. (5) See ss. 8, 21.

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for this purpose that probate can be granted; and, in the case now before us, probate must be granted, limited as indicated in s. 18 of this Act.

The amount of probate duty payable is regulated by Act VII of 1870, sch. I, art. 11, which provides that a duty of two per cent. shall be paid on the amount or value of the property in respect of which probate is granted if such amount or value exceeds Rs. 1,000. As, in the present case, probate is only granted in respect of such debts as may be due to the estate, the duty payable by the executors will be two per cent. on whatever the amount of such debts may be. The amount secured by the Government promissory notes will be included among the debts in respect of which such duty is leviable, and for which probate will be granted, but the probate can have no operation in respect of the testator's share in the ships mentioned in the affidavits of the appellants.

With reference to the first branch of the application, *viz.*, that probate should be granted to take effect throughout India, we are **[460]** of opinion that such probate cannot be granted. We do not think that Cutchi Memons can be regarded as Hindus within the meaning of the Hindu Wills Act, by which s. 242 of the Indian Succession Act with the clause subsequently added by Act XIII of 1875 is made applicable to Hindus. We know of no difference between Cutchi Memons and any other Mahomedans, except that in one point connected with succession it was proved to Sir E. Perry's satisfaction that they observed a Hindu usage which is not in accordance with Mahomedan law. That is not enough to bring them within the term 'Hindu' as used in the Hindu Wills Act. It is admitted that, among such Memons, marriages are celebrated by the Kazi, they attend the masjid, they belong to the Suni division of Mahomedans, and make pilgrimages to Mecca. Under these circumstances we must hold them to be Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established.

Probate, therefore, in this case cannot be granted to take effect throughout India. It must be limited to this Presidency, and will be in such form as to confine its operation within the limits prescribed by Act XXVII of 1860.

Attorney for the applicants: Mr. *H. W. Payne.*
Attorney for Government: Mr. *R. V. Hearn.*

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Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Sir Charles Sargent, Justice.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF THAKER MADHAVJI DHARAMSI.

GOKALDAS MADHAVJI, *Applicant.*

[27th September, 1882.]

Indian Succession Act (*X of* 1865), *ss.* 179, 226—*Probate—Limited probate.*

Probate limited to part of the estate cannot be granted in cases where under s. 179 of the Indian Succession Act (X of 1865) the whole estate is vested in the executor.

[R., 26 B. 571=4 Bom. L.R. 9.]

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THE applicant in this case was the only son and universal legatee and devisee of the testator (a Hindu) who died on the 18th January, 1880, leaving a large amount of property, both **[461]** moveable and immoveable, all of which, with the exception of a house of trifling value, was self-acquired. The testator left a widow and a married daughter him surviving. His will was dated the 18th March, 1879. The applicant now sought probate limited to certain specified outstanding debts and shares in joint stock companies.

Inverarity, for the applicant.—The will in this case was made in 1879, and, therefore, by the Hindu Wills Act, s. 2, the Indian Succession Act (X of 1865) applies. We only need probate for the purpose of collecting a few outstanding debts, and effecting the transfer of some shares. As the only son of the testator the applicant takes all the property without the assistance of the Court, and it is unjust to make him pay duty upon the whole estate when he only needs probate to deal with a small part of it. The issue of limited probate is contemplated by the Indian Succession Act. Sections 212 and 220 enable the attorney of an absent person to obtain such probate, so that hereafter, when the applicant leaves Bombay he will be able to obtain indirectly what he now asks for directly.

[WESTROPP, C. J.—No. 488 of the Supreme Court Rules, which is continued in force by Rule I, Chap. II of the High Court Rules, requires us to follow the English practice in the absence of special legislation inconsistent with it.]

But the rule in England, that limited probate should not be given, is not inflexible: see Brown's Probate Practice (ed.) 214. The rule, if it exists in India, should be relaxed in the case of Hindus who are not bound to take out probate. In England Probate duty is a kind of succession duty, and it is paid by every one, but that is not the case in India among Hindus. A son may succeed to property of any amount, and may deal with it without taking probate. Section 226 of the Indian Succession Act enables the Court to grant limited probate under special circumstances.

Hon. *F.L. Latham* (Acting Advocate-General), for the Government.—In England limited probate cannot be granted except where the will itself limits the interest of the executor, and the law applicable in this case is the same as English law: *Sutton* v. *Smith* (1). The rule in that case is the rule laid down in **[462]** s. 219 of the Indian Succession Act: Williams on Executors (8th ed.), 387. We say a general probate must be granted, or none at all.

JUDGMENT.

WESTROPP, C.J.—We think that this application for the grant of limited probate to the son and executor of the testator must be refused. In this case the will was made subsequently to the passing of the Hindu Wills Act (XXI of 1870). By the Act certain sections, and amongst them s. 179 of the Indian Succession Act (X of 1865), were declared applicable to all wills of Hindus made on or after the 1st September, 1870. Section 179 provides that the executor of a deceased person is his legal representative for all purposes, and that all the property of the deceased vests in him as such. It is clear that under this section the interest of the executor in the property of the deceased is not limited as it is in cases falling under s. 18 of Act XXVII of 1860. This latter Act only affects the powers of executors of wills which do not come within the provisions of the Succession

(1) 1 Lee Eccls. Cases 275.

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Act, so that we have not now to consider it. There appears to be no provision in the Succession Act which authorizes the Court to grant probate limited to part of the estate in cases where under s. 179 the whole estate is vested in the executor. It has been contended that this can be done in the present case under s. 226, but we do not think this section in any way applicable. By the will the testator's property is given, without reservation, to his son who is the applicant, and no circumstance has been brought to our notice which would justify us in holding (in the words of the section) that "the nature of the case requires" any limitation to the probate. It has been suggested that there is no obligation upon the applicant to take out probate at all; that, as sole heir of his father, the whole property devolves upon him even though the will should never be authenticated by the Court; and that it is a hardship under these circumstances to require him to take out a general probate and to pay duty upon the whole estate when he needs probate only in order to enable him to deal with a small fraction of the testator's property. It may be a hard case, but we do not think that that circumstance brings it within the provisions of s. 226.

As the applicant is in Bombay it is not necessary for us to **[463]** consider whether it would be possible for him, under ss. 212 and 220 of the Succession Act, to obtain, in the circuitous method suggested in argument, the limited probate which he desires.

Application refused.

Attorneys for the applicant: Messrs. *Hore, Conroy, and Brown.*
Attorney for Government: Mr. *R. V. Hearn.*

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APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

SHIDDHESHVAR (*Original Plaintiff*), *Appellant v.* RAMCHANDRARAV (*Original Defendant*), *Respondent.** [10th April, 1882.]

Bombay Hereditary Offices Act III of 1874, *s.* 10—*Certificate by Collector—Jurisdiction—Hindu law—Age of majority—Mortgage by a person not owner—Agent—Ratification—Estoppel.*

A certificate under s. 10 of Bombay Act III of 1874, stating that a *vatan* has been assigned to an officiator as his remuneration, and granted by the Collector to save a *vatan* from attachment before judgment, does not exclude the jurisdiction of the Civil Court to make a decree, notwithstanding that the decree may be rendered inoperative by the Collector issuing a fresh certificate.

A Hindu to whom Act XX of 1864 (Minors Act) is not applied, and who is not governed by the Indian Majority Act, 1875, attains his majority when he attains the age of sixteen years.

The plaintiff sued the defendant on mortgages executed to the plaintiff by the adoptive mothers of the defendant (who were also defendants) subsequently to his adoption. The plaintiff contended that the mortgages had become effectual as against the defendant by reason of his subsequent conduct. Evidence was given that he had promised his adoptive mothers to redeem the mortgages, and that he had stood by and allowed the plaintiff to carry out the provisions of the mortgage deeds to his own detriment by paying maintenance to the defendant's adoptive mothers, and by paying off certain mortgages which had been created by them previously to the adoption of the defendant.

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Held, that the defendant was not liable upon the mortgages. His promise to redeem the mortgages was not made to the plaintiff, but to his adoptive mothers, and there was no consideration for such promise as he made. Nor could the promise have the effect of ratification, for the ratification of the unauthorized contract of an agent can only be effectual when the contract has been made by the agent avowedly for or on account of the principal, and not when it has been made on account of the agent himself.

[464] *Held*, also, that knowledge on the part of the defendant that the plaintiff was carrying out the part of the mortgage deeds, and his allowing the plaintiff to do so, did not estop him from disputing them afterwards, for it was no part of his duty to step in and protect the plaintiff against the consequences of his own unauthorized dealings with his property.

[R., 37 B. 37 = 14 Bom. L.R. 793; 54 P.R. 1902 = 64 P.L.R. 1902.]

THIS was a regular appeal from the decision of Rao Bahadur Purushotam S. Binivale, Subordinate Judge (First Class) at Satara.

The plaintiff sued Lakshmibai and Bhavanibai, widows of one Mahipatrav and Ramchandrarav, their adopted son. He alleged that the widows executed two mortgage deeds to him for Rs. 5,000 and Rs. 4,000 on the 27th August, 1867, and 15th April, 1868, respectively, which sums he claimed with interest and mesne profits.

The female defendants admitted the execution of the deeds, but pleaded (*inter alia*) that they were executed during the minority of their adopted son, the third defendant who alone was responsible for the plaintiff's demand. They also stated that the plaintiff had agreed to give them a certain amount for maintenance, and if he continued to give them that amount they would not oppose the plaintiff's claims. The third defendant (*inter alia*) contended that the property mortgaged was *deshmukhi vatan*, and assigned to the officiator as remuneration, and not alienable without the sanction of the Collector of the district. He also contended that the acts of the first two defendants did not bind him, he having been a minor at the date of the deeds.

The Court below held that the deeds had, in fact, been executed, but that there was no legal necessity for their execution, and that the third defendant was not bound by the acts of his adoptive mothers. It was of opinion that there was collusion between the plaintiff and the widows. It also held that the Collector having certified, under s. 10 of the Vatan Act (Bombay Act III of 1874), that the property was *vatan*, the mortgages should be held to be of no effect, and a decree was made in favour of the plaintiff against the first two defendants only.

The plaintiff appealed to the High Court, making the third defendant the only respondent.

Inverarity (with him *Kirloskar*), for the appellant.—The adoption of the third defendant by the first and second defendants took **[465]** place in 1864,—that is, before the execution of the earlier of the plaintiffs mortgages. The two defendants were indebted in large sums at that time, and the plaintiff paid them off. The mortgages to the plaintiff were before the Vatan Act of 1874. The Collector of Satara under s. 10 of the Act, did grant a certificate on the 28th of February, 1879, declaring the property to be *vatan* assigned to the officiator as remuneration; but this certificate touches only beneficial personal interest. Section 10 of the Act does not empower the Collector to declare a mortgage to be null and void. The third defendant acquiesced in the acts of the plaintiff and of the other defendants for many years after he attained the age of majority, —that is eighteen years complete. He even promised his mothers to redeem the mortgages.

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Lang (with him *Shantaram Narayan*), for the respondent.—The female defendants had no right to mortgage: *Bai Kesar* v. *Bai Ganga* (1). At the date of the earlier mortgage the third defendant was more than sixteen, which is the age of majority according to Hindu law. Evidence shows he was eighteen. Any promise made by him was without consideration, and ineffectual. It did not amount to ratification. The fact that he allowed the plaintiff to give maintenance to his mothers does not debar him from disputing unauthorized dealings with his property.

JUDGMENT.

MELVILL, J.—In this case the Collector of Satara has given a certificate under the provisions of s. 10 of Bombay Act III of 1874, in which he states that the whole of the property against which the plaintiff seeks to enforce his mortgages is *deshmukhi vatan* assigned as the remuneration of the officiator, and, consequently, inalienable. This certificate appears, to have been issued to defeat an attachment before judgment placed in this suit, and, having fulfilled its object, it cannot be said that it operates to exclude the jurisdiction of this Court to make a decree in the plaintiff's favour. There can be no doubt, however, that if this Court were to make such a decree, the Collector would immediately renew his certificate, and this Court would then be constrained, by s. 10 of the Act, to cancel its decree, which would consequently be wholly inoperative. Under these **[466]** circumstances it seems strange that the plaintiff should have thought it worth his while to press this appeal.

Independently, however, of this consideration, we are of opinion that the plaintiff is not entitled to a decree against the third defendant, Ramchandra, or against the mortgaged property. The mortgages were executed on the 27th August, 1867, and the 15th April, 1868, by the two first defendants, Lakshmibai and Bhavanibai, in their own names. These ladies had adopted the third defendant Ramchandrarav in 1864. Consequently, at the date of the mortgages, they had no right to deal with the property as their own, since it had long since vested in Ramchandra. Nor, even if they had professed (which they did not do) to deal with it as Ramchandra's guardians, had they any power so to act: for the evidence proves to our satisfaction that, at the date of the earlier of the two mortgages, Ramchandra had attained the age of sixteen, and, therefore, as Act XX of 1864 had not been applied to him, he was, according to the rulings of this Court, no longer a minor: *Shivji Hasam and others* v. *Datu Mavji* (2); *Hari Mahadaji* v. *Vasudev Moreshwar* (3); *Gungadhur* v. *Chimnaji* (4).

The mortgages having been effected by persons who had no authority to deal with the property, it is contended that they have nevertheless become effectual through the subseqent conduct of Ramchandra. It is in evidence that Ramchandra promised the two first defendants that he would redeem the mortgages; but he made no promise to the plaintiff, nor was there any consideration for such promise as he made. Nor can the promise have the effect of a ratification: for a ratification of the unauthorized contract of an agent can only be effectual when the contract has been made by the agent avowedly for, or on account of, the principal, and not when it has been made, as in the present case, on account of the agent himself: *Wilson* v. *Tumman* (5). The only other ground on which

(1) 8 B.H.C.R. A.C.J. 31. (2) 12 B.H.C.R. 281. (3) 2 B.H.C.R. 325.
(4) 5 B.H.C.R. 95. (5) 6 M. & G. 236.

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it is contended that Ramchandra is bound, is that he stood by and allowed the plaintiff to carry out the provisions of the mortgage deeds to his own detriment, by paying maintenance to the two widows, and by paying off certain mortgages which had been created by the widows previously [467] to Ramchandra's adoption. But it was no part of Ramchandra's duty (even if he knew of what was going on), to step in, and protect the plaintiff against the consequences of his own unauthorized dealings with Ramchandra's property. If he has acquired, by assignment, any valid charges against that property, it is open to the plaintiff to assert his claim in another suit, if he think it worth his while to do so in the face of the Collector's certificate.

The decree of the Subordinate Judge is confirmed with costs.

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6 B. 467.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

HUSEIN BEGAM (*Original Plaintiff*), *Appellant v.* ZIA-UL-NISA BEGAM AND ANOTHER (*Original Defendants*), *Respondents.**

[10th April, 1882.]

Mahomedan law—Sale of minor's property—Validity of such sale—Guardian—Sanction of sale by ruling authority.

The plaintiff sued to recover her husband's share in certain property at S. to which he and other persons became entitled as heirs of M. That property had been sold to the defendants by the heirs of M. during the minority of the plaintiff's husband, his elder brother acting for him in the transaction. It was proved that the sale of the property to the defendants had been approved of by H, who was the Agent of the Governor of Bombay at S., and the representative of the ruling authority in the management of M.'s estate. The plaintiff contended that, according to Mahomedan law, it was not competent for the elder brother of a minor, as guardian, to alienate a minor's property.

Held that the sanction of the ruling power constituted a sufficient authority for the act of the guardian, provided that the transaction was one which, according to Mahomedan law, a duly constituted guardian might have entered into on behalf of his ward. That law permits a guardian to sell the immoveable property of his ward when the late incumbent died in debt, or when the sale of such property is necessary for the maintenance of the minor. The evidence in the present case showed that the indebtedness of M. and the distressed condition of his heirs existed in a sufficient degree to justify the sale of the whole property of the heirs.

[R., 34 A. 572=9 A.L.J. 844=15 Ind. Cas. 138; 11 O. C. 1; 43 P.L.R. 1907 (F.B.) =23 P.W.R. 1907.]

THIS was an appeal against the decree of Rao Bahadur Mangeshrav Balvant, Subordinate Judge (First Class), Surat.

The plaintiff in this case sought to establish her title to a fourth of her husband Kutubudin's share in the three-annas' share in [468] the rupee adjudged to Mir. Kamrudin in the estate of the late Nawab of Surat, amounting to Rs. 1,75,415-8-11. The defendants relied upon their purchase of the three-annas' share from the plaintiff's husband and the other heirs and descendants of Mir. Kamrudin. The only question here was whether the plaintiff's husband Kutubudin was bound by the sale, he having been admittedly a minor at the date of the sale. The Subordinate

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* Regular Appeal No. 37 of 1880.

Judge held that the plaintiff's husband, although a minor, was bound by the sale, and dismissed the plaintiff's claim.

The plaintiff appealed to the High Court.

Pandurang Balibhadra, for the appellant.—The plaintiff's husband being a minor at the date of the sale, his elder brother acted for him. But, according to Mahomedan law, he is a remote guardian, and had no control of any kind over the property of his ward. The sale was, therefore, invalid. No greater powers can be exercised by a *de facto* guardian who has not legally completed his right to manage a minor's estate than can be exercised by a guardian appointed by the Court: *Abhassi Begam* v. *Maharanee Raj-Roop Koonvar* (1).

Shantaram Narayan; for the respondents.—Any defect which might have existed in the guardianship was cured by the sanction of the ruling power.

JUDGMENT.

MELVILL, J.—The plaintiff's husband, Kutubudin, was admittedly a minor, at the date of the sale, *viz.*, the 30th April, 1855. The guardian who acted for the minor in the transaction was his elder brother Hemdulla. It is contended that it was not competent to such a guardian to alienate his ward's property. In Macnaghten's Principles of Mahomedan Law, Chap. VIII, s. 5, it is said: "Guardians are near or remote. Of the former description are fathers and paternal grandfathers and their executors and the executors of such executors. Of the latter description are the more distant patneral kindred, and their guardianship extends only to matters connected with the education and marriage of their wards. The former description of guardians have power over the property of the minor, for purposes beneficial to him. In their default this power does not vest in the remote guardians, **[469]** but devolves upon the ruling authority." This being the law on the subject, it may well be that an alienation by Hemdulla would have been void, if it had not received the sanction of the ruling authority. But as we have already noticed in the companion case which we first heard [*Mir Azimudin Khan* v. *Zia-ul-Nisa* (2)], Mr. Hebbert, who was the Governor's Agent at Surat, and the representative of the ruling authority in the management of Mir Kamrudin's estate, was consulted as to the sale, and approved of it. He reported to the Government that the transaction was no bad bargain for Mir Kamrudin's heirs, and thereupon the Government commuuicated to Mr. Hebbert their sanction to the sale. It does not appear that the circumstance that some of Mir Kamrudin's heirs were minors was brought prominently to the notice of the Government; but Mr. Hebbert was well aware of the fact, and there is no reason whatever to suppose that the Bombay Government would have taken any other view of the transaction, if it had been expressly informed of a circumstance of which it was probably not ignorant. Under these circumstances we think that the sanction of the ruling power constituted a sufficient authority for the act of the guardian, provided that the transaction was one which a duly-constituted guardian might have entered into on behalf of his ward under the rules of the Mahomedan law. Now at p. 64 of Macnaghten's Principles are enumerated seven circumstances under which a guardian is at liberty to sell the immoveable property of his ward. One of these circumstances is where the minor has no other property, and the sale of it is absolutely necessary to his maintenance. Another is where the

(1) 4 C. 33.

(2) 6 B. 309.

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late incumbent died in debt, which cannot be liquidated but by the sale of such property. We are of opinion that the evidence establishes that these two circumstances, *viz.*, the indebtedness of Mir Kamrudin and the distressed condition of his heirs, existed in a sufficient degree to justify the sale of the whole property of the heirs. For these reasons we confirm the decree of the Court below with costs.

6 B. 470.

[470] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

NAHALCHAND (*Plaintiff*) *v.* BAI SHIVA AND ANOTHER (*Defendants.*)*

[4th April, 1882.]

Hindu law—Husband and wife—Widow—Re-marriage—Liability of widow who has re-married for debt contracted during widowhood—Liability of wife for debt contracted during coverture—Personal liability of widow—Stridhan.

A Hindu woman who was a widow when she executed a money bond, but has subsequently re-married, is personally liable for the debt. Her liability is not restricted merely to her *stridhan*.

UNDER s. 617 of the Code of Civil Procedure, Rao Saheb Ranchhodlal K. Desai, Subordinate Judge of Borsad, submitted the following case for the opinion of the High Court:—

"On the 28th of April, 1880, the defendants executed a money bond for Rs. 45 in favour of the plaintiff, thereby binding themselves to pay jointly and severally the amount of the bond personally, and the bond recites that this bond has been passed in settlement of the claim the plaintiff had against the deceased husband of the defendant No. 1, and on the terms of this bond the plaintiff has sued to recover the amount of the bond with interest from the person and property of both the defendants; but the defendant No. 1 has, as is admitted by the plaintiff, performed a re-marriage since the execution of the bond sued on, and hence a question arises, whether a decree can be given against the person and property of the defendant No. 1, or must be restricted only to her *stridhan*?

"In the case of *Nathubhai Bhailal* v. *Jhaver Raji* (1) it has been ruled by the High Court that, under the Hindu law, a wife who has voluntarily separated from her husband, without any circumstances justifying her separation, is liable for debts contracted by her (even for necessaries) although without her husband's consent; but her liability is limited to the extent of any *stridhan* she may have, and this ruling was followed by the High Court in its Original Side in the case of *Govindji Khimji* v. *Lakkmidas Nathubhai, his wife Bai Gomtibai and another* (2), even though the wife contracted for the debt jointly [471] with her husband and separately for herself with her husband's consent. It thus appears that the person of a Hindu married woman is protected, and not liable to arrest, for the payment of a debt contracted by her either with or without her husband's consent.

"I beg to confess my inability to find from any of the reported cases, or from the Mitakshara, or from the Vyavhara Mayukha, anything that will justify me in holding the person of a Hindu widow not liable for the

* Civil Reference No. 9 of 1882.

(1) 1 B. 121.

(2) 4 B. 318.

payment of the debts contracted by her; but, on the contrary, I find from the old cases decided by the Sadar Divani Adalats of Bombay and Bengal (*Ootamram and Himutram, sons of Wajehram Desai* v. *Mt. Bhanee, widow of Gokool Lakmidas, and another* (1); *Ootamram and Himutram, sons of Wajehram Desai* v. *Hargovindas Hurjeevandas* (2); and *Mt. Sootee Koowar* v. *Punuvo Roy* (3) that the Sadar Divani Adalats ruled that a debt incurred by a Hindu widow is recoverable from her personally as well as from her separate property.

"In the Vyavahara Mayukha (translated by Rao Saheb Vishvanath Narayan Mandlik) certain modes of recovering the debts by a creditor are specified, and no distinction is therein made between a male and a female debtor as regards the modes of recovering the debts (*vide* pp. 109 to 115); but, on the contrary, a passage occurs at p. 114 'that a woman shall pay the debts agreed to by her or contracted by her jointly with the husband or by herself alone; (and) she shall pay no other debts.' This shows that a woman, like any male debtor, is liable to pay the debts agreed to by her, or contracted by her jointly with her husband, or by herself. This passage also occurs in the Mitakshara (*vide* Coleb. Dig., Book I, text 211). The term used in these passages is 'woman,' which includes both a married woman whose husband is alive and a widow; it thus appears that there is no distinction made between the liability of a Hindu married woman and that of a Hindu widow for debts contracted by them.

"The ruling in the cases of *Nathubhai Bhailal* v. *Jhaver Raiji and another* and *Govindji Khimji* v. *Lakmidas Nathubai and others*, **[472]** referred to above, that the liability of a Hindu married woman for debts contracted by her is limited to the extent of any *stridhan* she may have, seems to have been based, not on any particular text of Hindu law, but on the previous decisions of the High Court in Special Appeals Nos. 261 of 1861 and 467 of 1869. These decisions have not been reported; and thus I have no means of knowing the reasons or the authority on which the learned Judges based their decisions in the special appeals above referred to. Under these circumstances I am unable to find whether the High Court intended that the exemption from personal arrest should be extended to Hindu widows who have remarried after the contracting of the debt, and even to a Hindu widow who has not remarried.

"In the case of a Hindu married woman it may, I submit, be considered that she contracted the debt with reference to her *stridhan*, which is analogous to a woman's separate property in England; but in the case of a Hindu widow who has remarried subsequently to the contracting of the debt, it cannot be so considered, for the creditor had, at the time at which she contracted the debt, no means of knowing that she would marry again.

"It will not be out of place here to state that this Court as well as all other Courts in this district have hitherto been giving decrees against the person and property of Hindu widows for debts contracted by them.

"Considering that this point is of general importance, and that it is one on which I entertain some doubt, I deem this reference necessary.

"My opinion on the point hereby referred being in the affirmative, I have given the decree against the person and property of the defendants contingent upon the decision of the Honourable the High Court."

The parties did not appear.

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(1) 2 Borr. 185, ed. of 1863.
(2) 2 Borr. 127 ed. of 1863.
(3) 6 Beng. S.D.A.R. 154.

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6 B. 470.

OPINION.

Per Curiam.—The Court thinks that the decree passed by the Subordinate Judge is correct.

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6 B. 473.

[473] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

NAROTAM (*Plaintiff*) *v.* NANKA AND OTHERS (*Defendants*).*

[28th March, 1882.]

Hindu law—Husband and wife—Contract—Liability—Stridhan.

A Hindu married woman who contracts jointly with her husband is liable to the extent of her *stridhan* only, and not personally.

[F., 12 B. 228.]

UNDER s. 617 of the Code of Civil Procedure, Rao Saheb Madhuvachhram, Subordinate Judge of Anklesvar, submitted the following case for the opinion of the High Court:—

"One Narotam Lalabhai, of Anklesvar, instituted a suit, within the Small Cause Court jurisdiction of this Court, against a Dhed by name Nanka Madhav, his wife Bai Dahi, and two others on a simple money bond alleged to have been passed by them on Jeth Sudi 12th Samvat 1935, corresponding with the 1st of June, 1879. None of the defendants have put in appearance, and the case has been tried *ex parte*. The issues fixed for decision are—

"1. Is execution of the bond sued upon proved?

"2. Is the defendant Bai Dahi liable for the claim under the Hindu Law?

"From the evidence adduced by the plaintiff it appears that, about six years ago, the defendant Nanka wanted to marry a son of his, and was in need of money. He went to the plaintiff, and asked for a loan. The latter accommodated him with the amount required, and a *khat* was written. In this *khat* or bond the obligors were the defendants Nanka, his wife Bai Dahi, and two sureties. In 1879 the debt was renewed, and the bond, on which the action has been based, was written. Two witnesses, Gopal Gowan and Nathabhai Rasikdas, examined by the plaintiff, prove beyond a doubt that the defendants executed the bond sued upon in favour of the plaintiff.

"The question then arises—'is the defendant Bai Dahi liable for the claim?' At the time the debt was contracted she lived with her husband Nanka, and the plaintiff himself admits that even now the husband and wife live together. Under these [474] circumstances whether coverture affords a protection against responsibility is the point that demands consideration. So far as I am aware, the practice in the Mofussil has been to hold that a married woman, under the provisions of the Hindu law, is not answerable for a debt contracted by her jointly with her husband. This interpretation is supported by a ruling of the late Sadar Adalat (*Pitamber Jetha and Bai Oojam* v. *Harivallabhdas Runchordas* (1)) and by the decision of the High Court in *Parsotam Javerchand* v. *Moti Bhikha and his wife Bai Ganga* (decided on the 23rd of March, 1865,

* Civil Reference No. 17 of 1882.

(1) 7 Har. 202.

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on a reference made by the Judge of the Court of Small Causes at Ahmedabad). Both these cases are directly to the point; but their authority seems to have been weakened by some of the observations made by Mr. Justice Nanabhai in *Bhailal* v. *Jhaver Raiji and another* (1), wherein a wife who had voluntarily separated from her husband without any circumstances justifying her separation was held liable for a debt contracted by her, although without her husband's consent. In 2 Macn., p. 278, case 2, it is said: 'It is a general principle in law that a wife is incompetent to contract a debt, or to execute any obligation; but if a debt be contracted by a woman of any of the superior tribes, such as a Brahminee or Kshatria, for the support of the family it must be liquidated by the husband.' In enumerating persons incompetent to contract, the sage Manu says: 'A contract made by a person intoxicated, or insane, or grievously disordered, or *wholly dependent*, by an infant or a decrepit old man, or in the name of another by a person without authority, is utterly null.'—Institutes of Manu, ch. viii, shl. 163. The expression '*wholly dependent*' refers to slaves and women. 'Day and night must women be held by their protectors in a state of dependence; but in lawful and innocent recreations, though rather addicted to them, they may be left at their own disposal. Their fathers protect them in childhood, their husbands protect them in youth, their sons protect them in age; a woman is never fit for independence.'—*Ibid.* ch. 9, v. 2 and 3. Katayana is more explicit. According to him 'let no man lend anything to women, to slaves, or to children; whatever thing of value has been lent to them the lender cannot, *in* **[475]** *general*, recover without the assent of their guardian or master.'—Coleb. Dig., Bk. I, ch. i, s. 2, part viii. No doubt a married woman can acquire and hold property in her own right, and exercises an absolute control over some sorts of her *stridhan*. But this is only an exception, and because it is an exception her power of disposal is expressly declared by Hindu lawyers. Moreover, it is not every sort of *stridhan* which can be disposed of at her pleasure. Jagannath, commenting on the verse of Katayana above quoted, observes: 'Nothing should be lent to women, because they are unable to repay it, for it is recorded that they have no property exclusively their own.'—I. Coleb. Dig., Bk. I, ch. i. s. 2, art. i, viii. 'Three persons—a wife, a son, and a slave—are declared by law to have, in general, no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they belong.'—Manu, ch. viii, v. 416. The Madras High Court has, no doubt held that everything acquired by a married woman during coverture does not pass to her husband: *Ramasami* v. *Virasami* (2). But it is equally clear that the husband has some power over the *stridhan* of his wife, and may take it under certain circumstances: Mitakshara, ch. 11, s. 11, arts. 32 and 33; and Vyavahara Mayukha, ch. iv, s. x, art. 10. In *Dantuluri* v. *Mallapudi* (3) the Judges (Holloway and Innes, JJ.) observe: 'Keeping in view the following passage from Colebrooke (obl., s. 611) which was not quoted in the argument, "and she is subject to his control even in regard to her peculiar and separate property," a passage written by this greatest of all authorities with all the texts from Jimut Vahana and his own Digest before him, and looking also at the repeated texts of Hindu law as to the absolute dependence as to every act of the woman, and at the fact abundantly clear from the history of

(1) 1 B. 121. (2) 3 M.H.C.R. 272. (3) 2 M.H.C.R. 360.

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our own law, that so-called absolute property is quite consistent with restricted power of alienation, and that this is still more conspicuously the case with the Hindu law, we could not, without the greatest consideration, conclude that a woman can without the consent of her husband, during coverture, absolutely alienate even her own landed property.' Some texts apparently tend to show that a wife is **[476]** personally answerable for debts contracted by her jointly with her husband. Yajnavalkya declares: 'A debt acknowledged by her husband, or contracted by her jointly with her husband, or son, or contracted by the woman herself, must be paid by a wife or mother; no other debts shall a woman be compelled to pay.'—I Coleb. Dig., Bk. I, ch. v, ccx. Katayana follows in the same strain. The texts of Yajnavalkya and Katayana are quoted by the author of the Vyavahara Mayukha, ch. v, s. iv, para. 20. A careful perusal of them cannot fail to convince that they refer to the liability of the woman *after* the death of her husband. The order of those bound to pay the debts of a deceased person is mentioned in the 16th and the succeeding paras of s. iv, ch. v, of the Vyavhara Mayukha. Vijnyaneshwar accordingly remarks that a debt contracted by a wife jointly with her husband must, *on failure of the husband*, be paid by the wife if she have no male issue.—Mitakshara, ch. 3, 13. Jagannath in commenting on a text of Katayana (I. Coleb. Dig., Bk. I., chs. v, ccxix) quotes with approbation this passage of Vijnyaneshwar, and says: 'Suppose a man whose son is an infant, and whose wife has contracted a debt jointly with her husband, but he dies, and his son inherits his property;—in that case by whom should the debt be paid? By the son *alone*.'

"Debts contracted by a married woman for domestic purposes are payable by her husband. The Hindu law in this particular is in unison with the English law. According to the latter a wife has no independent existence. According to the Hindu law, also, the wife merges in the husband. 'Whatever be the qualities of the man with whom a woman is united by lawful marriage, such qualities even she assumes: like a river united with the sea.'—Manu, ch. 9, v. 22. For this reason no sacrifice is allowed to women apart from their husband. A wife is declared by the Vedas to be half of her husband's body.

"On a consideration of all these authorities I am inclined to the opinion that a Hindu wife is not liable, during her husband's lifetime, for a debt contracted by her jointly with her husband. She has, no doubt, power to bind her peculiar property to some extent; but, then, there must be a special agreement to bind such property. From the observations made by Mr. Justice Nanabhai **[477]** Haridas in *Nathubhai* v. *Jhaver*, above cited, I feel a doubt whether the view taken by me is correct, and, therefore, think it right to obtain the orders of their Lordships the Judges of the High Court before finally disposing of the same."

The parties on either side put in no appearance before the High Court.

OPINION.

Per Curiam.—The Court thinks that *Nathubhai Bhailal* v. *Jhaver Raiji* (1) and *Govindji Khimji* v. *Lakhmidas Nathubhai* (2) are sufficient authorities for holding that a married woman who contracts jointly with her husband is liable to the extent of her *stridhan* only.

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(1) 1 B. 121. (2) 4 B. 318.

6 B. 477.

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APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

RAMCHANDRA (*Plaintiff*) *v.* BHIKIBAI (*Defendant*).* [4th April, 1882.]

Res judicata—Effect of rejection of plaint for non-appearance of plaintiff—Possessory suit in Mamlatdar's Court and in Civil Court—Bombay Act III of 1876, *s.* 13—*Specific Relief Act* (*I of* 1877), *s.* 9—*Civil Procedure Code* (*Act X of* 1877), *s.* 13.

A plaintiff, whose plaint has been rejected for default of appearance in the Mamlatdar's Court under Bombay Act III of 1876, s. 13, cannot bring another possessory suit on the same cause of action in the Civil Court under s. 9 of the Specific Relief Act I of 1877; for the rejection of a plaint under s. 13 of Bombay Act III of 1876 by reason of the failure of the plaintiff to attend with his proofs on the day appointed, is a hearing and final decision of the suit within the meaning of s. 13 of the Code of Civil Procedure (Act X of 1877), and upon the rejection of the plaint the question in the suit becomes *res judicata*.

[Diss., 24 B. 251; **R.**, 21 B. 91 (97); 25 B. 82; 28 B. 601=6 Bom. L.R. 612.**]**

THIS was a reference from Rao Saheb V. M. Bodas, Subordinate Judge of Yeola, under s. 617 of the Code of Civil Procedure. The plaintiff sued, under s. 9 of the Specific Relief Act (I of 1877), to recover possession of some immoveable property, alleging that he was dispossessed of the same otherwise than in due course of law within six months of the date of suit.

The defendant answered that the suit could not be maintained, as an exactly similar suit by the plaintiff against her on the **[478]** same cause of action and for the recovery of possession of the identical property had been dismissed by the Mamlatdar's Court at Yeola under s. 13 of Bombay Act III of 1876, the said plaintiff having failed to appear before that Court on the day appointed for the hearing of the suit.

The plaintiff admitted that the Mamlatdar's Court did dismiss his suit two months before, and that he did not avail himself of the remedy given to a defaulting plaintiff by the last clause of s. 13 of the Mamlatdar's Act for the rehearing of his suit.

Under these circumstances the Subordinate Judge felt a doubt as to whether the suit now brought under the Specific Relief Act would lie, and referred the matter for the orders of the High Court, expressing his own opinion that the suit would lie. He submitted that the Mamlatdar's action in rejecting the plaint under s. 13 of Bombay Act III of 1876 was analogous to the action of the Civil Court in dismissing a suit under s. 103 of the Code of Civil Procedure (X of 1877); that the rejection of the plaint in the former case was not the hearing and final decision of the matter in dispute; and that the plaintiff's failure to avail himself of the remedy provided in the last clause of s. 13 of Bombay Act III of 1876 did not preclude him from bringing a second suit on the same cause of action. He said that if the Legislature had intended to preclude such a suit, it would have expressly made a provision to that effect, as it did in s. 103 of the Code of Civil Procedure.

The plaintiff put in no appearance in the High Court.

Pandurang Balibhadra, appeared for the defendant.

OPINION.

Per Curiam.—We entertain no doubt that it would be contrary to the intention of the Legislature to allow a plaintiff, whose plaint has

* Civil Reference No. 15 of 1882.

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been rejected for default in the Mamlatdar's Court under Bombay Act III of 1876, to bring another possessory suit on the same cause of action in the Civil Court under s. 9 of the Specific Relief Act, 1877. The rule of *res judicata* is laid down in s. 13 of Act X of 1877, and we think that the rejection of a plaint under s. 13 of Bombay Act III of 1876 is a hearing and final decision of the suit within the meaning of s. 13 of the Code. It is certainly a final decision, and the [479] section of the Bombay Act itself treats the suit as having been heard, for it provides that the plaintiff may take certain steps to have the suit *reheard*. We, therefore, answer the question referred to us in the negative.

Order accordingly.

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6 B. 479.

APPELLATE CRIMINAL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

EMPRESS *v.* GASPAR D'SILVA.* [20th April, 1882.]

Jurisdiction—Sanction to prosecute granted by District Judge—Power of same person as Session Judge to try the offence—Criminal Procedure Code (Act X of 1872), ss. 472 and 473.

A District Judge who has, on hearing a civil appeal, sanctioned the prosecution of a party for forgery, is not debarred by s. 473 of the Code of Criminal Procedure (Act X of 1872) from trying the offence in his capacity of a Session Judge.

[F., 2 Bom.Cr.Cas. 27=15 Bom.L.R. 104=14 Cr.L.J. 190=19 Ind. Cas. 190; U.B.R. (1897—1901), 127 (130); Appl., 16 C. 766 (770) (F.B.); R., 14 A. 354 (355); 2 C. W.N. 613]

THE accused Gaspar D'Silva, a Portuguese shopkeeper in the city of Ahmednagar, was tried before W. Wedderburn, Session Judge, of having forged a receipt, and sentenced to suffer rigorous imprisonment for two years and a half.

On the 27th of August, 1876, the accused and another person executed to one Palanji a money-bond for Rs. 62-8-0, which they agreed to repay by monthly instalments of Rs. 4. They further stipulated that, in default of the payment of one instalment, interest at the rate of 2 pies per rupee was to be charged, but that, in default of the payment of more than two instalments, the whole amount with interest was to become due and immediately recoverable. In November, 1878, the obligee Palanji sued the accused upon this bond in the Court of the Subordinate Judge of Ahmednagar, claiming the amount due on the bond, *minus* two instalments of Rs. 4 each—one received on the 7th of October, 1876, and the other on the 8th of November, 1876. In answer to this claim the accused put in a receipt which, on the face of it, showed a payment of Rs. 4 on the 7th of October, 1876, and a payment of Rs. 46 on the 8th of November, 1876. The Subordinate Judge [480] held the latter entry to be a forgery. It appeared to him that figure 6 had been subsequently fraudulently added to the figure 4. An appeal was made to the District Court, and Mr. Wedderburn, in his capacity of District Judge, was of the same opinion. On the 31st of August, 1881, Mr. Wedderburn, as District Judge, granted sanction for the prosecution of the accused: and Mr. Wedderburn, as Session Judge, upon the case being committed to him by Mr. Hamilton, Magistrate (First Class), tried and convicted the accused. The accused appealed to the High Court.

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* Criminal Appeal No. 33 of 1882.

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6 B. 479.

Branson (with him *Jefferson*, *Bhaishankar*, and *Dinsha*), for the appellant.—Mr. Wedderburn had no jurisdiction to try this case as Session Judge, he having, as District Judge, granted the sanction for instituting criminal proceedings. The District Court and Session Court are the same Court, and s. 473 of the Code of Criminal Procedure says, except as therein provided, "no Court shall try any person for an offence committed in contempt of its own authority." The word "contempt" must be understood in a wide sense as including any attempt to pervert the proceedings of a Court to an improper end. Forgery is such an attempt, and, therefore, a contempt of the Court in which the forged document was produced: *Reg.* v. *Navaranbeg* (1); *Reg.* v. *Gaji kom Ranu* (2). The prohibition in s. 473 is not limited to offences in Chap. X of the Code: *Reg*, v. *Parsapa Mahadevapa* (3). The word "Court" in that section includes both Civil and Criminal Court, and if the Court thinks that in a particular case there is sufficient ground for inquiring into a criminal charge it should not try the case itself: *Queen* v. *Kultaram Singh* (4); *Empress of India* v. *Kashmiri Lal* (5). This case overrules that part of the ruling in the former which holds that an offence against public justice is not a contempt. The object of the Legislature in enacting s. 473 was obviously to prohibit the person who has formed an extra-judicial opinion on the subject afterwards trying the case judicially. The High Court of Madras has accordingly held that the word [481] "Court" should be construed as referring, not to the office, but to the person of the Magistrate or Judge before whom an offence of the class described in s. 473 of the Code was committed, and that the prohibition in that section was a purely personal prohibition. The definition of the expression "Criminal Court" in s. 4 of the Code admits of this construction.

The Sessions Judge was wrong in admitting improper evidence, for the evidence in the civil case ought not to have been admitted in the criminal trial. A trained Judge might keep the civil and criminal cases distinct, but not the untrained assessors. The admission of the evidence has prejudiced the accused.

Hon. *V. N. Mandlik*, Government Pleader, for the Crown.—The Court of Sessions is not the District Court. The functions of the two are quite distinct. The circumstance that both are presided over by the same officer is accidental. The case of the *Empress of India* v. *Kashmiri Lal* (5) is one in which the offence committed was before a Magistrate. The high position of a Sessions Judge makes the case different. Great inconvenience would be caused if the doctrine urged by the appellant be adopted.

JUDGMENT.

MELVILL, J.—No authority has been shown to us which requires us to hold that the Sessions Court has no jurisdiction to try an offence committed in contempt of the authority of the District Court. Section 473 of the Criminal Procedure Code does not seem to us to involve such a conclusion, for the District Court and Sessions Court are essentially distinct Courts, though presided over by the same officer. It is, no doubt, desirable, as a rule, that a trial should not be held before a Judge who has already prejudged the question of the guilt of the accused, and on this ground we have always been ready to entertain applications for the transfer

(1) 10 B.H.C.R. 73. (2) 1 B. 311. (3) 1 B. 339.
(4) 1 A. 129. (5) 1 A. 625.

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of trials in cases like the present. But it would be highly inconvenient to hold that a trial for an offence committed in a civil appeal, and exclusively triable by a Court of Sessions, can under no circumstance be regarded as within the jurisdiction of the Judge who heard the appeal, even though, as in the present case, the accused person may be perfectly willing to be tried by him. The Legislature seems to have been impressed by the sense of [482] this inconvenience, and, consequently, in enacting s. 472 of the Code, it gave jurisdiction to the Court of Sessions to try all cases of contempt committed before it in which the offence is triable exclusively by the Court of Sessions. It would be difficult to suppose that the Legislature had any other intention in regard to offences of the same kind committed before the Judge of the Court of Sessions in his civil capacity, and certainly s. 473 is not so worded as to oblige us to hold that there was any other intention.

The learned Judge then went into the merits of the case, and said no reasons existed to disturb either the conviction or the sentence, which were confirmed.

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6 B. 482.

ORIGINAL CIVIL.

Before Mr. Justice Latham.

RUNGRAV RAVJI (*Plaintiff*) *v.* SIDHI MAHOMED EBRAHIM AND EBRAHIM HOOSEIN KHAN (*Defendants*).* [27th April, 1882.]

Res judicata—*Objection by a plaintiff that the matter alleged in defence is* res judicata—*Effect of dismissal of suit under s.* 381 *of Civil Procedure Code (Act X of* 1877) *for default of plaintiff to give security for costs—Defendant precluded from pleading matter which is* res judicata—*Civil Procedure Code (Act X of* 1877), ss. 13, 102, 103, 381.

The plaintiff sued the defendants on a promissory note. The defendants filed a written statement, alleging that the note had been obtained by the plaintiff by fraud and false representation. Previously to the filing of the present suit by the plaintiff the defendants had brought a suit against the plaintiff in which they prayed that the said promissory note might be delivered up to be cancelled. Their plaint in that suit contained allegations of fraud and want of consideration identical with those contained in their written statement in the present suit. The plaintiffs in the former suit (the present defendants) having failed to give security for costs, the suit was dismissed under s. 381 of the Civil Procedure Code (Act X of 1877). It was now contended that the defendants were estopped from pleading as a defence to the present suit, the fraud and want of consideration which had been alleged by them as plaintiffs in the former suit which had been dismissed.

Held that the defence might be pleaded, and that the question of fraud and want of consideration was not *res judicata* within the meaning of s. 13 of the Civil Procedure Code. The previous suit had been dismissed by reason of the [483] plaintiffs' (the present defendants') failure to give security for costs; and a Court cannot be said to "hear and decide" a matter which it is relieved from hearing and deciding by the plaintiff's default.

Under s. 13 of the Civil Procedure Code (Act X of 1877) a defendant may be precluded from pleading as a defence matter which is *res judicata*.

Quære—Whether a plaintiff, whose suit has been dismissed under s. 381, can again litigate the subject-matter of the dismissed suit.

[R., 24 B. 251 ; 12 C. 563 ; 10 M. 272 ; 9 C.W.N. 679.]

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* Suit No. 492 of 1881.

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6 B. 482.

THE plaintiff in this suit sought to recover the sum of Rs. 4,000 on a promissory note passed to him by the defendants, dated the 28th November, 1879. The second defendant was sued only as a surety.

The first defendant filed a written statement denying his indebtedness to the plaintiff, and alleging that he had received no consideration for the said promissory note. He also alleged that the said note had been obtained from him by the plaintiff by false and fraudulent representation, and he set forth in detail the circumstances under which the plaintiff had induced him to execute the note. The defendants had previously brought a suit (No. 459 of 1880) against the present plaintiff, in which they had (*inter alia*) charged him with having obtained this note for Rs. 4,000 and divers sums of money from the defendant Sidhi Mahomed Ebrahim by means of false and fraudulent misrepresentations, and prayed (*inter alia*) that the said note might be delivered up to be cancelled. In that suit (No. 459 of 1880) the plaintiffs being resident out of the jurisdiction had been ordered on the 23rd April, 1881, to give security for costs, which they failed to do, and the suit was accordingly dismissed on the 17th June, 1881, under s. 381 of the Civil Procedure Code (Act X of 1877).

The present suit had been accepted as a short cause; but, before it came on for hearing, the first defendant filed his written statement, alleging (as above stated) fraud and misrepresentation on the part of the plaintiff and want of consideration for the said note—the circumstances set forth being those which had been stated in the plaint in suit No. 459 of 1880. The present suit being on the list for hearing as a short cause—

Jardine, for the defendants, moved that it should be transferred to the long-cause list, and came on for hearing as a long cause. **[484]** He read the written statement, and contended that the trial of the issues raised by it would require a considerable time.

Lang, for the plaintiff, resisted the motion, and contended that the defendants could not be permitted now to put forward, as a defence, the matters set forth in the written statement, inasmuch as they had been the matters in issue between the parties in suit No. 459 of 1880, which had been dismissed. They were, therefore, *res judicata*. There was under those circumstances no defence to the present suit, which might be heard as a short cause.

JUDGMENT.

LATHAM, J.—It has been agreed by counsel on both sides that the allegations of fraud and want of consideration, which are contained in the written statement in this suit, are practically identical with the allegations of fraud and want of consideration contained in the plaint in suit No. 459 of 1880, in which the present defendants were the plaintiffs and the present plaintiff was the defendant. It is further agreed that in that suit an order was made on April 23rd, 1881, that the plaintiffs therein should give security for the defendants' costs, as they resided out of British India; and that the plaintiffs having failed to comply with this order, the suit was, on June 17th, 1881, dismissed by order of this Court under s. 381 of the Civil Procedure Code (Act X of 1877).

The question is, whether, under these circumstances, the fraud and want of consideration here alleged, and being 'the matter directly and substantially in issue' in the present suit, have been 'directly and substantially in issue,' in suit No. 459 of 1880, and have been heard and finally decided in that suit. If this question be answered in the affirmative, the

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present defendants will be prevented from setting up the same matter in defence in the present suit by the provisions of s. 13 of the Civil Procedure Code (X of 1877), or, to use the well-known phrase, by reason of this matter of defence being *res judicata*.

As might be expected, there is little precedent as to the case of a defendant being met with the answer of *res judicata* to his defence, the common case being that of a plaintiff against whom is set up the plea of *res judicata* in a former suit in which also he was plaintiff. I can, however, feel no doubt that, under the **[485]** words of s. 13 of the Civil Procedure Code (X of 1877) "suit or issue," the answer is admissible to estop a defendant from defence as well as a plaintiff from attack, and in England the case of *Outram* v. *Morewood* (1) is directly in point.

The next question is, can it be said that these allegations of fraud and want of consideration were "heard and finally decided" in suit No. 459 of 1880, in which the merits were not gone into, the suit having been dismissed, under s. 381 of the Civil Procedure Code, by reason of the plaintiffs therein not having complied with the Court's order that they should give security for costs? In England it would appear that, apart from recent orders made under statutory authority, there is no *res judicata*, unless there has been a decision directly on the point. In the above-cited case of *Outram* v. *Morewood* (1) it is said by Lord Ellenborough of the verdict in a case there referred to: "It could only be conclusive upon the right if it could have been used and were actually used in pleading by way of estoppel, which it could not be in that case, because no issue was taken in the first action upon any precise point, which is necessary to constitute an estoppel in the second action." So in the judgment of DeGrey, C. J., in the *Duchess of Kingston's Case* (2) he says the "judgment of a Court of concurrent jurisdiction directly on the point is as a plea a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another suit." And in *Hall* v. *Hall* (3) Sir James Hannen says that it is well known that neither a non-suit at common law before the rules made under the Judicature Act nor the dismissal of a bill before the hearing in chancery before the order of 1845 was a bar to further proceedings, and he applies the rule to the Matrimonial Court.

In India there is little authority. The case of *Shokee Bewah* v. *Mehdee Mundul* (4), decided by Seton-Karr and Mitter, JJ., is an express decision that, when a case had not been tried on its merits, the cause of action had not been tried and decided within the meaning of s. 2 of the Civil Procedure Code (Act VIII of 1859). The other cases cited do not apply. In the case of **[486]** *Luckee* v. *Joyshunkur* (5) there seems to have been no decision at all, and that at *Baban Mayacha* v. *Nagu Shravucha* (6) is beside the mark, as there the former suit was not before a Court of competent jurisdiction—a necessary element in a *res judicata*. Still there is no contrary decision, and the case of *Shokee Bewah* v. *Mehdee Mundul* (4) is cited in the most recent text books.

I am not aware of any decision on the words of s. 13 of the Civil Procedure Code (Act X of 1877), and must form my opinion on the language of the Act and with the guidance furnished by the earlier cases. I have come to the conclusion that a matter cannot be said to be "heard

(1) 3 East, 346 (365). (2) 2 Sm.L.C. (7th ed.), 761. (3) 27 W.R. 664.
(4) 9 W.R.C.R. 327. (5) 7 W. R. C. R. 236. (6) 2 B. 19.

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and finally decided " by a Court which does not try that matter. No doubt the Court decides *the suit* in the pleadings of which such matter is alleged and denied, when it dismisses that suit for default on the plaintiff's part, whether the default be non-appearance or failure to furnish security; but I do not think that the Court can properly be said to hear and decide the matter which it is relieved from hearing and deciding by the plaintiff's default. I think it clear that the Civil Procedure Code (Act X of 1877) does not contemplate the dismissal of a suit by default under s. 102 as preventing the plaintiff, by s. 13, from again litigating the same matter, as, if so, the first sentence of s. 103 would be superfluous; but, no doubt, this may be explained on the ground that the decision under s. 102 is not a final one within Expl. 4 to s. 13. It is hard to conceive that the Legislature should have intentionally visited a plaintiff with a heavier penalty for failing to give security for costs than for failing to appear. Still the dismissal under s. 381 does appear to be final within the meaning of s. 13; and I, therefore, rest my decision on the matter not having been heard and decided, in the former suit. I give no opinion as to the result if a plaintiff, whose suit had been dismissed under s. 381, should attempt again to litigate the subject-matter of the dismissed suit. Possibly the reference to s. 373 may be found sufficient to preclude him from so doing.

As I hold the defendants to be at liberty to raise the issues of fraud and want of consideration, and as I understand the plaintiff's **[487]** counsel to admit that, if the defendants do raise these issues, the case cannot be tried within the limits proper to a short cause, I direct the case to be transferred to the long-cause list; costs to be costs in the cause.

Case transferred.

Attorneys for the plaintiff: Messrs. *Balcrishna and Bhagwandas.*
Attorney for the defendants: Mr. *Mirza Hoosein Khan.*

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6 B. 487.

MATRIMONIAL JURISDICTION.

Before Mr. Justice West.

HARRIETTE A. KING (*Petitioner*) *v.* J. S. KING (*Respondent*).*
[12th June, 1882.]

Divorce—Husband and wife—Appeal by a wife from order made in suit for divorce—Wife's costs—Security for costs—Memorandum of appeal admitted without requiring security—Limitation Act XV of 1877, s. 5—Period of limitation expiring during vacation—Power of Prothonotary to receive and file memorandum of appeal presented on the day the Court re-opens.

In a suit for divorce brought by a wife against her husband, the wife obtained a decree *nisi* which ordered the respondent to pay a monthly sum by way of alimony to the wife, and also ordered him to pay the wife's costs of suit. Under this decree a sum of Rs. 3,369 was due to the wife on the 26th May, 1882. The wife appealed from an order made in the suit, and the Court, under the circumstances, admitted the appeal without requiring from the appellant the usual security for costs.

Where the period of limitation for the filing of an appeal has expired during vacation, a party to a suit has a right, under the provisions of the Limitation Act (XV of 1877), to have his appeal admitted on the day the Court re-opens, and the Prothonotary of the High Court, has power to receive and file a memorandum of appeal on that day.

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* Suit No. 195 of 1881.

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MATRIMONIAL JURISDICTION.

6 B. 487.

APPLICATION that a memorandum of appeal against the order made by Bayley, J., in this case on the 4th May, 1882, should be received and filed; that the said appeal should be admitted without requiring security for costs for the appellant, or, if such security should be required, then that the same should be taken by staying (to the amount of the security required) execution of the decree for alimony and costs already passed against the respondent.

In this case a decree *nisi* was made, on the 26th July, 1881, for the dissolution of the marriage between the petitioner and the respondent, and by that decree it was ordered that the respondent **[488]** should pay to the petitioner, or her attorneys, Messrs. Crawford and Boevey, as alimony the monthly sum of Rs. 300 from the date of the said order, and should continue to make such monthly payment on or before the 26th day of each succeeding month until the said decree should be made absolute or until further order; and, further, that the respondent should pay to the petitioner her costs of and incidental to the suit and of and incidental to the petition for alimony filed on the 6th May, 1881.

On the 23rd day of April, 1882, the petitioner moved to make absolute the said decree *nisi*, and by an order made on the 4th May, 1882, Bayley, J., adjourned the said motion until the 4th August, 1882, in order that certain allegations made in affidavits filed by the respondent's solicitor might be investigated (1). From this order the petitioner now desired to appeal.

From an affidavit made by the petitioner's solicitor it appeared that there was a balance of Rs. 2,327-6-7 due from the respondent to the petitioner in respect of the alimony granted by the decree *nisi*, and that there was a further sum of Rs. 1,042-4-6 due by the respondent to the petitioner for her costs, making, in all, a sum of Rs. 3.369-11-3 due to the petitioner from the respondent on the 26th May, 1882.

By a rule of Court an appellant, upon lodging a memorandum of appeal, was required to deposit in Court as security a sum of Rs. 500. The present petitioner, being without means, now applied to be allowed to appeal without giving the usual security, or, if such security were required, then that it should be taken by his staying execution of the decree against the respondent to the extent of Rs. 500 out of the sum due by him under the decree.

The time for filing the appeal had expired during the May vacation, and on this day (12th June), being the day on which the High Court reopened after vacation, the memorandum of appeal was presented to the Prothonotary, who refused to receive it and required that an application should be made in Court.

Inverarity, for petitioner.— The time for appeal expired during the vacation, and by s. 5 of the Limitation Act (XV of 1877), the appeal is admissible when the Court re-opens.

[489] I also apply that the appeal should be admitted without requiring the appellant to deposit the usual security. This is a suit for divorce by a wife against her husband. She wishes to appeal against an order made in the suit. She should not be required to give security to her husband. She is still his wife notwithstanding the decree *nisi*: *Norman* v. *Villars* (2). It would be absurd to make a wife give security for costs when she could not be made to pay costs. No order requiring

(1) See 6 B. 452.

(2) 2 Ex. D. 359.

a wife to pay costs is ever made, except where she has separate property. Mrs. King has none.

If, however, the usual security must be given, we ask that it be given by staying execution of the decree against the respondent to the amount of Rs. 500. He owes the petitioner Rs. 3,369-11-3. Even if the decree *nisi* should be reversed by the Court, the order for alimony would stand, and would not be affected: *Whitmore* v. *Whitmore* (1). So the security would still be good. The right of a wife to costs only ceases on the day on which she is declared guilty of adultery. So the respondent in any event would have to pay the petitioner's costs: *Robertson* v. *Robertson* (2).

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JUDGMENT.

WEST, J.—I think this appeal may be admitted. I do not consider that, with respect to this part of the present application, it was necessary to come to the Court. The Prothonotary, as chief executive officer of this Court, had power to receive and file a memorandum of appeal on the day the Court re-opens, where, as in this case, the period of limitation has expired during the vacation. A party to a suit has a right, under the provisions of the Limitation Act, to have his appeal admitted under such circumstances.

With regard to the second part of this application, it is necessary that an order should be made at once, as the period of limitation has expired: so I will admit this appeal without requiring security, in order to save the right of appeal to the petitioner; but if the respondent should think fit to apply to have the order rescinded, I will reconsider the matter.

Appeal admitted without security.

Attorneys for the appellant: Messrs. *Crawford and Boevey.*

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6 B. 490=6 Ind. Jur. 590.

[490] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

BAPUJI BALAL (*Original Plaintiff*), *Appellant* v. SATYABHAMABAI, WIDOW AND HEIR OF BALKRISHNA RAMCHANDRA, DECEASED (*Second Defendant*), *Respondent.** [13th March, 1882.]

Mortgage without possession—Decree—Execution—Judicial sale—Right of mortgagee as against the purchaser—Effect of Court sale—Difference between a mortgage valid as against a private purchaser for valuable consideration and one valid as against a purchaser at a Court-sale—Priority—Optional registration—Penalty.

On the 19th September, 1871, the land in dispute was mortgaged by L. (defendant No. 1) to the plaintiff for Rs. 25. The deed of mortgage was not registered. By it defendant No. 1 agreed to pay interest at the rate of one pice per rupee *per mensem*, and it was provided that the mortgagee was to remain in possession for a period of twenty-five years in lieu of principal and interest, and that the mortgagor was not to claim the property back, unless he paid the principal and interest that might accrue due in twenty-five years from the date of the bond. On the 8th July 1872, the land was sold in execution of a decree against the father of L. and purchased by B. (defendant No. 2), who obtained possession under the certificate of sale. In 1874, the plaintiff (the mortgagee) sued L. and B. for possession of the property. It was contended for B. (defendant No. 2)

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* Special Appeal No. 134 of 1876.

(1) 1 Pro. & Div. 96.

(2) 6 Pro. & Div. 119.

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6 B. 490=
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that the mortgage did not bind him, because he was a purchaser for value without notice of the mortgage, and because it was not accompanied with possession.

Held that, although the mortgage to the plaintiff might have been without possession, it would bind the mortgagor himself, and was, therefore, binding as against defendant No. 2, who purchased at Court sale under a decree obtained against the mortgagor. A purchaser at such a sale takes only that which the judgment-debtor could himself honestly dispose of.

Possession or registration is necessary to validate a mortgage in the Deccan or elsewhere in the Presidency of Bombay (except Gujarat) against a private purchaser for valuable consideration, but not against a purchaser at a Court sale.

Held, also, that the clause in the mortgage deed as to payment of twenty-five years' interest was not a penalty.

[**F.**, 6 B. 495 (497); 62 P.R. 1908=7 P.W.R. 1908; **R.**, 13 A. 28=10 A.W.N. 216; 27 B. 452.]

THIS was a special appeal from the decision of Baron D. H. Larpent, District Judge of Poona, amending the decree of the Joint Subordinate Judge at the same place.

The plaintiff sued to obtain possession of one-eighth share of a field at Banere, in the district of Poona. The first defendant, Lakshman, mortgaged that share for Rs. 25 to the plaintiff by **[491]** deed dated the 19th September, 1871, which provided that interest should be paid at the rate of one pice *per mensem*, and it contained the following clause:—"You are to manage the same (*i.e.*, the land) yourself, or cause any other person to manage it and enjoy the same from the month of Chaitra in Shake 1794 (April, 1872). And in lieu of interest and principal amount you are to manage the same for the period of twenty-five years, and after the expiration of the (said) period you are to deliver the said land in my charge. Should an objection be made by me to your management, I shall not claim the land, unless I pay the principal and interest that may accrue due in twenty-five years from the date (of this bond)."

A decree had been obtained against Lakshman's father, Ramjibin Vithoji, and on the 26th February, 1872, the decree-holder attached the land which had been mortgaged to the plaintiff, and on 8th July, 1872, sold it by auction to Balkrishna, the second defendant, who obtained possession. He died in the course of the present suit, and was then represented by his widow, Satyabhamabai. For the second defendant it was contended that as he had no notice of the first defendant's mortgage to the plaintiff, and as that mortgage was without possession, it was not binding upon him (the second defendant), he being a purchaser for valuable consideration. The Subordinate Judge awarded the sum of Rs. 33-14-0 to the plaintiff against the mortgaged property and defendant No. 1 personally. In appeal the District Judge held that the clause in the mortgage deed relating to the payment of twenty-five years' interest was a penalty, and amended the decree of the first Court.

The plaintiff appealed to the High Court.

Shamrav Vithal, for the appellant.

Pandurang Balibhadra, for the respondent.

The following is the judgment of the High Court:—

JUDGMENT.

WESTROPP, C.J.—The suit in which this special appeal has arisen, was brought by the plaintiff, Bapuji Balal, against Lakshman Ranji Tambre and Balkrishna Ramchandra to obtain possession of a share of one-eighth of a field at Banere, in the district of Poona. The first defendant,

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6 B. 490 = 6 Ind. Jur. 590.

Lakshman, mortgaged **[492]** that share to Bapuji Balal by deed dated 19th September, 1871, the translation of which runs as follows:—"Mortgage bond on the 5th of the month of Bhadrapad, Tuesday, in the cyclical year named Prajapati, Shake 1793 (19th September, 1871). On that day this mortgage bond is given in writing to Rajasbri Bapuji Balal Khare, inhabitant of Poona, Peth Shanvar, by Lakshman bin Ramji Tambre, mali (gardner), inhabitant of mauze Banere, tarf Haveli, for reasons as follows:—I have borrowed from you Rs. 25 in cash of the Company's coin; in letters twenty-five. As to interest thereon, I have agreed to pay you one pice per rupee *per mensem*. In the security for the [payment of the] same there is my eighth share in Thal Payer bearing classification [Survey] No. 98 in the village of Banere, situate within the local limits of the Sub-Registrar of taluka Haveli. The land, together with trees, shrubs, and the peru (guava) plantation thereon measuring 13 gunthas, assessed at rupee 1, has been mortgaged to you by me; you are to manage the same yourself, or cause any other person to manage it, and enjoy the same from the month of Chaitra in Shake 1794 (April, 1872.) And in lieu of interest and principal amount you are to manage the same for the period of twenty-five years, and after the expiration of the [said] period you are to deliver the said land in my charge. Should an objection be made by me to your management, I shall not claim the land unless I pay the principal and interest that may accrue due in twenty-five years from the date [of this bond]. I have this day taken and received these twenty-five rupees, and consequently there is no need of a [separate] payment receipt. I have duly given in writing this mortgage bond of my free will and pleasure and in sound mind and consciousness. The 19th of September, 1871."

Naro Govind had obtained a decree against Ramji bin Vithoji, the father of the defendant, Lakshman, in respect of a debt apparently due to Naro Govind from Vithoji, the grandfather of the defendant, Lakshman; and on the 26th February, 1872, caused the land now in dispute to be attached under that decree under which it was sold on the 8th July, 1872, by auction, to Balkrishna Ramchandra, the second defendant, who obtained possession. He died in the course of the present suit, and is represented by his widow and heir, Satyabhamabai. The certificate **[493]** of sale has not been put in evidence: so it does not appear whether or not that certificate was registered. The sale has, however, been admitted.

In the Courts below it was contended that Laskshman, the mortgagor, was a minor when he executed the mortgage of the 19th September, 1871, and that the mortgage was fraudulent and antedated. The District Judge, however (whose findings of fact bind this Court on special appeal), has found against the alleged minority of Lakshman, and also that the alleged fraud has not been proved. Hence we must assume the mortgage to the plaintiff to be a genuine and valid instrument. Being for a sum under Rs. 100 it was optionally registrable only.

For the defendant, Balkrishna, it was contended that as he had not notice of Lakshman's mortgage to the plaintiff, and as it was without possession, it did not bind him (Balkrishna), he being a purchaser for valuable consideration. Whether the plaintiff ever had possession under Lakshman's mortgage, was a fact in dispute between the parties. The Subordinate Judge held that the plaintiff never had such possession. It is not quite clear on the judgment of the District Judge whether he intended so to hold. But in the view which we are compelled to take of this case, it is

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6 B. 490 = 6 Ind. Jur. 590.

not material whether or not the plaintiff ever had possession. No doubt, possession or registration is necessary to validate a mortgage in the Deccan (where the property in dispute lies), or elsewhere in this Presidency, except Gujarat, against a private purchaser for valuable consideration without notice; but this is not the case of a private purchaser, but of a purchaser at a judicial sale, and, according to the main principle on which the recent Full Bench decision in *Sobhagchand* v. *Bhaichand* (1) was based, such a purchaser takes only that which the judgment-debtor could honestly dispose of, and although the mortgage to the plaintiff may have been without possession, it would bind the mortgagor himself: *Chintaman* v. *Shivram* (2); *Shaik Adam* v. *Baba* (3); and see the remarks on the second exception to the rule as to possession in *Lakshmandas* v. *Dasrat* (4), another recent Full [494] Bench decision. For these reasons we agree with the District Judge that the mortgage of 1871 must prevail against the judicial sale in 1872.

We regret that we are compelled to differ from the learned District Judge on the question of interest. It does not appear to us that the payment of twenty-five years' interest is a penalty. The main scheme of the mortgage is that the mortgagee should by twenty-five years' possession be deemed to have received in full both principal and interest, but that, if the mortgagor wished to regain possession of the land within that time, he might do so by repayment of so much of the principal and twenty five years' interest as might then be due. This is an option given to him, and not a penalty inflicted on him. Of course, it must be understood that, if the mortgagee had been in possession, he would not be entitled to receive any principal or interest in proportion to such time as he may have been in possession, but the balance only of such principal and interest as so much of the twenty-five years as remained to run from the time of the redemption of the land by the mortgagor would represent. It was a part of the case of the plaintiff (the mortgagee) that he was in possession. For so much time as he has alleged that he was in possession he will not be entitled to the principal or interest as would be covered by that time. For example, if the plaintiff were in possession for two years, two twenty-fifth parts of the principal and two years, interest at the rate of one pice per rupee *per mensem* must be deemed to have been received by him, and he would be entitled on that hypothesis to the balance only of the principal, *viz.*, Rs. 23 and interest at one pice per rupee *per mensem* on that amount from that time. It should be ascertained precisely for what time the plaintiff by himself or through his witnesses alleged that he was in possession; and the principal and interest due to him should be calculated according to the method above indicated. The decree of the District Judge stands varied accordingly by directing that the amount due to the plaintiff must be ascertained by that method. The parties respectively must bear their own costs of this appeal, and the respondent must also bear the costs (if any) of the cross-objections.

Decree varied.

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(1) 6 B. 193.
(2) 9 B.H.C.R. 303.
(3) Sp. Ap. 286 of 1872, Printed Judgments of 1872, December 9.
(4) 6 B. 168.

6 B. 495.

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[495] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp Kt., Chief Justice, and Mr. Justice Melvill.

RUPCHAND DAGDUSA (*Original Defendant*), *Appellant v.* DAVLATRAM VIOHALRAV (*Original Plaintiff*), *Respondent.*)*

[15th March, 1882.]

Registration, optional, compulsory—Acts XX of 1866, *VIII of* 1871, *and III of* 1877 *s.* 50—*Priority.*

On the 14th February, 1869, S. and M. mortgaged a house and site to the plaintiff for Rs. 50. The mortgage was not registered. On the 15th June, 1870, S. (M. being then dead) mortgaged the same property to the father of the defendant for Rs. 200. That mortgage was registered. On the 24th June, 1871, S. further mortgaged the property to the plaintiff for Rs. 96, including the amount due on the previous mortgage. This second mortgage was not registered. Possession was not given under any of the mortgages. In 1873 the defendant obtained a decree on his mortgage against S., and in execution of it purchased the property for Rs. 20 at a Court sale. The certificate of sale, dated the 9th July, 1874, was registered and the defendant was put in possession of the property under it. The plaintiff sued S. on his second mortgage, and obtained a decree upon it in 1875. The defendant was no party to that suit. The plaintiff attached the property in execution of his decree, but the attachment was removed on the application of the defendant. In 1879 the plaintiff sued the defendant on his two mortgages, seeking to enforce them and his decree on the second mortgage against the property. The defendant contended that s. 50 of the Registration Act III of 1877 operated retrospectively and conferred priority on his mortgage of 1870, in virtue of its registration, even over the plaintiff's earlier mortgage of 1869.

Held that the plaintiff's unregistered mortgages, being each for a sum under Rs. 100, were, under the Registration Acts of 1866 and 1871, optionally, and not compulsorily, registrable, and that the Registration Act of 1866, under which the defendant's intermediate mortgage of 1870 had been registered, did not bestow any priority on it.

Held, further, that s. 50 of the Registration Act III of 1877 was not retrospective in its application, and that, as registered purchaser at a Court sale, the defendant took subject to existing lines.

Held, also, that the plaintiff's decree did not operate against the defendant, as he was not made a party to the suit in which that decree was obtained, although the plaintiff had constructive notice of the defendant's mortgage through registration.

Kanitkar v. *Joshi* (1) followed.

[F., 16 B. 486 (491) : **R.**, 7 B. 146 (148) ; 13 B. 229 ; 28 B. 153 (167) ; **Expl. and D.**, 5 C.L.J. 527.]

THIS was a second appeal from the decision of E. Cordeaux, Judge of the District Court of Khandesh, reversing the decree **[496]** of Jeyasatya Bodhrav, Second Class Subordinate Judge at Amalner.

This suit was instituted by the plaintiff for possession of a house and site. The claim was dismissed by the Subordinate Judge, but allowed by the District Judge in appeal. The facts of the case are fully stated in the judgment of the High Court.

Pandurang Balibhadra, for the appellant.

Shivshankar Govindram, for the respondent.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—The plaintiff has brought this suit to obtain possession of a house and site, mortgaged to him for Rs. 50 on the 14th

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* Second Appeal No. 506 of 1880.

(1) 5 B. 442.

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February, 1869, by Shekji and Mukun (Mahomedans). That mortgage (Ex. 26) was not registered. The same property was mortgaged on the 15th June, 1870, by Shekji (Mukun being then dead) to Dagdusa, the father of the present defendant, Rupchand, for Rs. 200. That mortgage (Ex. 21) was registered. On the 24th June, 1871, Shekji further mortgaged the same property to the plaintiff for Rs. 96, including the sum due on the mortgage of the 14th February, 1869. This second mortgage to the plaintiff (Ex. 17) was not registered. Under none of these mortgages was possession given to either of the mortgagees. But in the year 1873 the defendant obtained against the mortgagor a decree under his mortgage (Ex. 21) for Rs. 167-9-6, and at a sale made in execution of that decree purchased the property for Rs. 20. The certificate of that sale (dated 9th July, 1874) was registered. The defendant was put into possession of the property under that certificate of sale as purchaser. The plaintiff sued the mortgagor on the second mortgage to the plaintiff (Ex. 17), and in 1875 obtained a decree upon it, but in attempting to execute that decree was resisted by the defendant, and the plaintiff's attachment was removed. By the present suit, founded on his mortgage of 1869 and his mortgage of 1871, the plaintiff seeks to set aside the order removing his attachment, and to enforce those mortgages and his decree upon the second of them against the property. Those unregistered mortgages, having each been for a sum under Rs. 100, were, under the Registration Acts of 1866 and 1871, optionally, not compulsorily, registrable. The **[497]** Act of 1866, under which the defendant's intermediate mortgage of 1870 had been registered, did not bestow any priority, but it was contended that s. 50 of Act III of 1877 operates retrospectively, so as to confer priority on the mortgage of 1870, in virtue of its registration, over even the plaintiff's earlier mortgage of 1869. This we, following *Kanitkar* v. *Joshi* (1), hold not to be so. And as registered purchaser at a Court sale we hold that the defendant took subject to existing liens (see Full Bench decision in *Sobhagchand* v. *Bhaichand* (2) ; *Bapuji Balal* v. *Satyabhamabai* (3), and *Rama Kuber* v. *Bai Lakhmi* (4).

The plaintiff has, it is true, by his plaint sought to enforce his decree on the second mortgage, which decree is inoperative against defendant, who was not made a party to the suit in which that decree was obtained, although plaintiff had through registration constructive notice of defendant's mortgage. But we do not think that we should put the plaintiff to the expense of another suit, because his pleader in the Court below mistook his remedy. We, therefore, vary the decree of the District Judge by ordering an account to be taken by the Subordinate Judge of the amount due to plaintiff on his mortgage of the 14th February 1869 (Ex. 26) and the defendant to pay the balance found due thereon within two months after amount of such balance, is notified to him, or, in default, to deliver possession of the premises in the plaint mentioned to the plaintiff.

(1) 5 B. 442. (2) 6 B. 193. (3) 6 B. 490.
(4) Second Appeal No. 248 of 1881, Printed Jugdments of 1882, p. 82.

6 B. 498 (F.B.)=6 Ind. Jur. 587.

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[498] APPELLATE CIVIL—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill and Mr. Justice Kemball.

RAMJI (*Original Plaintiff*), *Appellant v.* GHAMAU (*Original Defendant*), *Respondent.** [8th July, 1879.]

Hindu law—Adoption—Adoption by widow—Authority to adopt—Consent to adopt given by husband's family—Adoption in undivided family—Adoption to a husband separated in estate.

A Hindu widow, who has not the family estate vested in her and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of his undivided co-parceners.

Where the husband of a Hindu widow dies separated and she herself is the heir, or she and a junior co-widow are the heirs, she may adopt without the sanction of the husband (if he have not, expressly or by implication, indicated his desire that she shall not do so) and without the sanction of his kindred.

N. and J. were two Hindu brothers undivided in estate. N. died first, leaving a widow K. J. died next, leaving two sons and a widow, G. (the defendant). K. adopted the plaintiff as son to her husband and herself without the consent either of J.'s two sons or his widow, G. On the death of K. and the two sons of J., the plaintiff sued G. (the widow of J.) for possession of the family estate. G. claimed the estate as heir of her last surviving son, and while admitting the fact of the plaintiff's adoption by K. denied its validity, on the ground that the members of the family had given no assent to the adoption. It was admitted that K. had not received from her husband N. any permission or direction to adopt a son.

Held that the plaintiff's adoption by K. was invalid, inasmuch as she had not the authority of her husband or the consent of his undivided co-parceners to adopt, nor did she hold any estate in the property.

[**Appl.**, 6 B. 505 (507) ; **R.**, 12 A. 328; 14 B. 463 ; 15 B. 110 ; 19 B. 331 (337) ; 21 B. 319 (323) ; 22 B. 199 (204); 22 B. 416 (422) ; 22 B. 551 (556) ; 23 B. 327 (330) ; 29 B. 51 (59)=6 Bom. L.R. 268 (273) ; 1 Bom. L.R. 144 (150) ; 16 C.L.J. 304=17 C.W.N. 319=16 Ind. Cas. 817 ; 8 C.W.N. 266.]

THIS was a special appeal from the decision of W. H. Newnham, Judge of the District Court of Poona, reversing the decree of the Second Class Subordinate Judge.

The facts of the case are fully stated in the judgment of the High Court.

The case first came before Melvill and Kemball, JJ., who referred it to a Full Bench.

[499] The question argued before the Full Bench was whether the plaintiff's adoption was valid.

The Hon. Rao Saheb *V. N. Mandlik*, for the appellant.

Pandurang Balibhadra, for the respondent.

JUDGMENT.

The authorities cited are mentioned in the following judgment of the Full Bench delivered by

WESTROPP, C.J.—There were two brothers, Narayan and Jivaji, undivided in estate. Of these, Narayan died, leaving a widow named Kondai. Jivaji died next, leaving two sons and a widow, the defendant Ghamau. The plaintiff, Ramji, alleges that Kondai, having requested Ghamau to

* Special Appeal No. 392 of 1875.

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give to her one of Jivaji's sons in adoption, and Ghamau having refused so to do, she (Kondai) adopted the plaintiff as son to Narayan and herself. One of Jivaji's sons died, and subsquently Kondai died. The defendant Ghamau alleged that her then surviving son, Sawlia, performed the funeral ceremonies of Kondai. Sawlia next died. His mother Ghamau claimed to be his heir, and at the commencement of this suit was in possession of the family estate (lands iu Kasar village), which had belonged to Narayan and Jivaji jointly, and of which Jivaji, from the death of Narayan until his own death, was in exclusive possession. The plaintiff alleges that, at some time subsequently to his adoption, he had been in possession; that during his absence at Bombay, the defendant Ghamau obtained possession, but refused, on his return, to admit him into possession; and that hence he brought the present suit to recover the family estate.

The defendant had denied that Kondai had gone through the ceremony of adopting Ramji, the plaintiff; but eventually, on the appeal to the District Court, her pleader admitted that the evidence established the tact of the performance of the ceremony. He, however, controverted its validity, there not being any assent by the members of the united family, to the adoption. It was admitted, at the bar before us, that Narayan himself had not given to Kondai any permission or direction to adopt.

The Subordinate Judge made a decree in favour of the plaintiff.

[500] The District Judge, being of opinion that the adoption was invalid by reason of the absence of the assent of Ghamau (which it was found had never been given), and relying on the *dictum* of the Court in *Rupchand Hindumal* v. *Rakmabai* (1), reversed the decree of Subordinate Judge with costs, and made a decree in favour of the defendant. The District Judge found that neither the plaintiff nor, on his behalf, his natural father had ever been in possession of the lands as owner, but that they may have occupied them as tenants of Ghamau. There was neither allegation nor evidence that the sons of Jivaji (both of whom were living at the time of the adoption), or either of them, had assented to the adoption.

The plaintiff having made a special appeal to the High Court, and that appeal having come on for hearing before Mr. Justice Melvill and Mr. Justice Kemball, they referred it to a Full Bench with the following remarks:—"Having regard to the observations of their Lordships of the Privy Council in their judgment in the appeal of *Shri Virada Pratap* v. *Shri Brozo Kishoro Patta Dev* (2), delivered 24th March, 1876, we think that the question at issue in the present case should be dealt with by a Full Bench."

In that case the father-in-law of the adopting widow had not, nor had any member of the undivided family, to which her husband belonged, consented to the adoption made by her. That adoption was supported by the Privy Council upon an express authority in writing conferred upon her by her husband. Here, as already said, it is admitted that Narayan, the husband of the adopting widow, has not conferred upon her, either in writing or otherwise, any authority to adopt, and it is not pretended that any member of the undivided family, to which he belonged, ever assented to the adoption made by her. It is also found, as a fact by the District Judge, that Ghamau, the widow of Jivaji, never assented. Under these circumstances the learned pleader for the appellant rested the adoption

(1) 8 B.H.C.R.A.C.J. 114.
(2) 3 I.A. 154.

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on the authority of *Rakhmabai* v. *Radhabai* (1), where it was laid down that, in the Maratha country, a Hindu widow may, without the permission of her husband [501] and without the consent of his kindred, adopt a son to him, if the act is done by her in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. That case, however, was not of adoption in an undivided family, and, therefore, is not in point. There were two widows, of whom the senior adopted—the junior dissenting, which latter was bound by the former's adoption (2). Couch, C.J., expressly distinguished the case from that of an undivided family, and based the decision on the precedence of the elder widow in acts of religion and on the act of adoption by a widow being the performance of a religious duty. We do not feel ourselves at liberty to carry the authority of that case beyond what its facts actually warrant (3). It was not an adoption in an undivided family and, therefore, does not necessarily rule the present case.

There has not been any text quoted to us from the books to the effect that the widow of a parcener in a Hindu undivided family may adopt without the authority of her husband or the assent of his coparceners. The authorities in relation to the taking in adoption by a Hindu widow in this Presidency are so fully collected and discussed in *Bayabai* v. *Bala Venkatesh* (4), *Rakhmabai* v. *Radhabai* (1), and *Narayan Babaji* v. *Nana Manohar* (5) that it is unnecessary to set them forth here. In the last of these cases the effect of the Hindu authorities is briefly recapitulated thus (6) : " We find Manu and the Mitakshara silent as to adoption by any woman ; Vasishtha allowing adoption by a woman with the consent of her husband ; Devanda Bhatta reciting the text of Vasishtha, and, if our opinion be right, leaving that text uncontroverted and unexplained so far as it relates to a taking in adoption by a woman (7) ; Nanda Pandita reciting the same text, and admitting that a wife may, with the assent of her husband, adopt, but denying that a widow can adopt at all, [502] because she cannot, as he says, obtain the consent of her husband ; and Nilakantha, whose authority, amongst those who have actually written on the point, stands highest here, also reciting the text of Vasishtha, and requiring the order or command of the husband to the wife, but dispensing with it in the case of the widow, and substituting for it the consent of kinsmen." A passage (8) from the Nirnaya Sindhu has been quoted to us by Mr. Mandlik, which he translates thus : " No woman shall give or receive a son without the permission of her husband," this (applies) during the lifetime of the husband ; for [otherwise] the texts of Vatsa and Vyasa, which say 'the son given by the father or the mother is a given son,' will be departed from." The reason assigned in that passage is limited to the giving only, and there is nothing to show that the passage itself is applicable to an adoption into an undivided family. A passage in the Viro Mitrodaya (9) (relating to the same text of Vasishtha), to which passage Mr. Mandlik also referred, still less aids his argument for the appellant. His translation is as follows :—

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(1) 5 B.H.C.R.A.C.J. 181. (2) West and Buhler (2nd ed.), p. 139.
(3) A petition of appeal to the Privy Council was presented in *Rakhmabai* v. *Radhabai*, but was not prosecuted to a hearing.
(4) 7 B.H.C.R. Appx. 1. (5) 7 B.H.C.R.A.C.J. 153.
(6) 7 B.H.C.R.A.C.J. 174. (7) Acc. 3 B.L.R.A.C.J. 145=11W.R. 468.
(8) Oblong ed. of Nirnaya Sindhu, lithographed at Bombay in Shake 1784. Parishchheda III, 1st half leaf, 9, lines 3 and 4.
(9) Calc. 4th ed. *l.* 188, p. 2, and *l.* 189, p. 1.

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"So, similarly, while the husband is alive, the wife should not, on her own authority, adopt a son not approved by him [*i.e.*, the husband]. This is the sense of the words 'without the husband's permission.' After he is dead the permission of those alone will be necessary upon whom [the widow is] dependent. In this way the prohibition is for worldly reasons. Therefore, even though the husband died without giving permission, an adoption by the widow would not be objectionable" (1).

This passage shows that Mitra Misra, the author of the Viro Mitrodaya, insisted upon the necessity, if the husband were dead, of the assent of those upon whom the widow is dependent, and they, in the case of an undivided family, would clearly be the co-parceners from whom she obtains her maintenance. The necessity for the sanction of the husband's kindred, as existing in the Maratha School, is mentioned by Sir Thomas Strange (2) and by Mr. Colebrooke (3).

[503] Accepting, however, the view which the cases seem to establish, *viz.*, that the widow, where the husband dies separated, and she herself is the heir, or she and a junior co-widow are the heirs, may adopt without the sanction of the husband (if he have not expressly, or by implication, indicated his desire that she shall not do so), and without the sanction of his kindred, we are not (as has been previously said in this Court (4) disposed to carry the deviation from ordinary Hindu law further than it has been already established by precedents. The only case that has been cited to us as justifying the contention of the appellant is *Gopal* v. *Naro* (5), which was a suit to recover possession of a fourth share of family property. It is not, however, at all clear in the report that the property was undivided: inasmuch as it appears to have been found there as a fact that Savitri, the adoptive mother of the appellant, had exclusive possession of the share in question for some time. Nothing is said by the High Court as to the property being undivided, nor is there any reference to the case of *Mt. Bheebun Mayee Debia* v. *Ram Kishore* (6), decided by the Privy Council in the previous year. Moreover, the Court in *Gopal* v. *Naro* expressly evaded the question as to whether the consent of relatives was essential to the validity of the adoption, being of opinion that at least the consent of one male relative (which was passed) was sufficient, although another, who did not consent, was in possession of the property—a view which, if the consenting relative were not the father-in law of the adoptive widow or the family manager (neither of which he was) and the family were undivided, would be inconsistent with the doctrine of the Privy Council in the more recent cases of *The Collector of Madura* v. *Moottoo Ramalinga Sathupathey* (7) and *Shri Raghunandha* v. *Shri Brozo Kishore* (8). Assigning to the Maratha deviation from ordinary Hindu law the limit which we have above suggested, *viz.*, that the widow of a Hindu, dying without leaving male issue, may, *if her husband were separated from his family in estate* (or, in other words, when she is his heir), adopt without any express authority from him (if **[504]** he have not prohibited her from so doing or otherwise implied his intention that she should not adopt); and without the consent of his relatives, and believing that there is not any sufficient text or precedent for conceding any wider range to that diviation, and concurring in the

(1) See also Galapchandra Sarkar's Translation, p. 116, Calc., 1879.
(2) 1 Stra. H. L. 79, 80.
(3) 2 Stra. H. L., Appx., p. 92.
(4) 7 B.H.C.R. Appx. xvii.
(5) 7 B.H.C.R. Appx., xxiv.
(6) 10 M. I.A. 279.
(7) 12 M I.A. 397 (441, 443).
(8) 3 I. A. 154 (191).

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remarks of Melvill, J., in *Rupchand Hindumal* v. *Rakhmabai* (1), we feel ourselves at liberty to adopt the following passages from the judgment of the Privy Council in *Shri Raghunandha* v. *Shri Brozo Kishore* in which, after approving of "the principle recognized by the Travancore case (2), *viz.*, that the requisite authority is, in the case of an undivided family, to be sought within that family," their Lordships say: "The joint and undivided family is the normal condition of Hindu society. An undivded Hindu family is ordinarily joint, not only in estate but in food and worship; therefore, not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom they have expressly, or by implication, delegated the task of regulation. The Hindu wife, upon her marriage, passes into and becomes a member of that family. It is upon that family that, as a widow, she has her claim for maintenance. It is in that family that she must presumbly find such counsellors and protectors as the law makes requisite for her. There seem to be strong reasons against the conclusion that, for such a purpose as that under consideration, she can, at her will, travel out of that undivided family and obtain the authorization required from a separated and remote kinsman of her husband" (3); and again: "It may be the duty of a Court of Justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere illegal consequence. But it is impossible not to see that there are grave social objections to making the succession, of property, and it may be in the case of collateral succession as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious **[505]** influences which interested advisers are too apt in India to exert over women possessed of, or capable of, exercising dominion over property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

For these reasons we concur with the District Judge in holding that the attempted adoption of the plaintiff by Kondai in this case was invalid. Kondai was not authorized by her husband to adopt, and did not hold any estate in the property or interest beyond her right to maintenance. She did not obtain the consent of the manager or other members of the undivided family to which her late husband belonged. We affirm the decree of the District Judge with costs of suit and of both appeals.

Decree affirmed.

(1) 8 B.H.C.R. 114 (118 to 120).
(2) 8 Mad. Jur. 58.
(3) 3 I.A. 54 (91). A.C.J.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill and Mr. Justice Kemball.

DINKAR SITARAM PRABHU AND OTHERS (*Original Defendants*), *Appellants v.* GANESH SHIVRAM PRABHU (*Original Plaintiff*), *Respondent.** [8th July, 1879.]

Adoption—Undivided Hindu family—Adoption by widow without the consent of her husband or his undivided co-parceners and without the authority of her husband to adopt.

A Hindu widow who has not the estate vested in her is not competent to adopt a son to her husband without his authority or the consent of his co-parceners with whom he was united in estate at the time of his death.

K. and V. were two Hindu brothers. K. had a son who died in 1849 in the lifetime of his father, but who was then united in interest with him (K.). K. died in 1856, leaving him surviving his two nephews, S. and P. (the sons of his brother V.), and his daughter-in-law, Y. (the widow of his pre-deceased son). At the time of his death, K. was united in estate with his nephews, S. and P. In 1871 Y. adopted the plaintiff as son to her husband and herself. In 1873 the plaintiff sued P. and the sons of S. (who died in the meantime) for a share in the [506] family estate. It was found that Y. had not the authority either of her husband or of her father-in-law, K., or of any of his co-parceners to adopt.

Held that the adoption was not valid.

Held, further, that a separated kinsman was not qualified to authorize the adoption.

Ramji Narayan Durafe v. *Ghaman kom Jivaji* (1) referred to.

[R., 23 B. 327 (332).]

THIS was a second appeal from the decision of C. B. Izon, Judge of the District Court of Ratnagiri, reversing the decree of G. K. Bhatavdekar, Second Class Subordinate Judge at Devgad.

The facts of the case are fully stated in the judgment of the Full Bench.

The case first came before Westropp, C.J., and Kemball, J., who referred it to a Full Bench for their consideration.

Ghanasham Nilkanth Nadkarni (with him *Manekshah Jehangirshah*), for the appellants.

The Hon. Rao Saheb *V. N. Mandlik*, for the respondent.

The following is the judgment of the Full Bench :—

JUDGMENT.

WESTROPP, C.J.—Krishna and Vishnu were brothers. Krishna, who died in A.D. 1856, had a son, Shivram, who died in 1849 in the lifetime of his father, Krishna. Yamunabai, the widow of Shivram, in A.D. 1871 adopted the plaintiff, Ganesh, as son to Shivram and herself. At the time, however, of Shivram's decease in 1849 he and his father (Krishna) were members of a family united in estate, of which family his father continued until his own death in 1856 to be a coparcener in estate. Krishna's brother Vishnu, had two sons. Sitaram and the defendant Parashram, both of whom survived Krishna, and were united in estate with him at his death. His funeral ceremonies were performed by Sitaram. Sitaram has since died, and left two sons, the defendants Dinkar and Vishvanath.

* Second Appeal No. 343 of 1877.

(1) 6 B. 498.

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The present suit has been instituted by Ganesh, who, in virtue of his adoption by Yamunabai, claims to be son of Shivram and grandson of Krishna, and, as such, entitled to a share in the family estate. The Subordinate Judge has found that none of the co-parceners, who survived Krishna, assented to the adoption, and that Krishna had not in his life-time, as contended by Yamunabai, directed or granted permission for the adoption of the plaintiff, **[507]** which was not made until fifteen years after the death of Krishna. The District Judge does not appear to quarrel with those conclusions. It has not been pretended that Shivram had granted any permission to Yamunabai to adopt. Yamunabai resides in a house which Sitaram built for her, and is treated by the District Judge as in possession of part of the family property; but this cannot be regarded as a partial partition of the family estate, or as more than an allotment to Yamunabai on account of maintenance and residence, as being the widow of a deceased co-parcener; and such house and property will, on her decease or marriage, fall again into the family estate. The defendants alleged that, by her incontinence, Yamunabai was disqualified from adopting; but both the Subordinate and District Judges held that such incontinence was unproved.

On the ground that Krishna had never authorized the adoption of the plaintiff by Yamunabai, and that Shivram, Krishna, and his nephews Sitaram and Parashram, the sons of Vishnu, formed an undivided family, and had never assented to the adoption of the plaintiff and that Yamunabai had made the adoption from vindictive motives towards the defendants, and not on religious grounds, the Subordinate Judge dismissed the plaintiff's suit, and directed the parties respectively to bear their own costs of the suit.

The District Judge—holding the consent of relations to be unnecessary to the validity of adoption by a widow in this Presidency, and also laying some stress on the circumstance that Dhond Prabhu (the natural father of the plaintiff) was, though separated from Shivram in estate, as nearly related to him as the defendants, and had assented to the adoption, and further holding that the adoption was not from improper motives—reversed the decree of the Subordinate Judge, and remanded the cause for re-trial on certain other issues, which the Subordinate Judge had not determined.

The defendants made a second appeal to the High Court, which, coming on for hearing before Westropp, C. J., and Kemball, J, was referred by them to the same Full Bench to which *Ramji* v. *Ghamu* (1) stood referred.

[508] The reasons for which we have to-day refused to sustain the adoption in the case of *Ramji* v. *Ghamu* are applicable in this case. It is, therefore, unnecessary to repeat them here. Yamunabai not having the estate vested in her, and not having the authority of her husband, Krishna, or of any of his co-parceners to adopt, and Dhond Prabhu being a separated kinsman of Krishna, and, therefore, not qualified to authorize the adoption [*Sri Raghunadha* v. *Sri Broso Kishore* (2)], it is impossible to hold the adoption of the plaintiff to be valid. We, therefore, reverse the decree of the District Judge, and restore that of the Subordinate Judge. The plaintiff must pay to the defendants their costs of the suit and of both appeals.

Decree reversed.

(1) 6 B. 498.

(2) 3 I.A. 154 (191, 193).

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APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

MORO DESAI (*Original Plaintiff*), *Appellant v.* RAMCHANDRA DESAI AND ANOTHER (*Original Defendants*), *Respondents.**

[14th February, 1882.]

Evidence—Ejectment—Burden of proof.

In an ejectment suit where the plaintiff claims land from which he alleges that he has been dispossessed, the general rule is that the burden is upon the plaintiff to show possession and dispossession within twelve years, or, at least, that the cause of action arose within twelve years; and this rule is not intended to be interfered with by the Privy Council in *Radha Gobind Roy* v. *Inglis* (1).

[R., 14 B. 458; 9 C. 744=12 C.L.R. 257; 13 Bom.L.R. 1053.]

THIS was a second appeal against the decision of J. W. Walker, Acting District Judge of Ratnagiri, confirming the decree of Rao Saheb Krishnaji Bapuji Bal, Subordinate Judge of Ratnagiri.

This was a suit in the nature of an ejectment brought in September, 1869, by the plaintiff to recover possession of some lands and other immoveable property, as well as to recover damages for the removal of a certain house and the cutting down of certain trees. The plaintiff also asked that an account might be taken as to the lands held by the defendant, Ramchandra, as a mortgagee, and that he might be allowed to redeem the said lands **[509]** on payment of what might be found due. The plaintiff alleged that his grandfather and the grandfather of the defendant were brothers; that in 1836 there was an agreement entered into between them for a division of their property, but that no partition ever took place.

The defendant, Ramchandra, answered that a partition had actually taken place, that the suit was barred by limitation, and that he was not liable to the damages claimed. The second defendant answered to the same effect.

The Subordinate Judge rejected the plaintiff's claim, except as to three fields, which he allowed the plaintiff to redeem on payment of Rs. 110-2-0. The District Judge, on appeal by the plaintiff, found—

1st. That there was a separation in interests between the father of the plaintiff and the father of the defendant, Ramchandra, in 1836.

2nd. That in 1836 there was an agreement by which the shares of each of the members were ascertained and defined, and that, subsequently, each treated his share as separate and distinct, and that, therefore, the property ceased to be joint in that year.

3rd. That there was an actual division of certain lands, and that, in the absence of proof to the contrary, it must be taken that there has been an actual division throughout of all the property; and

4th. That the plaintiff admitted, both in his plaint and in his deposition, that he had not had possession of the lands claimed since 1859; that there was no evidence adduced by the plaintiff that he was deprived of possession in that year; that the evidence adduced by the defendant went to show that the defendant, Ramchandra, had been in possession for more than twelve years before September, 1869, the date of the institution of

* Second Appeal No. 392 of 1881.

(1) 7 C.L.R. 364.

the suit; and that, therefore, the suit was time-barred under the twelve-years' limit laid down by the Limitation Act XIV of 1859.

The decree of the Subordinate Judge was, accordingly, confirmed.

The plaintiff appealed to the High Court.

[510] *Manekshah Jehangirshah*, for the appellant.

Mahadev Chimnaji Apte, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—The Courts below have held that the burden of proving possession within twelve years lies upon the plaintiff, and that he has failed to give the necessary proof.

We see no reason to believe that those Courts have either omitted from their consideration, or formed erroneous conclusions regarding any of the evidence bearing upon the question of limitation. The only question is. whether they were right in laying the burden of proof upon the plaintiff.

In actions of ejectment this Court has always laid the *onus* upon the plaintiff. The reason is stated in *Pandurang* v. *Balkrishna* (1), *viz.*, that the Limitation Acts interpose a bar to the admission of a suit, until the plaintiff satisfies the Court that his cause of action has accrued within the period of limitation. The Judicial Committee in *Maharaja Koowur* v. *Baboo Nund Lall Singh* (2) based the rule upon a similar necessity of removing the bar to an action created by Bengal Reg. III of 1793, s. 14, which says that "the Zillah and City Courts are prohibited hearing, trying, or determining the merits of any suit whatever against any person or persons, if the cause of action shall have arisen previous to" a certain specified date. The rule, which requires the plaintiff in ejectment to prove possession within twelve years, is laid down with equal clearness by the Judicial Committee in *Beer Chunder Jobraj* v. *The Deputy Collector of Bhullooah* (3).

On the other hand, it is contended that the more recent decision of the Privy Council in *Radha Gobind Roy* v. *Inglis* (4) establishes the proposition that in all suits for land it is sufficient for the plaintiff to establish his title, and that the burden of proving that the plaintiff has lost that title, by reason of the adverse possession of the defendant, is then shifted upon the defendant. The effect of the decision is certainly so stated in the head-note to the report; but we cannot believe that their Lordships intended, by a few remarks having reference to the **[511]** particular case before them, to upset a rule of evidence established by repeated decisions and long practice. The effect of the decision in the recent case has been much discussed by the Calcutta High Court in *Kally Churn Sahoo and others* v. *The Secretary of State for India in Council* (5) and in *Mano Mohun Ghose* v. *Mothura Mohun Roy* (6). We do not think it necessary to enter into the same discussion, or to attempt to reconcile the Privy Council decisions, feeling confident that the Judicial Committee will find no difficulty in explaining any apparent inconsistency when the question comes again before them. It is sufficient to say that the case of *Radha Gobind Roy* v. *Inglis* was a peculiar one, having reference to the recovery of alluvial lands which had been diluviated; and we entirely concur with the opinion expressed by the Calcutta Court

(1) 6 B.H.C.R.A.C.J. 125. (2) 8 M.I.A. 199. (3) 13 W.R.P.C. Rul. 23.
(4) 7 C.L.R. 364. (5) 6 C. 725. (6) 7 C. 225.

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that there was no intention, on the part of the Judicial Committee, of interfering with the general rule that, where a plaintiff claims land from which he alleges that he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years, or, at least, that the cause of action arose within twelve years. This is the rule which has been applied to the present case; and, there being nothing in the circumstances of the case to make it an exception of the ordinary rule, we think that that rule has been rightly applied, and accordingly confirm the decrees of the Courts below with costs.

Decree confirmed.

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6 B. 512 (F.B.).

[512] APPELLATE CIVIL—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.

APPANA (*Defendant*), *Applicant v.* NAGIA AND ANOTHER (*Plaintiffs*), *Opponents.** [20th April, 1880.]

Jurisdiction—Mofussil Small Cause Courts—Act XI of 1865, *s.* 6—*Suit by vatandar mahars to recover "aya"—Immoveable property, what is.*

A suit for *balute* or *aya* is a claim in respect of a *hak* belonging to, and forming the emoluments of, a hereditary office amongst Hindus, and one in respect of immoveable and not moveable or personal property. A Mofussil Small Cause Court has no jurisdiction to entertain a suit for such a claim.

There is no difference in principle between the *haks* of hereditary officiating mahars of a village and the *haks* appendant to the hereditary office of a village joshi, or the office of a hereditary priest of a temple and its emoluments. The *haks* of the former are not personal property.

THIS was an application to the High Court under their extraordinary jurisdiction against the decision of A. M. Cantem, First Class Subordinate Judge at Belgaum, with the powers of a Small Cause Court Judge.

The plaintiffs sued to recover three years' arrears of a *balute hak* or "*aya*" due from the defendant in respect of rice grown by him on his land in the village of Nandgad, in the district of Belgaum. They alleged that they were the hereditary *vatandar* mahars of the village, and entitled to the *hak* and the arrears claimed by them. The Subordinate Judge allowed the plaintiffs' claim, and gave them a decree for a portion of the arrears sued for.

The defendant appealed to the High Court.

The case first came before Melvill and Pinhey, JJ., who referred it to a Full Bench.

The question argued before the Full Bench was whether the suit was cognizable by a Court of Small Causes in the Mofussil.

Pandurang Balibhadra appeared for the applicant (defendant).

[513] *V. M. Pandit*, for the opponents (plaintiffs), relied upon *Hanmantrav* v. *Keru* (1) and *Naru Piru* v. *Naro Shidheshvar* (2), and contended that the plaintiffs' claim was one for personal property.

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* Application under Extraordinary Jurisdiction No. 135 of 1879.

(1) Printed Judgments for 1875, p. 291. (2) 3 B. 28.

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JUDGMENT.

The following is the judgment of the Full Bench delivered by

WESTROPP, C.J.—This application to the extraordinary jurisdiction of the High Court has been referred to a Full Bench by Melvill and Pinhey, JJ., to determine whether the Court of Small Causes at Belgaum has jurisdiction to entertain a suit brought by the plaintiffs, as *vatandar* mahars of the village of Nandgad, to recover *aya* (*balute hak*) from the defendant, three-years' arrears being alleged to be due from him to the plaintiffs in respect of rice grown by him in the Fasli years 1285, 1286 and 1287 on his land in the village. The learned Judges, who referred the case, doubted whether the decisions in *Hanmantrav* v. *Keru* (1) and *Naru* v. *Naro* (2) are sustainable.

The sixth section of Act XI of 1865 states that "the suit which shall be cognizable by Courts of Small Causes" (in the Mofussil) are "claims for money due on bond, or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage, or demand does not exceed in amount or value the sum of Rs. 500, whether on balance of account or otherwise."

It has not been contended that the present claim is founded upon a contract, or is in the nature of rent, but it has been argued that it is one for personal property. The claim is for a *hak*, called in Marathi "*balute*" and in Kanarese "*aya.*" H. H. Wilson in his Glossary, p. 41. states that the Sanskrit word "*aya* signifies income or profits, and that the Karnatic or Tamil words *aya* or *ayam*, derived from the Sanskrit word, denote toll, tax, tribute, custom, measurement. In the Dakhane the portion of the crop formerly paid to the hereditary village officers and servants." Amongst those village officers or servants, **[514]** Molesworth, Grant Duff, and Reeve include the mahar as gatekeeper (vasakar) or watchman, and place him amongst the twelve which include the joshi (joisa) or village astrologer. Wilson's Glossary, p. 53, says that "in most instances the offices are hereditary, are capable of being mortgaged or sold, and are paid by recognized fees and perquisites, by allotments of corn at the time of harvest, or sometimes by small portions of land held rent-free, or at a low quit-rent." He gives a more detailed account of the hereditary village officers including the mahar and jyotishi (joshi, joisa, josi) at pp. 55, 242, 243, and 319. That the *bara balute* (twelve village officers including those just mentioned) held their offices and emoluments hereditarily, is mentioned in Mountstuart Elphinstone's Report on the Dakhin, Appendix, p. 10.

In *Balvantrav* v. *Purshotum Shidhesvar* (3) it was, by a Full Bench, held that the *hak* appendant to the hereditary office of a village joshi is immoveable property. So, too, in *Krishnabhat* v. *Kapabhat* (4) the office of an hereditary priest of a temple and its emoluments were held to constitute immoveable property. We do not see any difference, in principle, between such *haks* and the *haks* of the hereditary officiating mahars of a village, and are unable to regard the latter as personal property.

Hanmantrav v. *Keru* (1) was not a claim by mahars in respect of their *haks*, but a claim for a payment called *rabta* (cash in lieu of service) from mahars by a Khote. The question of jurisdiction of a Court of Small Causes in that case was there very lightly touched in the judgment:

(1) Printed Judgments for 1875, p. 291. (2) 3 B. 28. (3) 9 B.H.C.R. 99.
(4) 6 B.H.C.R. A.C.J. 137.

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so we cannot say upon what grounds precisely the Small Cause Court was held to have jurisdiction.

In *Naru Piru* v. *Naro Shidhesvar* (1) the suit was for *balute*, but the contention there was that such a suit was "one essentially relating to an interest in land," which it was held not to be, but "for a share in produce severed from the land." The argument against the jurisdiction of the Small Cause Court was put upon too narrow a basis. It should have been that the suit **[515]** was not one for personal property, or founded upon contract. It appears to us that a suit for *balute* is a claim in respect of a *hak* belonging to, and forming the emoluments of, an hereditary office amongst Hindus, and therefore one in respect of immoveable (*nibandha*), and not moveable or personal property.

For this reason we think that the question—"whether a Small Cause Court had jurisdiction in respect to the claim made in this suit"—referred to this Full Bench should be answered in the negative.

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6 B. 515.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

SHIVRAM (*Original Plaintiff*), *Appellant* v. GENU AND HANMANTRAV SADASHIV (*Original Defendants*), *Respondents.** [6th March, 1882.]

Registration—Act XX of 1866, *s.* 50—*Priority—Notice of prior unregistered mortgage—Possession—Right to redeem—Parties.*

On the 24th September, 1869, G. mortgaged certain land to H. Subsequently, on the 14th June, 1870, he mortgaged the same land to P. Both the mortgages were for sums less than Rs. 100. The mortgage to H. was unregistered, but the subsequent mortgage to P. was registered. On the 21st June, 1873, in a suit to which P. was not a party, H. obtained a decree on his mortgage, and at the execution sale he himself became the purchaser, and was put into possession of the land under his certificate of sale. On the 21st September, 1874, P. assigned his mortgage to the plaintiff. The deed of assignment was not registered; neither P. nor his assignee, the plaintiff, ever had possession under the mortgage of 1870. The plaintiff brought this suit to obtain possession of the land. Both the lower Courts dismissed the plaintiff's claim. On special appeal to the High Court.

Held, that if P., at the time of taking his registered mortgage in 1870, had notice of the prior unregistered mortgage to H., he had that which it is the object of the registration law to give, and, consequently, the non-registration of H.'s mortgage could not, under Act XX of 1866, avail either P. or the plaintiff, who claimed under him by an assignment executed subsequently to the decree in H.'s mortgage suit.

A subsequent registered purchaser or mortgagee cannot avail himself of the registration of his deed against a prior unregistered purchase or mortgage of which he had notice.

[516] The High Court reversed the decrees of the Courts below, and remanded the case to the District Judge, to ascertain whether P., at or before the time of the execution of his registered mortgage, had notice of the prior unregistered mortgage to H.

Held, also, that, in order to bind P., by the decree passed in 1873 and thus make a good title to the purchaser under that decree, H. should have made P. a party to his suit, thereby giving P. an opportunity of redeeming H.'s mortgage. H. having neglected to do this, the plaintiff in the present suit, as the assignee of the rights and equities of P., was entitled to redeem the mortgage of H. in case it was proved that P. had notice of that mortgage.

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* Special Appeal No. 400 of 1876.

(1) 3 B. 28.

[**Appl.**, 12 B. 569 (572) ; **R.**. 7 B. 146 (148) ; 9 B. 427 ; 20 B. 158 (164) ; 20 B. 390 (393) ; 27 B. 452 (471) ; 28 B. 153 (168)=5 Bom. L.R 892 (901) ; 16 M. 148=3 M.L.J. 54 (**F.B.**) ; 6 C.L.J. 719=11 C.W.N. 1078 ; 14 C.L.J. 530=12 Ind. Cas. 155 ; **D.**, 5 C.L.J. 527 (536).]

THIS was a special appeal from the decision of R. F. Mactier, Judge of the District Court of Satara, affirming the decree of the Second Class Subordinate Judge of Vita.

The plaintiff, Shivram, brought this suit for possession of certain land. Both the lower Courts dismissed his claim. The facts are fully stated in the judgment of the High Court.

Bhairavnath Mangesh appeared for the appellant.

Shantaram Narayan, appeared for the respondents.

JUDGMENT.

The following is the judgment of the High Court delivered by

WESTROPP, C. J.—On the 24th September, 1869, Genu (the first defendant) mortgaged a piece of land to the second defendant, Hanmantrav, for a sum less than Rs. 100. That mortgage was unregistered.

On the 14th June, 1870, Genu mortgaged the same land to Pandu for a sum less than Rs. 100. That mortgage was registered.

On the 21st June, 1873, Hanmantrav obtained a decree upon his mortgage of 1869, and having caused the land to be put up for sale by the Civil Court became its purchaser. The certificate of sale to him under that purchase, was not registered. He did not make Pandu a party to the suit on the mortgage. Hanmantrav was put into possession (under s. 269 of Act VIII of 1859) in virtue of his certificate of sale. About eighteen months afterwards, the plaintiff, Shivram, brought the present suit to enforce the mortgage of 1870 to Pandu, which mortgage had been assigned by Pandu to the plaintiff Shivram. The deed of assignment (which was dated 21st September, 1874) was not **[517]** registered. Neither Shivram nor Pandu ever had possession under the mortgage of 1870. The Subordinate Judge held that Pandu had notice of the mortgage of 1869 to Hanmantrav. The District Judge has omitted to make any finding on the question of notice. If Pandu had notice, at the time of taking his registered mortgage in 1870, of Hanmantrav's unregistered mortgage of 1869, Pandu had that which it is the object of the registration law to give him, and, therefore, the non-registration of Hanmantrav's mortgage cannot avail Pandu, or the plaintiff, who claims under him by an assignment executed subsequently to the decree in Hanmantrav's suit. The language of s. 50 of Act XX of 1866, which is the enactment applicable to these mortgagees (both of which are for sums under Rs. 100), is not more stringent than that of the fourth section of the Irish Registry Act, 6 Anne, c. II (1), and yet, under that Act, a subsequent registered purchaser or mortgagee cannot avail himself of the registration of his deed against a prior unregistered purchase or mortgage of which he has notice. The reason for the decisions to that effect on the Irish Act, as well as on the Middlesex and Yorkshire Registration Acts, is concisely given by Lord Cairns in the *Agra Bank* v. *Barry* (2). He says : "I take the explanation to be this, that inasmuch as the object of the Statute is to take care that, by the fact of deeds being placed upon a register, those who come to register a subsequent deed shall

(1) For that enactment, see *Waman Ramchandra* v. *Dhondiba Krishnaji*, 4 Bor. 126 (145, note 1).

(2) L.R. 7 Eng. & Ir. App. 135 (147, 148).

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informed of the earlier title, the end and object of the Statute is accomplished if the person coming to register a deed has, *aliunde*, and not by means of the register, notice of a deed affecting the property executed before his own. In that way the notoriety, which it was the object of the Statute to secure, is effected—effected in a different way, but effected as absolutely in respect of the person who thus comes to register as if he had found upon the register notice of the earlier deed." In *Bushell* v. *Bushell* (1) Lord Redesdale, after describing the case of *Lord Forbes* v. *Deniston* (2), which was an appeal from Ireland, said: "The House of Lords determined that the words of the Act, which made **[518]** an unregistered deed fraudulent and void against a subsequent registered deed, had not that effect if there was notice of the prior deed. If a man has notice, he cannot say he is defrauded: it is fraudulent in him to take a conveyance to defeat the charge of another." And, again, speaking of the Irish Act, s. 4, he says: "It has the effect of giving priority, except in case of fraud (as where the party has had notice *aliunde*) and that it is a priority which a Court of Equity or of Law cannot take away" (3). That view of the Act was adopted by Lord Manners in *Eyre* v. *Dolphin* (4), and in the Irish cases mentioned in note 4, p. 149, I. L. R., 4 Bom. For cases on the Middlesex Act in which notice was held to excuse non-registration, see *Le Neve* v. *Le Neve* (5) and *Cheval* v. *Nichols* (6) in the Equity Exchequer and on the Yorkshire Act: *Blades* v. *Blades* (7). In a very recent Calcutta case, *Dinanath Ghose* v. *Aulick Mini Dabee* (8), the defendant claimed under optionally registrable but unregistered *kobalas*, respectively, dated the 19th and 20th November, 1871, and had possession of the immoveable property, the subject thereof. The plaintiff claimed the same property under an optionally registrable and registered conveyance of the 10th December, 1873, without possession. The Court (Prinsep and Field, JJ.) held the title of the defendant preferable to that of the plaintiff, inasmuch as the possession of the defendant was notice to the plaintiff of the defendant's unregistered title (9). Such, too, is the effect of possession in England—*Daniels* v. *Davison* (10).

The cause must, therefore, be remanded to the District Judge to ascertain whether or not Pandu, at or before the time of the execution of his registered mortgage of the14th June, 1870, had notice of Hanmantrav's unregistered mortgage of the 24th September, 1869.

[519] Assuming that the District Judge finds that question in the affirmative, *viz.*, that Pandu had such notice, it becomes necessary to remember that, although it would have been quite practicable for Hanmantrav to have bound Pandu by the decree in Hanmantrav's suit if he had made Pandu a party thereto, and, consequently, to have made a good title to the purchaser under that decree, whosoever he might be (in the present case himself), yet Hanmantrav neglected to take the proper means for that purpose by making Pandu a party to that suit, whereby Pandu might have had an opportunity of redeeming the land from

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(1) 1 Sch. & Lef. 90—100.
(2) 4 Bro. P. C. 189 (2nd ed.).
(3) 1 Sch. & Lef. 102.
(4) 2 Ball and Beatty 290 (302).
(5) 7 Ambler, 436 (447) = 2 Wh. & Tud. 32 (41, 42), (5th ed.).
(6) 1 Stra. 664.
(7) 1 Eq. Ca. A. 358, pl. 12.
(8) 7 C. 753. and see *per* Pontifex, J., in *Fuzlodeen Khan* v. *Fakir Mahomed Khan*, 5 C. 336 (343) *et seq.*
(9) See, also, *Nageshbhat* v. *Balvantrav*, 9 B.H.C. R. 151-N.
(10) 17 Vesey. 433; Sugden's Vendors and Purchasers (11th ed.), p. 1052, Ch. XXIII, 1, pl. 50; 2 Wh. & Tud, 61 *et seq*

Hanmantrav's mortgage (1). To that opportunity Shivram (the plaintiff), who has since become the assignee of the rights and equities of Pandu, will be entitled if it be established that Pandu had notice of Hanmantrav's mortgage. The burden of proving that Pandu had such notice will lie upon Hanmantrav.

Assuming, however, that Pandu had not, at or before the execution of his mortgage, notice of Hanmantrav's unregistered mortgage, and, therefore, that Pandu's mortgage by virtue of its registration is entitled to priority over that of Hanmantrav, the latter (Hanmantrav) will in that event be entitled, as owner of what was Genu's equity of redemption under the judicial sale to Hanmantrav, to redeem the mortgage of Pandu now vested in the plaintiff.

Whatever party may be subjected to the duty of redemption should have a reasonable time, say, six calendar months, within which he may redeem. Such account as may be necessary to ascertain the amount due on such mortgage should be taken in the District Court.

This Court reverses the decrees of the Courts below, except so far as the same affect the defendant Genu, and remands the cause for a new trial on the merits in accordance with the foregoing observations. The question of costs of the suit and of both appeals as between Hanmantrav and the plaintiff should, on such new trial, be disposed of in such manner as may be just.

Decrees reversed.

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6 B. 520=6 Ind. Jur. 655.

[520] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

SADASHIV DINKAR JOSHI AND MORESHWAR DINKAR JOSHI (*Original Plaintiffs*), *Appellants v.* DINKAR NARAYAN JOSHI AND MAHADEV VINAYAK MAYADEV (*Original Defendants*), *Respondents.**

[22nd March, 1882.]

Hindu law—Ancestral property—Undivided Hindu family—Alienation of ancestral property by father—Liability of estate for debts of father and grandfather—Son's interest in ancestral estate—Debt incurred for immoral or illegal purposes—Evidence—Burden of proof.

Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes), the whole of the estate of a Hindu undivided family is, in the hands of sons or grandsons, liable to the debts of the father or grandfather.

In 1865 certain lands, the ancestral property of D., were sold under a decree passed against D., and were bought by J. These lands had been mortgaged in 1863 by D. to N., in which transaction D. had been principal and J. his surety. In 1866 N. sued on his mortgage, and on the 21st January, 1868, a decree was made, directing the sale of the lands. Under that decree the right, title, and interest of J. were sold on the 1st April, 1869, to C. and C. afterwards sold the lands to M. In the present suit the plaintiff's (D.'s sons) sued D. and M. for possession of their two-thirds shares, alleging that the land was ancestral, and that the whole of it had been illegally sold under the decree of the 21st January, 1868. Both the lower Courts held that the land was ancestral; that the plaintiffs were united in interest with their father D. when the mortgage debt was contracted by the latter; that the burden lay upon them (plaintiffs) to prove that the debt had been incurred for immoral or illegal purposes, and they failed

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* Second Appeal No. 19 of 1880.

(1) 5 B. 8—13.

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655.

to discharge it; that they were, therefore, bound by the sale. The lower Courts, accordingly, dismissed the plaintiffs' claim.

On second appeal the High Court affirmed the decrees of the Courts below on the grounds mentioned above.

Suraj Bunsi Koer v. *Sheo Prasad Singh* (1) referred to.

[F., 14 B. 320 (327); R., 7 B. 438; 4 Bom. L.R. 587 (597); 17 C.L.J. 38=17 C.W.N. 280; 4 O.C. 277 (279).]

THIS was a second appeal from the decision of C. E. G. Crawford, Assistant Judge at Thana, affirming the decree of B. K. Phadke, Second Class Subordinate Judge at Alibag.

The facts of the case are briefly mentioned in the head-note above, and will be found fully stated in the judgment of the High Court.

[521] The first point in the memorandum of second appeal preferred by the plaintiffs was—(1) The lower appellate Court ought to have held that, as the decree, in execution of which the land in dispute was sold, was a decree against Dinkar (defendant No. 1) personally, nothing beyond his share could pass by the Court sale.

Ghanasham Nilkanth Nadkarni, for the appellants.

The Hon. Rao Saheb *V. N. Mandlik*, for the respondents.

The following is the judgment of the Court:—

JUDGMENT.

WESTROPP, C.J.—The plaintiffs, who are the sons of Dinkar Narayan Joshi, the first defendant, brought this suit to recover, as their respective shares, two-thirds of certain ancestral lands. The first defendant did not appear. The second defendant claimed to be the purchaser of the lands, and alleged that the first defendant and his sons, the plaintiffs, were acting in collusion to defeat the second defendant's claim. The facts established were as follows:—The lands were ancestral, having been inherited by the first defendant, Dinkar, from his grandfather. In a suit brought by Balkrishna Narayan Bodas, in 1863 against Dinkar Narayan Joshi (the present first defendant), the lands were sold on the 17th August, 1865, to Janardhan Trimbak Devdhar for Rs. 200. The certificate of that sale (Ex. 8) was dated 14th July, 1879. Possession does not appear to have been given to Janardhan Trimbak Devdhar. In a suit brought in 1866 by Narayan Antaji Datar against the present first defendant, Dinkar Narayan Joshi, and Janardhan Trimbak, upon a mortgage bond of the same lands, dated 26th November, 1863 (1 Kartik Vad, Shake 1785), in which transaction Dinkar Narayan Joshi apparently was principal and Janardhan Trimbak Devdhar was surety, a decree (Ex. 39), dated the 21st January 1868 was made by the District Judge of Thana, directing the sale of the lands in satisfaction of the amount due on the mortgage together with interest, and that the balance (if any) should be paid personally by the defendants in that suit. Under that decree the right, title, and interest of the defendant, Janardhan Trimbak Devdhar, in the lands were sold by public auction on the 1st of April, 1869, to Chinto Bhaskar Dandekar for Rs. 630, [522] as appears by the certificate of sale (Ex. 10), dated 15th June, 1869. He subsequently sold the lands to the second defendant in the present suit, Mahadev Vinayak Mayadev, as appears from the deed, dated 13th October, 1874 (Ex. 9).

The Subordinate Judge held that, inasmuch as the plaintiffs and their father were united in estate at the time the mortgage-debt to

(1) 6 I.A. 88 (106).

Narayan Antaji Datar was incurred, and that the plaintiffs were unable to show that it was incurred for immoral or illegal purposes, they were bound by the sale.

The plaintiffs appealed to the District Court; but the decree of the Subordinate Judge was, by the Assistant Judge, affirmed with costs.

The plaintiffs then filed the present second appeal to the High Court. Their first point of appeal is a mistake, inasmuch as the decree (Ex. 39), so far as it affects the lands, is not a decree against the defendant, Dinkar Narayan Joshi, personally only, but directs the sale of the lands; and he, being a party to the suit in which that decree was made, is bound by the direction for sale (founded on the mortgage) in that decree, and by the proceedings under it, whether or not there was any irregularity in the lateness of the issuing of the certificate of sale (Ex. 8) to Janardhan Trimbak Devdhar in the previous suit of Balkrishna Narayan Bodas, or weakness in his title thereunder for want of possession. He made no objection to the lands being described at the sale as those of Janardhan Trimbak Devdhar, and did not deny that they had passed to him by the previous sale.

Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes), the whole of the estate of a Hindu undivided family would be, when in the hands of sons or grandsons, liable to the debts of the father or grandfather: 1 Digest, Bk. 1, chap. v, pl. clxvii ; *Girdharilall* v. *Kuntoolall* (1); *Udram Sitaram* v. *Ranu Panduji* (2); *Narayanacharya* v. *Narso Krishna* (3). The true scope of the decision of the Privy Council in *Girdharilall* v. *Kuntoolall* had been explained by their [523] Lordships themselves in the subsequent case, *Suraj Bunsi Koer* v. *Shev Prasad Singh* (4) thus: "This case, then, which is a decision of this tribunal (the Privy Council), is an authority for these propositions: 1st, that where joint ancestral property has passed out of the joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchaser had notice that they were so contracted; and, 2nd, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

Hence it appears that the burden of proof that the mortgage debt was for an illegal or immoral purpose lay upon the plaintiffs, the sons of the first defendant, Dinkar Narayan Joshi. The District Judge has found that the plaintiffs have not proved anything beyond the fact that their father kept a mistress, and have not proved any connection between that act and the debt in question. That finding of fact by the District Judge binds this Court. Hence we must affirm, with costs of this appeal, the decrees of the Courts below.

Decree affirmed.

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(1) 1 I.A. 321.
(2) 11 B.H.C.R. 76 (83).
(3) 1 B. 262.
(4) 6 I.A. 88 (106).

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6 Ind. Jur.
592.

6 B. 524=6 Ind. Jur. 592.

[524] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

SOMASEKHARA RAJA (ALLEGED) ADOPTED SON OF BASLINGA RAJA (*Original Plaintiff*), *Appellant v.* SUBHADRAMAJI, WIDOW OF BASLINGA RAJA (*Original Defendant*), *Respondent.** [16th March, 1882.]

Lingayats—Hindu law—Adoption of an only son—Gift in adoption by widow, without an express authority from her husband—Practice—Objection taken for the first time on second appeal.

The plaintiff, a Sudra of the Lingayat caste, sued for possession of certain property, alleging that he had been adopted by the defendant, a widow of the same caste. The defendant denied the adoption, and contended that it was invalid, inasmuch as he was an only son, and had been given in adoption by his widowed mother without an express authority from her husband.

The plaintiff, in support of his adoption, produced two documents executed by the defendant, *viz.*, a deed of adoption and a compromise, in which the defendant had ratified the plaintiff's adoption. It was found that the defendant was very young, and did not act independently in the execution of those documents.

Held, that the adoption was invalid on two grounds, *viz.*, 1st, that the mother had no authority to give the plaintiff in adoption, because he was the only son of her deceased husband at the time of the adoption; and, 2ndly, that the defendant (whether an infant or not) was not, either at the time of the alleged adoption or at that of the alleged ratification of it, a free agent, but was subject to undue influence.

In the case of an only son the High Court refuses to imply authority in the mother to give such a son in adoption.

Bayabai v. *Bala Venkatesh* (1) and *Gopal Narhar* v. *Hanmant Ganesh and another* (2) referred to.

Lakshmappa v. *Ramava* (3) approved.

Quære—Whether the plaintiff was incapable of being adopted by the defendant, because his mother was a second cousin of the defendant's husband.

It is too late to make an objection, for the first time in second appeal, that a certain witness, for whose evidence no application had been made in the Courts below, ought to have been examined by the appellate Court.

[R., 9 A. 253; 24 B. 367; 11 M. 43.]

THIS was a second appeal from the decision of A. L. Spens, District Judge of Kanara, reversing the decree of V. V. Wagle, Subordinate Judge of Sirsi.

[525] The plaintiff, Somasekhara, sued for the possession of certain moveable and immoveable property left by one Baslinga Raja, deceased, alleging that he was the adopted son of the said Baslinga, and entitled to his estate. The plaint further alleged that Baslinga Raja died in 1869, and that on the 24th December, 1871, the plaintiff was adopted by the defendant, Subhadra, widow of Baslinga Raja. In support of his adoption the plaintiff relied upon two documents executed by the defendant, *viz.*, a deed of adoption (Ex. No. 3), dated the 22nd December, 1871, and a deed of compromise (Ex. No. 4), dated the 10th April, 1875, in which the defendant had ratified the plaintiff's adoption in the presence of the Mamlatdar of Shidapur.

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* Second Appeal No. 297 of 1880.

(1) 7 B.H.C.R. Appx. 1. (2) 3 B. 273. (3) 12 B.H.C.R. 364.

The defendant, Subhadra, denied the plaintiff's adoption by her, and answered (*inter alia*) that the adoption was invalid, because he was an only son, and had been given in adoption by his widowed mother without any express authority from her husband; that the plaintiff was incapable of being adopted by her; inasmuch as his mother (Dewa) was a second cousin of Baslinga Raja; that she was young and inexperienced at the time of the execution of Exs. 3 and 4, and that she was forced to execute the said documents under great pressure and undue influence.

The Subordinate Judge held that the plaintiff was adopted by the defendant; that she was not then a minor; that the adoption was valid; that the deed of adoption and compromise (Exs. 3 and 4) were executed by her without any undue influence. He, accordingly, allowed the plaintiff's claim, and made a decree in his favour on the 12th October, 1878.

In appeal, the District Judge held that Dewa, the plaintiff's natural mother, had no express authority from her husband to give him in adoption; that the adoption, therefore, was invalid; that, at the time of the execution of Exs. 3 and 4, the defendant was young, and acted under great coercion. He, accordingly, on the authority of *Bayabai* v. *Bala Venkatesh* (1) and *Lakshmappa* v. *Ramava* (2), reversed the decree of the Subordinate Judge and threw out the plaintiff's claim (12th March, 1880).

The plaintiff preferred a second appeal to the High Court.

[526] *Shantaram Narayan* (with him *Shamav Vithal*), for the appellant.— The *factum* of the plaintiff's adoption, as shown by Ex. No. 3, is held proved by the Courts below. The defendant by various voluntary acts has recognized the plaintiff's *status* as her adopted son. She fully ratified the adoption by executing the deed of compromise (Ex. No. 4) in the presence of a public officer. It is not now open to her to deny the validity of the adoption. The District Judge ought to have given the appellant (plaintiff) an opportunity to examine the Mamlatdar in whose presence Ex. No. 4 was executed by the defendant.

Ghanasham Nilkanth, for the respondent.

The following is the judgment of the Court :—

JUDGMENT.

WESTROPP, C. J.—The parties to this suit belong to the Malva subdivision of the Lingayat caste, and being Lingayats are, therefore, Sudras by class—*Gopal Narhar* v. *Hanmant Ganesh and another* (3). The plaintiff, Somasekhara, was, at the time of the death of his natural father, Chanbasapa, the only surviving son of the latter. It has not been alleged that Chanbasapa authorized his wife Dewa, who survived him to give the plaintiff in adoption to any person: nevertheless Dewa, on the 24th December, 1871, when the plaintiff was about fifteen years old, appears to have gone through the form of giving him in adoption to the defendant, Subhadra, the elder widow of Baslinga, then recently deceased, at an early age. Subhadra is by the Subordinate Judge found to have been, at the time of the ceremony of adoption, only fifteen years old; and the finding of Mr. Spens, the District Judge of Kanara, is that she was not, at the utmost, more than seventeen years of age at that time. Vira, the other widow of Baslinga, was junior to Subhadra. Basling a was also survived by his stepmother, Chinamaji, the sister

(1) 7 B.H.C.R. Appx. 1. (2) 12 B.H.C.R. 364. (3) 3 B. 273.

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of the plaintiff. Dewa, the natural mother of the plaintiff (Somasekhara), was the second cousin of Baslinga. There is, on behalf of the plaintiff, evidence that Baslinga, when dying, asked Dewa to give the plaintiff in adoption; but the District Judge, for reasons which it is difficult successfully to contravene, seems not to have accepted that evidence as trustworthy. Even, however, if Baslinga had made such a request, and Dewa had promised compliance, there remains [527] the absence of express authority from Chanbasapa to Dewa to make such a gift in adoption. In the case of an only son the Court, for the reasons assigned in *Lakshmappa* v. *Bamava* (1), which case has been, as we think, rightly followed by the District Judge, refuses to imply authority in the mother to give such a son in adoption. That case does not appear to have been cited to the Subordinate Judge.

The learned pleader for the plaintiff endeavoured to surmount that objection by contending that defendant was, by her conduct and more specially by her execution of the deed of adoption (Ex. No. 3), and by her having entered into a compromise (Ex. No. 4) in the presence of the Mamlatdar of Shidapur estopped from denying the validity of the adoption. The District Judge, however, has found that the defendant was not on either of these occasions acting independently. This Court was bound by his finding; but, even if this were not so, we fail to perceive any sufficient reason for supposing his conclusion to be incorrect. The point made in this Court, that the Mamlatdar ought to have, been examined, was not made in the Courts below, nor does there appear to have been any application, on behalf of the plaintiff, that the Mamlatdar should be examined. It is quite too late to make such an objection on second appeal.

Upon the following two grounds—*viz.*, 1st, that Dewa had not any authority to give her son, the plaintiff, in adoption, he being at the time of the alleged adoption, the only existing son of her husband (then deceased) his natural father; and 2ndly, that the defendant, Subhadra (whether an infant or not) was not either at the time of the alleged adoption or at the time of the alleged ratification of it a free agent (see *Bayabai* v. *Bala Venkatesh* (2), but was subject to undue influence—we affirm the decree of the District Judge, which holds the alleged adoption to be invalid.

We do not consider it necessary to give any opinion on the question whether the plaintiff was, by reason of the alleged relationship of his mother Dewa to Baslinga Raja, incapable of being adopted as son of Baslinga Raja, inasmuch as the points already decided are sufficient to dispose of the case.

The decree of the District Judge is affirmed with costs.

(1) 12 B.H.C.R. 364.

(2) 7 B.H.C.R., Appx. 1.

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[528] ORIGINAL CIVIL.

Before Mr. Justice West.

COOVERJI LUDHA (*Plaintiff*) *v.* BHIMJI GIRDHAR (*Defendant*).*
[8th August, 1882].

Party wall, liability for cost of—Building-leases—Agreement to refer dispute to a person—Effect of such agreement on the right to sue—Award of such third person essential to right of action—Surveyor's certificate—Limitation—Covenant—Right to sue—Stranger to consideration—Landlord and tenant.

The plaintiff sued to recover from the defendant half the cost of a party wall.

The plaintiff and defendants were lessees of adjoining pieces of land under agreements made between them respectively and the Secretary of State for India in Council as lessor. The terms and conditions of the two agreements were the same. By these agreements the plaintiff and defendant respectively agreed to build houses upon the said pieces of land in the manner therein specified, and the agreements contained the two following clauses:—(1) "The building to be continuous with party walls common to both adjoining houses." (7) "All disputes regarding the cost and maintenance of party walls to be decided by the Government surveyor, whose decision shall be binding on both parties." In pursuance of the said agreements the plaintiff and defendants respectively erected buildings on the said pieces of land. The plaintiff caused the northern wall of his building to be built as a party wall, and it was used by the defendants as the southern wall of the building erected by them. The defendants paid the builder who was employed by the plaintiff a sum of Rs. 700 on account of the cost of erecting the party wall, but the rest of the cost was defrayed by the plaintiff. The party wall was completed in November, 1871; but, in consequence of disputes which arose between the plaintiff and the building contractor, the sum payable to the latter was not ascertained for some years. In March, 1879, the plaintiff caused the party wall to be measured by a surveyor, and on the 7th June, 1879, demanded from the defendants payment of half the cost. The defendants, however, failing to pay the sum demanded, the plaintiff, after notice to the defendants, caused the cost of the said party wall to be ascertained by the Government surveyor, who by a certificate, dated the 25th February, 1882, certified that the share of the cost to be borne by the defendants for the said party wall was Rs. 3,226. The plaintiff in this action sought to recover this sum from the defendants *minus* the Rs. 700 which, as above stated, the defendants had already paid, and for which the plaintiff gave them credit.

The defendants in their written statement alleged that the party wall had been partly built with materials supplied by them, and that in the year 1870 they had adjusted accounts with the plaintiff in respect of the said materials and the said party wall, and it was then agreed that the sum of Rs. 700 paid by the defendants should be treated as a final settlement. They also alleged that the plaintiff had settled disputes with the building contractors, and had only paid them three annas in the rupee on the amount of their claim in full satisfaction; the defendants pleaded that they ought not to be charged with more than their due proportion of such reduced amount. It was further contended for the defendants that their obligation to pay half the costs of the party wall existed independently [529] of the arrangement between them and the plaintiff to refer the matter to the Government surveyor; that this latter covenant was only collateral, and did not interfere with the plaintiff's right to sue the defendants for their half share of the cost; that the plaintiff's cause of action in this respect arose on the 15th October, 1878, when the contractor's claim was finally settled, and that this suit not having been brought for more than three years after that date it was barred by limitation.

Held that the suit was not barred. There was no right of action independently of the valuation and award of the Government surveyor. There was no separate covenant to pay compensation to which the covenant for reference to the Government surveyor could be collateral. The rights of the parties were defined by the contracts, and, under these, each lessee might have the benefit of a party wall on

* Suit No. 99 of 1882.

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such terms, and no others, as he on his part submitted to. Payment of a share of the cost was not one of those terms, except in so far as each lessee if a dispute arose, was bound by the decision of a Government surveyor. That decision was not ancillary, serving to give greater explicitness to a right already fully subsisting. It was essential to the right itself, and until it was made, no cause of action for the moiety of the cost arose.

Where, in leases granted by one lessor to several lessees taking sites for buildings intended to be contiguous and to form one block or group in mutual relation, there is a common covenant which is an inducement to the lessee to take the lease, and which he must know is equally an inducement to his neighbour to take his lease, neither can be called a stranger to the consideration. Each may be regarded as an equitable assignee of the covenants which the lessor made for his benefit as lessee. Each, consequently, has an equitable right to enforce against the other the obligation stipulated for in his interest, and serving as a part of his inducement (as the other knew) to the contract.

[R., 9 B. 183 (197).]

SUIT to recover Rs. 2,526, alleged to be the share of the cost of erecting a party wall, payable by the defendant.

The plaint stated that under certain agreements made between plaintiff and the Secretary of State for India in Council, the plaintiff became lessee for the term of nine hundred and ninety-nine years from the 26th August, 1877, of a certain piece of land in Bombay, called lot No. 5, upon the tenure and conditions specified in the said agreements. The defendants became lessees of adjoining land, called lot No. 4, under similar agreements made by them with the Secretary of State for India in Council which contained terms and conditions similar to those contained in the agreements entered into by the plaintiffs.

By the terms of the said agreements the plaintiff and defendants respectively agreed to erect upon the said pieces of land buildings in the manner and within the times therein specified, and it was also provided that the buildings to be erected upon the [530] said two pieces of land should be continuous with party walls common to both of them. It was further provided that all disputes regarding the cost and maintenance of the said party walls should be decided by the Government surveyor, whose decision should be binding on both parties.

In pursuance of the said agreements the plaintiff and defendants respectively erected buildings on the said pieces of land. The plaintiff caused the northern wall of his building to be built as a party wall, and it was used by the defendant as the southern wall of the building erected by him. The defendants paid the builder, who was employed by the plaintiff a sum of Rs. 700 on account of the cost of erecting the party wall, but the rest of the cost was defrayed by the plaintiff. The party wall was completed in November, 1871.

After the erection of the plaintiff's buildings and of the party wall had been completed, disputes arose between the plaintiff and the contractor who had been employed by him, in consequence of which the sum payable to the contractor was not ascertained for some years.

7. "In the month of March, 1879, the plaintiff caused the work of the said party wall to be measured by a surveyor, and the amount so found to be due by the defendant to the plaintiff for their half share in the cost of the said wall was Rs. 3,648-13-0. The plaintiff by his solicitors' letter, bearing date the 27th day of June, 1879, demanded payment of the said sum.

8. "The defendants having failed to admit the accuracy of the said report, or to pay the said sum of Rs. 3,648-13-0, the plaintiff, in pursuance of the said seventh clause of the said specification, and after due

notice to the first defendant, caused the cost of the said party wall to be ascertained by the Government surveyor. By a certificate, bearing date the 25th day of February, 1882, the said Government surveyor certified that the share of cost to be borne by the defendants for the said party wall was Rs. 3,226.

9. "After crediting the defendants with the said sum of seven hundred paid by them as aforesaid, there remains due to the plaintiff by the defendants the sum of Rs. 2,526 for their share **[531]** of the cost of the said party wall. The plaintiff has demanded from the defendants payment of the said sum, but the defendants have failed to pay the same or any pay part thereof."

The plaintiff claimed to recover from the defendants the sum of Rs. 2,526, with interest at the rate of 9 per cent. per annum from the 17th November, 1871.

The following paragraphs from their written statement set forth the defendants' defence :—

4. "The defendants say that the plaintiff in building his house, in the said paragraph mentioned, used a considerable quantity of building materials belonging to the defendants, and that a portion of the plaintiff's party wall in the said paragraph mentioned was built by the defendants at their own expense. After the completion of the houses of the plaintiff and the defendants in the year 1870 they adjusted their mutual accounts in respect of the said materials and the said party wall, and it was then agreed by and between the plaintiff and defendants that the sum of Rs. 700 paid by the defendants, as in the said fifth paragraph mentioned, should be treated as a final settlement of all accounts whatever between them in respect of the said buildings.

5. "The defendants believe that disputes did arise between the plaintiff and his contractors, as in the sixth paragraph of the plaint stated, but such disputes were settled in or about the year 1876 by the said contractors accepting payments at the rate of three annas in the rupee or thereabouts on the amount of their claim against the plaintiff in full satisfaction thereof. The defendants submit that in any case they ought not to be charged more than their due proportion of the reduced amount so paid by the plaintiff to the said contractors.

6. "The defendants say that they had no notice of the plaintiff's intention to make the measurement in the seventh paragraph of the plaint referred to. The defendants do not admit that they or any of them received the letter of the 27th day of June, 1879, in the said paragraph mentioned."

The defendants also pleaded that the suit was barred by limitation.

[532] The following issues were raised by the defendants :—

(1) Whether the claim was barred by limitation ?

(2) Whether the plaintiff was entitled to be recouped by defendants any and what part of the sum expended by him on the construction of the party wall in question ?

(3) Whether there was a final settlement between the parties as alleged in paragraph 4 of written statement ?

(4) Whether the defendants were entitled as against plaintiff to credit for building materials or otherwise by way of set off against the whole or any portion of the plaintiff's claim.

The defendants began :—

Telang (with *B. Tyabji*, for the defendant).—The cause of action arose when the contractor was paid, which was in December, 1877, and

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October, 1878. The plaintiff was not at liberty to sleep on his right: *Dawson* v. *Fitzgerald* (1). In the leases there is no covenant not to sue until the surveyor settles the cost. Here there is no dispute as to the cost of the wall. The defendants allege that part of the materials were supplied by them. The clause requiring disputes to be settled by the Government surveyor did not prevent the plaintiff suing: *Goldstone* v. *Osborn* (2). Again, the decision of the Government surveyor cannot do more than settle the actual cost. The amount to be contributed by the defendant is not settled. The defendant can only be required to pay his proportion of what the plaintiff has actually paid, which, we say, was much less than contractor's charge. He has only paid part in satisfaction of the whole. Defendant may claim the benefit of the reduction: Leake on Contracts, ch. i, sec. 2; *Maxwell* v. *Jameson* (3).

Farran (with the Hon. *B. Lang*, Acting Advocate-General) for plaintiffs.—The case of *Maxwell* v. *Jameson* does not apply. In that case there was a joint obligation. The defendants contend they are entitled to a reduction. Suppose we had paid at a double rate, could we claim at that rate from them? The "cost" means the cost at a reasonable rate determined by the Government surveyor.

[533] No cause of action arose until the certificate of the Government surveyor was given.

It is contended that the obligation to pay for the party wall arises by implication of law, but it really arises from the agreement, and can be made complete only in the way contemplated by the agreement.

JUDGMENT.

WEST, J.—The plaintiff and the defendant hold adjacent plots of building land, numbered 5 and 4, under agreements for a lease from the Secretary of State for India. These are expressed in identical terms, save as to the definition of the areas, and it has been admitted by the defendant's counsel that as to terms inserted for the common benefit of a group of lessees taking sites for buildings intended to be contiguous and to form one block or group in mutual relation, the defendant having a knowledge of the circumstances, is bound by his covenant not only towards the Secretary of State, the lessor, but also towards the lessees of the neighbouring plots for whose benefit the terms were introduced, and on whom, reciprocally, he, on his part, has a claim for the fulfilment of the like terms by them for his benefit as lessee: see *Western* v. *Macdermott* (4); *German* v. *Chapman* (5). A covenant in favour of a lessor does not indeed, necessarily, avail for the tenant injured by some act of another tenant, but where there is a common covenant, such as in the present case, which is an inducement to the lessees, to take the lease, and which he must know is equally an inducement to his neighbour to take his lease, neither can be called a stranger to the consideration. Each may be regarded as an equitable assignee of the covenants which the lessor made for his benefit as lessee: see *Master* v. *Hansard* (6). Each, consequently, has an equitable

(1) L. R. 9 Ex. 7, *per* Bramwell, L.J., at p. 11, whose view was approved by the Court of Appeal, 1 Ex. D. 257.
(2) 2 C. & P. 550.
(3) 2 B. & Ald. 51, *per* Bayley, J.
(4) L.R. 1 Eq. 499 = L.R. 2 Ch. Ap. 72.
(5) 7 Ch. D. 271.
(6) L.R. 4 Ch. D. at pp. 723, 724, *per* Bramwell, L.J.; and see *Lloyds* v. *Harper*, 16 Ch. D. 290, *per* Fry, J.: "Where a contract is made for the benefit and on behalf of a third person, there is an equity in that third person to sue on the contract, and the person who has entered into the contract may be treated as a trustee for the person for whose benefit it has been entered into."

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right to enforce against the other the obligation stipulated for in his interest and serving as a part of his inducement (as the other knew) to the contract.

Among the terms is an engagement that the intended lessee shall, within two years, erect a building of one of several kinds specified **[534]** "of such description and in such positions and according to the specification hereunto annexed." The specification so annexed applies in its terms to the whole group of intended buildings. It says: "(1) The buildings to be continuous, with party walls common to both adjoining houses," and (7) All disputes regarding the cost and maintenance of party walls to be decided by the Government surveyor—whose decision shall be binding on both parties." There is here no stipulation that either of the lessees of contiguous sites shall build the party wall, but it is obvious that whichever tenant should build first must, of necessity, build a wall serving as a party wall to his own house and his neighbour's. The term "party wall" has different meanings under different circumstances: *Watson* v. *Gray* (1); but the most usual of these implies a tenancy in common held by the holders of the adjacent properties, and the expression "common to both adjoining houses" seems to favour that sense in the present case. As the neighbouring lessees were thus to be tenants in common of what in the ordinary course would be built by one of them or of what would at any rate seldom be built in exactly equal proportions by each, it would be reasonable that the cost should be fairly distributed between them. Disputes might probably arise, and hence the utility, if not necessity, of the 7th article of the specification making the Government surveyor final adjudicator in all such disputes. The plaintiff built the party wall in question and paid the contractors with a comparatively small exception. He sought payment from the defendant of one-half of the costs as valued by an architect, and when this demand failed, he applied to the Government surveyor, who eventually valued the party wall, and after making allowance for certain materials supplied by the defendant, pronounced him liable to pay to the plaintiff Rs. 3,226 as his share of the cost. Defendant had paid Rs. 700 to the contractors, and, deducting this, plaintiff now claims Rs. 2,526.

The defendant pleads limitation. It appears that the plaintiff being in difficulties, a friend of his, in 1877 and in October, 1878, bought the shares of the remaining claims against the plaintiff from the two partners of the firm of contractors who had built **[535]** for him the houses on plots No. 2 and No. 5. The sum claimed being Rs. 20,559, the plaintiff's friend bought it up for Rs. 5,150, and, on the 5th November, 1879, he transferred it or released it to the plaintiff for the same sum. It is admitted that the plaintiff's friend, Liladhar, was, in fact, acting for the plaintiff. As the contractor's claim was finally settled by him on the 15th October, 1878, while the present suit was not brought until 1882, the claim, it is contended, is barred by the lapse of three years since the cause of action arose.

In support of this contention Mr. Telang has relied on several cases, of which the one most in point is that of *Dawson* v. *Fitzgerald* (2). In that case there were covenants by a tenant to keep down hares and rabbits within uninjurious limits and to pay reasonable compensation for injury caused by an excessive number, "the amount of such compensation, in case of difference, to be referred to the arbitration of two

(1) L. R. 14 Ch. D. 192.

(2) L. R. 1 Ex. D. 257.

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arbitrators, the arbitrators...to...nominate an umpire, and the decision of such arbitrators or umpire to be binding and conclusive on the lessors and the lessee," and the Court of Appeal reversing the decision of the Court of Exchequer, held that the agreement to refer to arbitrators being collateral to the one to pay compensation, the latter might be sued on without a reference. The distinction taken by the Court was between a covenant to pay a sum to be ascertained by some third person or persons and one creating a liability accompanied by another for referring the matter giving rise to such liability to arbitration. In the latter case it was ruled the right of action on the one covenant was not taken away by the second covenant, whatever effect the latter might have in giving the defendant a cause of action against the plaintiff for not referring to arbitration or in enabling him to call for a reference by the Court under the Common Law Procedure Act. So, in the present case, Mr. Telang contends that the right of action, if it exists at all, arose, at latest, when the contractors were paid, that the covenant to abide by the decision of the Government surveyor is collateral, and as the plaintiff could have sued in 1878, he is barred by limitation in 1882.

[536] The question is, whether there was any right of action independently of the valuation and award of the Government surveyor? I cannot find that there was. Each lessee who builds, is bound to allow the wall between his house and the next "to be a party wall common to both houses." This is a term of his holding which he covenants to fulfil. There is no provision for compensation at all, except what is involved in art. 7 of the specification. The language used is not, "I covenant to pay my share of the cost of party walls, such share to be ascertained in case of dispute by reference to the Government surveyor," there is no separate covenant at all to which that for the reference can be collateral. The case, therefore, differs wholly from the one relied on, and resembles those in which "no cause of action arises until the third person assesses the sum." The law, it was argued, would compel the defendant to pay his share, but the parties did not leave their rights to be settled by the law; they defined them, as they might do, by their contracts. Under those each lessee might have the benefit of a party wall on such terms and no others as he on his part submitted to. Payment of a share of the cost was not one of these terms except in so far as each lessee, if a dispute arose, was bound by the decision of the Government surveyor. Thus his assessment was not only ancillary, like reference to a builder's price book, serving to give greater explicitness to a right already fully subsisting. It was essential to the right itself. Until it was made, no cause of action for the moiety of the cost arose, and as the assessment was, in fact, made within the present year, the suit is not barred by limitation.

The same stipulation which makes the surveyor's valuation essential to the right and obligation between the parties makes it conclusive as to the amount that may be claimed. It would only be in case of fraud or misconduct, or of circumstances that must produce an unfair bias of his judgment, that the Court could deprive the Government surveyor of the functions assigned to him by the contracting parties. I find, therefore, on the several issues for the plaintiff, awarding him under the fourth issue the amount claimed by him with costs. Interest to be allowed on Rs. 2,526 at 9 per cent. from 25th February, 1882, till judgment, **[537]** and interest on the aggregate amount decreed until satisfaction.

There was, however, it is said, no dispute as to the cost of the party wall; the dispute was as to the deduction to be made from the defendant's share of the cost, and it is stipulated only that the Government surveyor's decision shall settle the mere cost, not that it shall give any right to one lessee as against another, as such right may be subject to unlimited modifications by other circumstances. To this the answer is that by silently rejecting the claim of the plaintiff, the defendant most practically refused to recognize it. A demand which he did not submit to, he disputed; and though the clause of the specification giving authority to the Government surveyor is very defectively expressed, the sense is clear, that when a settlement is not arrived at by private agreement, the surveyor is to be called in and his decision accepted as final. The surveyor's decision, however, being final and the tenants being entitled as admitted *inter se* to take advantage of the covenants for their common benefit, it cannot be doubted that the right to the moiety of the cost of the party wall arose in this case immediately on the award of the Government surveyor being given. It might be qualified by other rights and obligations arising from other transactions, but could not in itself be questioned. An agreement, though clumsily expressed, must be given effect to where the intention is clear and where the party seeking to enforce it has expended money in reliance on it; and the only sense I can attach to the stipulation in this case is that what the surveyor settled the party liable should pay, subject, as in other cases, to any lawful deduction or set-off or accord and satisfaction.

Decree for plaintiffs.

Attorneys for the plaintiff.—Messrs. *Hore, Conroy, and Brown.*
Attorneys for the defendants.—Messrs. *Shapurji and Thakurdas.*

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6 B. 538 (F.B.) = 6 Ind. Jur. 646.

[538] APPELLATE CIVIL.—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill, and Mr. Justice Kemball.

NARAN PURSHOTAM (*Original Defendant*), *Appellant v.*
DOLATRAM VIRCHAND (*Original Plaintiff*), *Respondent.**
[February, 1882.]

Mortgage—Priority—Purchaser for value without notice of a prior san-mortgage—Suit by mortgagee against purchaser to establish right to attach property—Right of purchaser to redeem—Parties—Form of decree.

On the 23rd March, 1869, a house was mortgaged by its owner, P to J by a *san*-mortgage. After the death of P, his heirs, D and T, on the 9th July, 1869, executed to the plaintiff a *san*-mortgage of the same house for Rs. 62. That mortgage was neither registered nor accompanied with possession. On the 27th July, 1869, D and T sold the house to the defendant. The deed of sale was not registered. A part of the purchase-money was applied to the payment of the first *san*-mortgage, which was then delivered up to the defendant, with a receipt on it by J, who acknowledged to have received from the defendant the amount due on his mortgage. The defendant, however, omitted to take an assignment of that mortgage to himself. The plaintiff sued D and T on his *san*-mortgage of the 9th July, 1869, and, in 1872, obtained a decree for the recovery of the mortgage-debt out of the mortgaged property. The defendant was not made a party to that suit. The plaintiff attached the house in execution of his decree; but the

* Special Appeal No. 240 of 1875.

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6 B. 538 (F.B.) = 6 Ind. Jur. 646.

attachment was raised on the application of the defendant under s. 246 of the Civil Procedure Code, Act VIII of 1859. The plaintiff then sued the defendant to establish his (plaintiff's) right to attach and sell the house under his *san*-mortgage. The defendant answered that he was a purchaser for value, without notice of the plaintiff's mortgage. The plaintiff's claim was dismissed by the first Court, but allowed by the Appellate Court. On special appeal,

Held, that the defendant's plea that he was a purchaser for valuable consideration, and without notice of the plaintiff's *san*-mortgage, would not avail to defeat that mortgage under the established usage of Gujarat in favour of *san*-mortgages.

Held, further, that the defendant, having become entitled by his purchase at least to the equity of redemption in the house, ought to have been made a party to the plaintiff's original suit on his mortgage, and was not bound by the decree in that suit, and was entitled to a reasonable time to redeem the house from the plaintiff's mortgage.

Sobhagchand v. *Bhaichand* (1) referred to and followed.

[F., 20 B. 390; R., 10 A. 520=8 A.W.N. 210; 13 A. 28=10 A.W.N. 216.]

THIS was a special appeal from the decision of W. H. Newnham, Judge of the District Court of Ahmedabad, reversing the [539] decree of Chunilal Manaklal, Second Class Subordinate Judge at the same place.

The special appeal first came before Westropp, C. J., and Nanabhai Haridas, J., who on the 16th December, 1876, referred it to a Full Bench in connection with *Sobhagchand* v. *Bhaichand* (1), reported *supra*, p. 193.

The facts of the case are briefly mentioned in the head-note above, and will be found more fully stated in the judgment of the Full Bench.

Nagindas Tulsidas, for the appellant.

Dhirajlal Mathuradas, for the respondent.

JUDGMENT.

The following is the judgment of the Full Bench, delivered by

MELVILL, J.—This special appeal was agrued before the same Full Bench which heard the reference in Special Appeal, No. 540 of 1873 (1), on which reference judgment has been given to-day.

The house in dispute originally belonged to Pitha Bhana, who, in 1869, mortgaged it by way of *san* to Jeysang Bhavani. Pitha having died, the equity of redemption of the house devolved upon his heirs, Dala Dungar and Tulsi Dungar. They mortgaged it by way of *san* to the plaintiff, Dolatram, on the 9th July, 1869, for Rs. 62. That mortgage was unregistered. On the 27th July, 1869, Dola Dungar and Tulsi Dungar sold the house to the defendant, Naran; the deed of sale was unregistered. The part of the money was applied in paying off the first *san*-mortgage, *viz.*, that to Jeysang Bhavani, which was then delivered up to the defendant, and upon it there was written a receipt dated 27th July, 1869, whereby Jeysang Bhavani acknowledged to have received from the defendant, Naran, the amount due on that mortgage. Naran unfortunately, however, did not take an assignment of that mortgage either to himself or to a trustee for him. The plaintiff Dolatram instituted, against Dala Dungar and Tulsi Dungar, a suit on the *san* mortgage of the 9th July, 1869, to recover the amount due thereon, and obtained a decree to that effect in 1872. An attachment was thereupon issued against the house, but, on the application, under s. 246 of Act VIII of 1859 of the [540] present defendant, Naran, (who had not been made a party to that

(1) See *supra*, 6 B. 193.

suit) was raised on the 21st October, 1872. The plaintiff thereupon brought the present suit against Naran to establish the plaintiff's right under his *san*-mortgage of the 9th July, 1869, to attach and sell the house. Naran had not any notice of the plaintiff's *san*-mortgage when he (Naran) purchased the house on the 27th July, 1869, from Dala Dungar and Tulsi Dungar, though he had made some inquiry as to their title. The Subordinate Judge dismissed the plaintiff's suit. The District Judge reversed that decision and made a decree for the plaintiff, against which the defendant has instituted the present special appeal to the High Court.

The reply, which we have to-day given to the first question on the reference in *Sobhagchand* v. *Bhaichand* (1), shows why we must hold that Naran's plea—that he has purchased for valuable consideration and without notice of the plaintiff's *san*-mortgage—will not avail Naran to defeat that mortgage in the presence of the establised usage of Gujarat in favour of *san*-mortgages. But Naran, having by his purchase become entitled at least to the equity of redemption in the house, ought to have been made a party to the plaintiff's original suit on that mortgage, and, not having been so, is not bound by the decree in that suit, and is entitled now to a reasonable time to redeem the house from the plaintiff's mortgage. There is nothing to show that Naran was aware of the plaintiff's original suit, whereas Naran being then in possession of the house, the plaintiff must have wilfully omitted to make Naran a party of that suit, in which the equity of redemption was then wholly unrepresented, inasmuch as the defendants in that suit had divested themselves by their sale to Naran of all interest in the house. Under these circumstances the accounts taken by the Court in the plaintiff's original suit do not bind Naran, and, if such be his desire, but not otherwise, let there be a fresh account taken of what was due to the plaintiff on his *san*-mortgage. Naran must, within one month after the decree of this Court in this suit is notified to him by the Subordinate Judge, elect whether he (Naran) will have such fresh account taken or not. If within six calendar months from his **[541]** election to abide by the former accounts or within six calendar months after the Subordinate Judge shall have notified to the defendant, Naran, or his pleader the amount found due on such fresh account, as the case may be, the defendant, Naran, do not pay the amount due to the plaintiff on his *san*-mortgage, let the defendant, Naran, be for ever barred and foreclosed from redeeming the said house, and let the same be sold, and let the amount due to the plaintiff be paid to him out of the proceeds of sale, and the balance (if any) made over to the defendant, Naran. The decree of the District Judge must be varied in conformity with the above directions. The defendant, Naran, should pay to the plaintiff his costs of the suit. The parties respectively should bear their own costs of the appeals.

Decree varied.

(1) See *supra*, 6 B. 193.

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APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

KHODABHAI MAHIJI (*Plaintiff*) *v.* BAHDHAR DALA AND OTHERS (*Defendants.*)* [13th March, 1882.]

Hindu law—Inheritance in Gujarat—In Gujarat the father succeeds to the estate of a son, dying without issue or widow, in preference to the mother.

In Gujarat the right of succession to the estate of a Hindu who is separate in interest and who, at his death, leaves a father and mother, but no issue or widow, devolves upon the father, in preference to the mother.

[R., 14 B. 605 (611) ; 11 Bom. L. R. 641 (643).]

THIS was a reference under s. 617 of Act X of 1877 by Rao Saheb Madhuvachram Balvachram, Subordinate Judge of Borsad, in the District of Ahmedabad.

The following are the facts of the case as stated by the Subordinate Judge :—The plaintiff, Khodabhai, sued to recover Rs. 40, due on a bond, dated the 14th December, 1875, and payable on the 17th March, 1877. The bond was executed by Gabad Bahdhar (deceased) as principal and Kala Vahala as surety. Gabad died before the institution of the suit without issue or widow, but **[542]** leaving his father, Bahdhar, his mother, Bai Amrit, and his two brothers, Phatha and Dhira, surviving. As Gabad was dead, the plaintiff sued his father and brothers as his heirs and Kala Vahala, the surety. The defendant, Kala Vahala, denied the execution of the bond. The answer of the other defendants was that they had no knowledge of the transaction. The Subordinate Judge found that Gabad was separate in interest from his father and brothers, and held the bond proved ; also that the brothers of Gabad were not his heirs. The question referred by the Subordinate Judge to the High Court was whether Gabad's heir was his father, Bahdhar, or his mother, Bai Amrit. He was of opinion that the father was the heir.

Shantaram Narayan, as *amicus curiæ*, appeared in support of the mother's heirship, and referred to the following authorities :—Manu, ch. ix, pl. 185, 217 (1) ; Colebrooke's Digest, Bk. V, ch. viii, pl. 403, 404, 407, 423, 424, 425 (2) ; Vyav. May., ch. iv, s. 8, pl. 41 (3) ; Mitak., ch. ii, s. 1, pl. 2 and s. 3, pl. 1 to 5 (4) ; Dayabhag, ch. xi, s. 1, pl. 5 and s. 4, pl. 1 to 6 (5) ; Dayakrama Sangraha, ch. i, s. 5, pl, 1 and 2 (6); Vir Mitrodaya (7) ; West and Buhler, pp. 52, 158, 163, 2nd ed.; Norton's Leading Cases, Part II, p. 556.

Manekshah Jehangirshah in support of the father's heirship.—The balance of authorities cited by the learned pleader on the other side is in favour of the father's right of succession. Moreover, the whole Hindu law of inheritance is based upon the theory that he who offers the funeral

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* Civil Reference No. 19 of 1880.

(1) The Institutes of Manu, translated by Sir William Jones, pp. 255, 259, Madras edition, 1863.
(2) Pp. 532, 534, 550, 552, Madras edition, 1865.
(3) Stoke's Hindu Law Books, p. 87.
(4) Stoke's Hindu Law Books, pp. 427, 441.
(5) Stoke's Hindu Law Books, pp. 304, 330, 331.
(6) Stoke's Hindu Law Books, pp. 477, 478.
(7) Gopalchandra Sarkar's Translation, pp. 190, 191.

cake most efficaciously succeeds to the estate of the deceased. If this theory is good, then the father must be preferred to the mother. The learned pleader referred to West and Bühler, p. 551, and Mayne's Hindu Law, pp. 504, 505.

JUDGMENT.

[543] The following is the judgment of the Court delivered by

WESTROPP, C.J.—This reference by the Subordinate Judge of Borsad relates to a question which arose in a suit (No. 297 of 1880) pending in his Court. That suit was brought upon a money bond to recover Rs. 40, such bond being alleged to have been executed by the late Gabad Bahdhar as principal, and the defendant, Kala Vahala, as surety. The execution of the bond by these persons is held by the Subordinate Judge to be proved, and the question which he refers to us is, whether the heir of Gabad Bahdhar (who died separate in estate from his father and brothers and without leaving either issue or widow) is his father (the first defendant) Bahdhar Dala, or his mother, Bai Amrit. He held that the brothers of the deceased (who had been joined with their father as defendants) were not such heirs, and, therefore, not rightly made defendants. No question as to them is before this Court. The Subordinate Judge, in an elaborate judgment, states his opinion to be in favour of the father.

The parties did not appear by pleaders in this Court. But with that public spirit and zeal for the administration of justice with which the pleaders of the High Court are inspired, Mr. Shantaram Narayan, as *amicus curæ*, supported the heirship of the mother of the deceased, and Mr. Manekshah supported the heirship of the father.

As has been often stated here, the leading authorities in Hindu Law in this Presidency are Manu, the Mitakshara, and Vyavahar Mayukha (1), and of these the last mentioned is of special authority in Gujarat, whence this reference comes (2). Manu (ch. ii, pl. 185) says: "of him, who leaves no son, the father shall take the inheritance and the brothers." As amended by the great commentator, Kaluka Bhatta, that text runs thus: "of him, who leaves no son, *nor a wife*, *nor a daughter*, the father shall take the inheritance, and *if he leave neither father nor mother*, the brothers." Manu (ch. ix, pl. 217) says: "of a son dying childless, the mother shall take the estate, and the mother also being dead, the paternal grandmother shall take the heritage." As amended by **[544]** Kaluka Bhatta that text runs thus: "of a son dying childless and leaving no widow, *the father and mother shall take the estate*, and the mother also being dead, the paternal *grandfather and grandmother* shall take the heritage on failure of brothers and nephews." The amendments of Kaluka Bhatta in both texts tend to show that Kaluka Bhatta preferred the father to the mother.

The well-known text of Yajnyavalkya describing succession on the failure of sons, after naming the wife and daughter, next specifies "both parents" (3). Commenting upon this, Vijnyaneswara (the author of the Mitakshara) in distinct terms (Mitak., ch. ii, s. 3) assigns the priority to the mother. Balambhatta, contrary to his (her?) usual bias, prefers the father, as will be seen in Mr. Colebrooke's note 5 to ch. ii, s. 3, of the Mitakshara. That note shows the diversity of opinion which has prevailed on the question. Mr. Colebrooke admits that "the great majority of writers of eminence" prefer the father to the mother.

(1) 1 B.H.C.R. 13.
(2) 2 B. 418=3 B. 358 and 365=West and Bühler, 2nd ed., pp. 3, 172.
(3) Mitak., ch. ii, s. 1, pl. 2.

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Amongst these writers, he places (*inter alia*) Apararka and Nilkantha; the author of the Vyavahara Mayukha, who, in ch. iv, s. viii, pl. 15 of that work, combats the doctrine of the Mitakshara on this question, and denies the reason given for it by Vijnyaneswara. The compromise suggested by the Vir Mitrodaya and based on the principle of *detur digniori*(1) is not within the pale of practicable law.

In the general order of succession for this Presidency, Messrs. West and Bühler (2nd ed., pp. 52, 158, 163) have, following the Mitakshara, placed the mother before the father; but this cannot be regarded as an indication that those learned authors thereby intended to close the question for the whole Presidency: inasmuch as in a previous part of their work (2nd ed., pp. 3, 172) they admit the leaning of Gujarat towards the Mayukha, and state that the extent of that preference remains to be determined judicially. In the only Vyavastha given by them in which the father and mother were clearly placed in competition, the Sastri preferred the father. That, too, was in the Deccan, being an opinion given in 1857 to the Adalat at Poona. As authorities for his view, the Sastri cited first the Mayukha and secondly **[545]** the Mitakshara (West and Bühler, p. 159, q. 2). In these circumstances this Court inquired of the District Judge of Surat (Mr. Birdwood) and of the District Judge of Ahmedabad (Mr. Phillpotts) as to the existence of precedents in their respective districts. The latter said that, after search no precedents touching the succession of father and mother could be found in Ahmedabad. The District Judge of Surat, after consulting the 1st and 2nd Class Subordinate Judges of Surat, the Subordinate Judges of Bulsar, Jambusar, Anklesar, Olpad, Broach and Vagra and the Government pleaders of Surat and Broach, was only able to mention two instances in which the question as to priority of succession arose between the father and mother, both of which instances were furnished to him by the Subordinate Judge of Anklesar (previously of Borsad) and also mentioned by the Subordinate Judge of Olpad.

Of these two cases the first was in the Court of Small Causes at Surat. The suit was brought by the obligee of a money bond against the father of the obligor (the obligor being dead), the defendant objected that his wife, the mother of the deceased obligor, being still alive, was the heir of her son. To this view the Judge was at first disposed to accede, but, on hearing the arguments, arrived at the conclusion that the father was the heir and properly made the defendant. The suit was eventually compromised. Subsequently, the mother of the same deceased person brought a suit in the Court of the First Class Subordinate Judge at Surat to recover a debt due to the deceased, but it being objected on behalf of the defendant, that the father and not the mother of the deceased was his heir, the father was produced in Court by the plaintiff and then and there openly relinquished, in favour of the plaintiff, his wife, any right which he might have to the debt. Under these circumstances the First Class Subordinate Judge made a decree against the defendant. It must be admitted that these are not very satisfactory precedents. All the Subordinate Judges, however, consulted by Mr. Birdwood (except the Subordinate Judge of Bulsar) informed Mr. Birdwood that the tradition of their Courts and of the pleaders belonging to them, was that, in Gujarat, the father and not the mother of a person who dies without leaving a widow or issue is deemed his

(1) Vir Mitrodaya, translated by Gopalchandra Sarkar, pp. 190. 191.

[546] heir. Mr. Birdwood was similarly informed by the Government pleaders of Surat and Broach.

Looking to the preference generally, though not invariably, shown in Gujarat to the Mayukha, where it differs from the Mitakshara, to the fact testified by Mr. Colebrooke that the majority of eminent Hindu writers give the preference to the father over the mother, and to the information supplied by Mr. Birdwood, this Court is of opinion that the safest course will be to hold in this case that the father inherits from his son in priority to the mother, and, therefore, this Court concurs with the Subordinate Judge, who has made this reference, in ruling that the deceased alleged debtor, Gabad Bahdhar, is rightly represented on the record in this suit by his father Bahdhar Dala.

Our late colleague, Mr. Justice F. D. Melvill, we are aware, held the same opinion in this case as that at which we have arrived.

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6 B. 546 (F.B.)=6 Ind. Jur. 648.

APPELLATE CIVIL.—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Bayley and Mr. Justice Kemball.

THE COLLECTOR OF THANA (*Original Defendant*), *Appellant v.* HARI SITARAM AND ANOTHER (*Original Plaintiffs*), *Respondents.**

[17th April, 1882.]

Limitation—Act XIV of 1859, *s.* 1, *cls.* 12 *and* 16—*Grant by a Hindu sovereign to a Hindu temple—Hindu law to be applied to determine questions of limitation—Nibandha—What is immoveable property—Antastha Sadilvar—Kherij Jamabandi Parbhare Paiki—Religious penalty for resumption.*

The Peishwa, by a *sanad* dated 1790, granted to an ancestor of the plaintiffs, for the support of a Hindu temple, an annual cash allowance of Rs. 350 out of the "*Antastha Sadilvar*†" and three khandis of rice out of the "*Kherij Jamabandi Parbhare*," ‡ to be levied from certain mahals and forts mentioned in the *sanad*. The allowances were paid till the death of the plaintiff's father on the 26th [547] December, 1859, when the Collector of Thana stopped them. On the 23rd December, 1870, the plaintiffs sued to establish their right to the grant to recover six years' arrears of the allowances. The defendant pleaded that the suit was barred by the law of limitation. The question for consideration was whether the suit was governed by cl.12 or cl.16 of s. 1 of the Limitation Act XIV of 1859.

Held by a Full Bench that the grant made by the *sanad* was "*nibandha*," and that the subject-matter of the suit was immoveable property, or an interest in immoveable property within the meaning of the Limitation Act XIV of 1859, s. 1, cl. 12.

Held, also, that the Hindu law might be properly resorted to for the purpose of determining whether the subject-matter of the suit was immoveable property (*i.e.*, *nibandha*) within the meaning of the Limitation Act XIV of 1859, s. 1, cl. 12.

Assuming that it was incorrect to apply Hindu law to ascertain the nature of the grant in question, nevertheless *held*, that the grant was an interest in immoveable property within the meaning of the Limitation Act XIV of 1859, s. 1. cl. 12. The grant savoured throughout of locality, and was undoubtedly

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*Appeal No. 1 of 1881 under the Letters Patent of 1865.

† "Antastha Sadilvar" means extra assessment levied to meet local charges analogous to the present local cess fund.

‡ "Kherij Jamabandi Parbhare" means extra assessment in kind upon land over the regular land assessment collected by local officers and paid by them direct.

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irresumable, inalienable and perpetual. The Indian Legislature did not intend to exclude such property from s. 1, cl. 12 of the Act.

The Indian Legislature, which passed the Limitation Act XIV of 1859, has not given any explanation or definition in the Act of the phrase "immoveable property," but has left suitors to their former ideas on the subject. Under these circumstances it would be a hardship upon them to construe the Act inconsistently with such ideas, inasmuch as they were furnished with no guide which could have led them to suppose that "immoveable property" according to Act XIV of 1859 meant anything less than what they had previously known as such. And that the Indian Legislature were not disposed to be very harsh, is shown by its subsequent more fully developed legislation, on the subject of limitation, which to *haks* and other periodical payments assigns the twelve years' limit.

Held, further, that the grant was irresumable, inalienable and perpetual. It was not a grant from the revenues of the State at large or even of the zilla, but was made up of certain small special grants charged upon the *Antastha Sadilvar* produced by certain special localities in the zilla. Thus the grant was essentially localized, and whatever there might have been of contingency or variability in the levy or application of the *Antastha Sadilvar* previously to the making of the grant, such contingency or variability ceased to the extent of the grant from the moment of its being made to a Hindu temple.

The religious penalty for the resumption of a royal grant made for Hindu religious purposes is sometimes expressed in the grant and sometimes omitted from it. But its omission does not in any wise derogate from the durability of the grant. The Hindu law implies the religious penalty for resumption, albeit not expressed in the *sanad*.

A pension or other periodical payment or allowance granted in permanence is *nibandha*, whether secured on land or not.

[548] *Quære*—Whether a private individual as well as a royal personage may create a *nibandha*.

A Hindu religious endowment cannot be sold or permanently alienated though its income may be temporarily pledged for necessary purposes, such as the repair, &c., &c., of the temple.

[F., 33 B. 373=11 Bom.L.R. 352=2 Ind. Cas. 489; 37 C.179=11 C.L.J. 317=I4 C.W. N. 335=3 Ind. Cas. 353; 27 M. 435=14 M.L.J. 105; **Rel.**, 27 M. 465=14 M.L.J. 81; **R.**, 8 B. 234 (237); 10 B. 149 (151); 36 B. 94 (101)=13 Bom. L.R. 1171=12 Ind. Cas. 928; 37 C. 179=11 C.L.J. 317=14 C.W.N. 535=3 Ind. Cas. 353; 34 M. 535=9 Ind. Cas. 281=20 M.L.J. 969=9 M.L.T. 83=(1911) 2 M.W.N. 154.]

THIS was an appeal under s. 15 of the Letters Patent of 1865 against the decree of the High Court in second appeal, No. 12 of 1879, reported in I. L. R., 5 Bom., 322.

The decree of the High Court having been made in accordance with the decision of the senior Judge (Sir Charles Sargent), the Collector of Thana appealed against it.

Jardine (with him *Pandurang Balibhadra*), for the appellant.—The suit, not having been brought within six years from the date of the cause of action, is barred under cl. 16 of s. 1 of Act XIV of 1859. The allowance claimed by the plaintiffs in this suit is not *nibandh* or immoveable property according to Hindu law. The question whether the subject-matter of the suit is or is not immoveable property as regards the law of limitation ought not to be determined by a reference to Hindu law. The *sanad* did not confer a grant in perpetuity. The allowance granted by it was not a charge upon land.

The Hon. Rao Saheb *V. N. Mandlik*, for the respondents.

JUDGMENT.

The following is the judgment of the Full Bench, delivered by

WESTROPP, C. J.—The plaint, having been presented on the 23rd December, 1870, is unaffected by Act XXIII of 1871. The only question

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before us is whether the suit is barred by the law of limitation in force as its commencement, *viz.*, Act XIV of 1859. If the case fall within the 12th clause of s. 1 of that Act, *i.e.*, if the suit be for the recovery of "immoveable property or of any interest in immoveable property," it is not barred, inasmuch as twelve years since the alleged cause of action had not elapsed before the presentation of the plaint. In order, therefore, to determine the question whether the suit is barred, we must consider whether the subject-matter in dispute is immoveable property within the meaning of Act XIV of 1859, s. 1, cl. 12.

[549] The plaint states the suit to be brought to recover "an allowance," granted to the ancestor of the plaintiffs by the Government of the Peishwa by a *sanad*, dated A.D. 1790-1791, for the *naivedya* (offerings), &c., *nandadipa* (constantly burning lamp), &c., for the temple of Shri Vyankatesh at the town of Mahim in the zilla of Thana, which allowance was annually paid until the 26th December, 1859, being the time of the death of the plaintiff's grandfather, Govind Ramchandra when the defendant, the Collector of Thana, ceased to pay it. Although the plaint merely describes the subject of the suit as an allowance, yet as the *sanad*, whereby the allowance was granted, is referred to in the plaint, and alleged to have been destroyed by fire, but is proved by a copy of it registered by Government, and such copy has been produced from the Daftar of the Peishwa at Poona, and its genuineness is unquestioned, we must, having regard to the wonted laxity of mofussil pleading, deem the *sanad* to be incorporated in the plaint, and as showing the true nature of the subject-matter of the suit; otherwise justice could not be done in the case.

The Courts below differed on the question whether the subject matter of the suit is immoveable property within the meaning of Act XIV of 1859. So, too, here Sir C. Sargent and Mr. Justice Melvill in the appeal from Mr. Coghlan's decision to the High Court differed on the same point. Against the decree then made, in conformity with the opinion of Sir C. Sargent, affirming the order of the District Judge in favour of the plaintiffs, the defendant has appealed under cl. 15 of the Letters Patent of 1865 to the present Bench of three Judges. The case was argued before us on the 14th and 16th of September last.

The *sanad* was granted by the Sarsubha of the Konkan, an officer of the Peishwa, and who, it is admitted, had plenary authority on behalf of his sovereign to make such a grant. It is as follows:—

"The 15th Moon (day) of the month of the Rabilakhar. Whereas the Jamadar of the aforesaid province came to the Huzur seat at Poona, on behalf of the Sansthan of Shri Vyankatesh at Kasba Mahim in the province aforesaid, and represented to the Sarsubha as follows:—'Though the said seat of **[550]** the deity is very jagrit (active) no allowance was [granted] to it for *naivedya* (offerings) and *nandadipa* (a light kept before an idol night and day), &c., from the *Svarajya* (own Government). Consequently, last year, *i.e.*, in the Sur year [eleven hundred and] ninety (1790 A.D.) an allowance was granted from the revenue of the different mahals (districts) and killas (forts), but the said allowance does not meet the expenditure, and, therefore, an increased allowance should be granted.' Therefore [the Huzur] considering [the said prayer] and thinking that the Sansthan is big, that there is a large expenditure, and that the welfare of the Kingdom will be furthered by maintaining the Sansthan, granted an allowance, the whole of which is as follows:—

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The allowance which was granted in the last year, that is, in the Sur year eleven hundred and ninety (1790 A.D.), is as follows :—

From the different Mahals.

Rs.	15	Pargana Sayawan.
,,	10	Taluka Kaman.
,,	15	Taluka Agashi.
,,	8	Taluka Agar Vassai.
	5	Taluka aforesaid.
	3	Bhaida Thal.
	8	
,,	2	Tarf Manekpura.
,,	15	Pargana Sanjan.
,,	10	Peta Nevre.
,,	20	Peta Khanade Pavadi.
,,	2	Peta Bahare.
,,	4	Gambhirgad.
,,	8	Kalsi.
,,	5	Peta Manare.
,,	2	Peta Wade.
	116	

From the different Forts.

Rs.	10	Janjira Vasai.
,,	7	Subha Armar.
,,	9	Janjira Arnala.
,,	1	Kota (fort) Kelve.
,,	1	Kota Mahim.
,,	2	Kota Sirgav.
,,	4	Kota Tarapur.
,,	2	Dharam.
,,	1	Kota Umbargaon.
,,	3	Killa (hill fort) Indragagad.
,,	4	Killa Arjungad.
,,	1	Killa Gambhirgad.
,,	1	Killa Shengav.
,,	1	Killa Balalgad.
,,	1	Killa Asava.
	48	

Jakadi (customs) to be levied in the different mahals at the following places :—

Rs.	4	Kasba Mahim.
,,	2	Manora.
,,	3	Tarapur.
,,	3	Dahanu.
,,	2½	Sanjan.

The Dativere ferry beyond the creek.

Rs.	10	Khanked Pawade.
,,	1½	Bahare.
,,	6	Gambhirgad, including Reimnagar.
	34	
Rs.	198	

[551] The allowance granted from the current year :—

Cash Rupees.

Rs.	112	Peta Mahim.
	60½	Sajya Mahim.
	31½	Sajya Kelve.
	20	Sajya Shirgav.
	112	
	25	Peta Tarapur.
	10	Taraf Chinchni.
	5	Peta Dahanu.
	152	

Cash Rupees.
350

Grain, *i.e.*, Bhat, to be collected directly Kaili Khandis.

1½	Sajya Mahim.
½	Sajya Kelve.
½	Sajya Shirgav.
½	Tarf Chinchni.
3	

Grain 3 Kaili Khandis of Bhat directly (parbhara).

Thus an allowance, consisting of Rs. (350) three hundred and fifty and grain (*i.e.*) bhat 3 kaili khandis, is granted and this *sanad* is given. Therefore three hundred and fifty rupees in cash out of the *Antastha Sadilvar* [private contingent charges paid by extra assessment] and three khandis of bhat out of the extra *jamabandi* which (is to be levied) directly, should be sent to the Shri from year to year. Do not ask for a new *sanad* every year ; copy of this *patra* (order) should be taken and the original should be returned to *Savasthan* as a muniment of title. To this effect there is one *sanad* addressed to the present and future Kamavisdars."

The concluding passage which I have just read is an ordinary formal indication that the grant is made in perpetuity. The omission of the

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religious penalty which is sometimes expressed in and sometimes omitted from such grants, does not in anywise derogate from the durability of the grant. The Hindu law implies the religious penalty for resumption albeit not expressed in the *sanad* : 2 Dig., bk. ii, ch. iv, tit. iii, xxxv, xxxvii, xxxviii, xxxix, xl. So far as our experience extends, we know not of any such thing as a temporary royal grant for Hindu religious purposes, and no instance has been given of any such grant or of a resumption by the Peishwa's Government of a grant for religious purposes. No act on the part of a Hindu prince or sovereign would have been deemed more disgraceful than a resumption of such grant.

[552] The next circumstance to be noticed in the *sanad* (and we attach much importance to it) is that the grant thereby made is not a grant from the revenues at large of the state or even of the zilla, but is made up of certain small special grants charged upon the *Antastha Sadilvar* produced by certain special localities in the zilla, such localities being mahals(1) (districts) and killas (2) (forts). Thus the grant was essentially localised, and whatever there may have been of contigency or variability in the levy or application of the *Antastha Sadilvar* previously to the making of the grant, such contingency or variability ceased to the extent of the grant from the moment of its being made to a Hindu temple, such grant being permanent, irresumable and substantially inalienable. We say "substantially inalienable," because a Hindu religious endowment cannot be sold, or permanently alienated, though its income may be temporarily pledged for necessary purposes, such as the repair, &c., of the temple: *Prosunno Kumari Debya* v. *Galabchand Babu* (3) ; *Narayan* v. *Chintaman* (4), where many of the cases as to the inalienability of Hindu religious endowments (*Devasthan* or *Sevasthan*) or Mahomedan religious endowments (wakf) are collected. As for the *Antastha Sadilvar* in respect of the killas (forts) consisted of a percentage on the pay of soldiers, it must be remembered that it is not chargeable on the pay of the soldiers of the grantor generally, but upon such soldiers as were from time to time stationed in the particular forts mentioned in the *sanad*, and in respect of their occupation of the same. So, too, as to as much of the *Antastha Sadilvar* as is leviable in respect of the marriages in the mahals mentioned in the *sanad*. With reference to such of the *Antastha Sadilvar* as is, by the *sanad*, chargeable on the mahals, the learned Assistant Judge, Mr. Batty, who has written a most elaborate judgment in this case, says that the witness, No. 86, described it as "a half-anna cess, corresponding, in the way it was levied, to our local fund cess." Commenting upon that remark the Assistant Judge continues thus : "It was in fact a charge of one half-anna on each rupee of land revenue paid in cash. The one-anna cess livied on the revenue is not regarded **[553]** as a charge upon the land, as, under the survey system, a guarantee was given that no additional levy should be made on the land, and the half-anna cess by analogy would appear to be a distinct levy, and not a charge upon the land itself, and the charge on such a levy is too remote to be regarded as a charge upon land." As to these remarks, the first observation to be made is that any guarantee (short of legislation) given either expressly or by implication by the British Government to the ryots cannot supersede the prior grant by the Peishwa's Government by *sanad* to the temple, and that it seems to us purely artificial reasoning to argue

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(1) Wils. Gloss. 318.
(2) *Ibid*. 289.
(3) 2 I. A. 145 (151).
(4) 5 B. 393 (396.)

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that what is undoubtedly an extra assessment on the mahals is not a charge upon them or that a grant of a part of such charge to a Hindu temple, which grant is perpetual, irresumable, and inalienable, is not also *pro tanto* a charge upon the mahals. We also think it quite impossible to maintain that the three kaili khandis of rice (bhat) are not chargeable upon the four places named in that behalf in the *sanad*.

So far as the doctrine laid down by Her Majesty's Privy Council in the *Toda Garas* case, *Maharana Fattehsangji Jaswatsangji* v. *Desai Kalianraiji Hukmatraiji* (1) in relation to Act XIV of 1859 affords a guide to us in such circumstances as we have to deal with in the present case we are bound to follow it. We understand their Lordships to have approved of the decisions of the Bombay High Court in *Krishnabhat* v. *Kapabhat* (2) and *Balvantrav* v. *Purshotum* (3), and to have been of opinion that the Hindu law texts were rightly there resorted to with a view to ascertain whether the hereditary office of a joshi, the right to which was there in dispute, was immoveable property. Speaking of the rule deducible from those joshi cases their Lordships said:

"The rule is shortly this, *viz.*, that, inasmuch as the term 'immoveable property,' is not defined by the Act, it must, when the question concerns the rights of Hindus, be taken to include whatever the Hindu law classes as immoveable, although not [554] such in the ordinary acceptation of the word. To the applications of this rule within proper limits, their Lordships see no objection. The question must, in every case, be whether the subject of the suit is in the nature of immoveable property, or of an interest in immoveable property; and if its nature and quality can be only determined by Hindu law and usage, the Hindu law may properly be invoked for that purpose. Thus, in the two cases on which the appellant relies, Hindu texts were legitimately used to show that, in the contemplation of Hindu law, hereditary offices in Hindu community, incapable of being held by any person not a Hindu, were in the nature of immoveables" (4).

The *sanad* in the present case is a grant by a Hindu sovereign to a Hindu temple, which is periodically (*i.e.*, annually) payable in perpetuity, is irresumable and inalienable. It cannot be held by any person except the Hindu managers of that temple—the grantees. Under such circumstances we think that the just quoted passage in their Lordships' judgment justifies us in looking to the Hindu law to ascertain whether or not the grant is immoveable property. It may be said that there might be a grant to a Mahomedan mosque or masjid, and it has been asked whether such a grant should be tried by a different rule in order to ascertain whether s. 1, cl. 12 of Act XIV of 1859 would be applicable to it. So it may be said that there may be a hereditary office held by Mahomedans, and no doubt there may be—take the notable instance of the hereditary village butcher or Mulana in Hindu villages, who ordinarily is a Mahomedan (5).

But that possibility did not prevent Her Majesty's Privy Council from considering that, with respect to the immoveability of a Hindu hereditary village office, Hindu texts were properly resorted to. We are accordingly of opinion that the Hindu law may properly be resorted to for the purpose

(1) 1 I.A. 34 = 10 B.H.C.R. 281; and see 4 B. H. C.R, A.C.J. 189.
(2) 6 B.H.C.R. A.C.J. 137.
(3) 9 B. H. C.R. 99.
(4) 1 I.A. 50 (51).
(5) See Grant Duff's History of the Mahrattas, Vol. I., pp. 26—27. Note and Wilson's Glossary. Tit *Baluti*, p. 53.

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of determining whether the subject-matter of the present suit—a grant by a Hindu sovereign to a Hindu temple—which can only be held by the managers of that temple, is immoveable property, *i.e.*, **[555]** *nibandha*, within the meaning of Act XIV of 1859, s. 1, cl. 12. The following texts, as we think, show beyond doubt that such a grant is what has been badly translated a corrody, *viz.*, *nibandha*.

At Volume II of Colebrooke's translation of Jagannath's Digest (first edition), p. 162, pl. xxxiv, is the following passage:—

"Yajnyavalkya:—Let a king having given land or assigned a corrody, cause his gift to be written for the information of good princes who will succeed him, 2. Either on prepared silk, or on a plate of copper sealed above with his own signet. Having described his ancestors and himself, 3. The quantity of the gift, *with the penalty of resumption*,* and set his own hand to it, and specified the time, let him render his donation firm."

Thus we see that Yajnyavalkya classes together land and a corrody, and directs that the donation of either should be "firm." The commentator on pl. xxv says (*Ibid*, p. 163).

"In the Dipacalica a corrody is thus explained: the gift of a future thing by a previous agreement in this form 'I will give a hundred *suvernas* every month of *kartiki*' or 'out of this mine, or this village, I will annually give a hundred *suvernas*' or 'I will monthly give one *suverna*.'" The property over which the father has full dominion is mentioned in Volume III, at p. 31, pl. xc, xci; and next at p. 34 the property over which his sons have equal dominion with him. Placitum xcii is:*

[556] "Yajnyavalkya:—Over land acquired by the grandfather, over a corrody out of mines or the like, settled on him and his heirs by the king, and over slaves employed in his husbandry (or over gold and the like, for the word '*dravya*' is expounded variously), the father and the son, when the grandfather dies, have equal dominion;" and the commentator says: "a 'corrody,' a fixed pension receivable out of mines or the like, and settled on him and his heirs by the king or other benefactor."

Placitum xciii is: Brahaspati:—Of property acquired by the grandfather, whether moveable or immoveable, equal shares are ordained for the father and the son." The commentator considers 'moveable' as

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* NOTE.—These words "with the penalty of resumption" appear, as we learn from our learned friend and able Sanskrit scholar Mr. K. T. Telang, who has more than once afforded to us valuable aid as to Sanskrit texts, to be taken from an incorrect reading of Yajnyavalkya's text. Mr. Telang says of this text: "The translation seems to be based upon different readings than those found in the Bombay edition of the Mitakshara; commenting on stanza 317, Vijnyanesvara defines *nibandha* thus: so many *rubakas* (a coin current in ancient times) out of a praticular fund, so many leaves out of a plantation of arecas." Subsequently Mr. Telang continues thus: "Instead of the quantity of the gift with the penalty of the resumption" it should be the quantity of what is accepted and the description of the boundaries of what is given. On this Vijnyanesvara writes as follows:—"What is accepted means the thing which is the subject of acceptance, that is *nibandha*, its quantity of *rubakas*, &c. What is given means the subject of the gift, that is, a field and so forth, its boundaries and those by which it is severed from other fields, &c., such as a river or other limit—a description of its quantity in *nivartanas*, &c. It should be remarked that those stanzas **[556]** are part of the stanzas on Yajnyavalkya relating to the duties of kings." Further on Mr. Telang adds that the new Sanskrit Dictionary now in course of publication at Calcutta by Professor Taranath Tarkarvachespati, "*nibandha* is rendered to mean a thing which is promised to be given at a specified time." Professor Wilson in his Glossary describes *nibandha* as immoveable property.

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here signifiying anything not immoveable, as gold or the like. In expounding the text of Yajnyavalkya (xcii) the Ratnacara has this Gloss.: 'that which is fixed or made fast (*nibadhyate*) is a corrody (*nibandha*), fixed pension receivable out of mines or the like.' 'Equal dominion': in this case no greater share is allotted to one than to another; nor can the father give away such property at his pleasure. Here again we have, in these pl. xcii and xciii and in the commentary, corrodies classed with land. In the same volume (3) of the Digest in the comment on pl. ccclxv at p. 376 the Gloss. of Ratnacara is again referred to as follows :—"Thus the Ratnacara: 'A corrody,' a pension which is assigned (*nibadhyate*) by the king, on a mine or the like (that is, a pension which is fixed as it were by words, or which is made irrevocable), is a corrody (*nibandha*), the suffix bears the passive sense. Or the same inflexion may bear a neuter sense; thus, 'ten certain things shall be received by you from this mine for such a space of time,' and so forth. In like manner, the right of Brahmans, who attend at funerals and similar privileges, must be considered as corrodies. The immunities of a Brahman, who burns dead bodies, and other similar rites, are in a manner fixed in perpetuity; but there is this difference, that he receives his dues as the reward of his trouble." The commentator in the same volume at p. 39 **[557]** says: "In the text of Vyasa likewise (xciv), the terms 'a house or land' comprehend a corrody, and slaves as well as immoveable property"; and further commenting on another text of Vyasa at p. 189 of the 2nd Volume says: "'All subjects are dependent': land or the like given by subjects, with the king's consent, is a valid gift; so if a corrody be granted by a wealthy man, the gift of it, with his assent, is valid."

In the Vyavahara Mayukha, ch. ii, s. 1, pl. 6, occurs the following passage :—Yajnavalkya and Brahaspati illustrate the three kinds of royal edicts, before alluded to: 'Let a king, having given land or assigned fixed property, cause his gift to be written, for the information of good princes who will succeed him, either on prepared silk, or on a plate of copper, sealed above with his own signet.' Having described his ancestors and himself, and stating the quantity of the gift, with the measure of the acquisition(1)and the divisions, and set his own hand to it, and specified the time, let him render his donation firm.' *Fixed property*, a corrody in mines or the like, given by the king or others, having the probable gains fixed. That which is received, is an *acquisition*, whether land or any other thing. *Its measure*, stating it to be so much. That which is given, is a *gift*, whether a house or any other thing. Its *divisions* are the boundaries. *Stating*, reciting. Moreover: 'If the king, pleased with the service or bravery of any one, bestow on him a district or other [portion of land] by a written deed, that is a writing of favour.' 'When the king, after going through the plaint, answer, proofs and decision, in a cause, issues a written [decree] to the gaining party, that is called a writing of victory.'" In Rao Saheb Visvanath Narayan Mandlik's "Hindu Law or Mayukha Yajnyavalkya" at page 19, the same passage is rendered thus :—"Yajnyavalkya and Brahaspati explain the three kinds of royal writings before mentioned (Yajnavalkya, ch. i, vv. 317, 318, 319, 320): 'Having given land or a corrody, let the king execute a writing of the gift [317] for the information of future blessed kings. On a piece of cloth or a copper-plate marked above with his seal [318], the king, having written down the names of himself and of his ancestors, and the dimensions of the gift and a description of its boundaries (2) [319],

should issue a permanent grant bearing date, **[558]** and his signature made by his own hand' [320]. *Nibandha* (corrody), what is given by the king, &c., out of the produce of a mine and the like. *Pratigrahah* [is] that which is received as a gift, such as land, &c. *Parimanam* [means] its dimensions. *Danam* or gift [is] that which is given, such as a house, &c. *Chheda* [means] *boundaries* or its limits. *Upavarnanam* (its description) [means] the mention of its boundaries, &c. [So as to indentify it.]

"Likewise [Brahaspati] :--When a king, pleased with the services, valour, and the like of any one, grants land, &c., by a writing, that writing is called *prasadalikhita* (a writing of favour). When after the decision of a suit by [investigation into the] proofs of both parties, the king gives a writing to the successful party, it is called a *jayapatra* (a writing of success, or a decree)."

In the Daya-Bhaga, ch. ii, pl. 13, there is this passage :—

"A 'corrody' signifies what is fixed by a promise in this form : 'I will give that in every month of Kartiki.' There is a note of Mr. Colebrooke on this passage, which runs thus : [A corrody.] The author explains corrody (*nibandha*) as signifying anything which has been promised, deliverable annually or monthly, or at any other fixed periods. Srikrishna."

In the Viramitrodaya, ch. ii, part i, s. 13 (at p. 66 of Golapchandra Sarkar's Translation) *nibandha* is described in the following passage as settled income :—" 'The ownership of father and son is, indeed, similar in acquisitions of the grandfather, whether land, any settled income or moveables.'" And the meaning of this text is this: 'land' signifies rice-field and the like ; 'any settled income' is what is given by reason of written grants by kings to the following effect : 'To such and such a person, so many betel leaves or the like shall be given from such and such a plantation of betel-leaves or orchard of betel-nuts.'" See also as to *nibandha* being immoveable property the quotation from Sir T. Strange's Hindu Law and the opinions of Colebrooke and Ellis mentioned in *Balvantarav* v. *Purshotam Sideshvar* (1).

Mr. Telang informs us that "the earliest use of the word 'nibandha' in any sense kindred to its sense in law is to be found in two of the Nasik inscriptions. In the transactions of the **[559]** International Congress of Orientalists held in London in 1874, the inscriptions in which the word occurs are given, pp. 324, 331. Professor Bhandarkar has this note on the word, p. 326 ; 'This word (*nibandha*) originally signifies any piece of composition. It is then applied to a piece of composition issuing from a king. Hence the legal word *nibandha*, which signifies any hereditary office conveyed by a royal charter.' Of the inscriptions, one (No. 25 at p. 324) records a grant of land, the other inscription records the dedication of one of the Nasik caves to mendicants, and the deposit with certain guilds of a certain sum of money to be applied in the supply of garments, &c., in each rainy season to the mendicants who may reside in the cave. These inscriptions appear to belong to the second and fourth centuries after Christ."

The Hindu authorities, which we have quoted, seem to show that a pension or other periodical payment or allowance granted in permanence is *nibandha*, whether secured on land or not. Some of them favour the supposition that a private individual as well as a royal personage may create a *nibandha*. Whether that view is sustainable is a question on which we

(1) 9 B.H.C.R. 99.

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do not intend to give any opinion, such being unnecessary, inasmuch as the present grant is from the Peishwa's Government, which it is admitted had full power to make it. We are unanimous in holding that the grant made by the sanad here is *nibandha*, and that, for the reasons already given, we are bound to regard it as immoveable property or an interest in immoveable property within the scope of Act XIV, 1859, s. 1, cl. 12.

We are, we think, bound to notice a further passage in the judgment of the Privy Council in the *Toda Giras* case (*Maharana Fattehsangji* v. *Desai Kalianraiji* (1)) already mentioned. Their Lordships say :—

"It is, however, unnecessary to consider this point, because their Lordships are of opinion that the question whether a *toda giras hak* is an interest in immoveable property within the meaning of Act XIV of 1859 is one which ought not to be determined by Hindu law. It appears from the authorities cited in the case (reported in the 2nd Vol. of Morris's Reports, that the Grassias were sometimes Mahomedans, and therefore, that the **[560]** *hak* may, in its inception, have been held by a Mahomedan. It is certain that, as, these *haks* now exist, they may pass to, and be held and enjoyed by Mahomedans, Parsis, or Christians : and their Lordships think that the applicability of particular sections of this general Statute of Limitation must be determined by the nature of the thing sued for, and not by the status, race, character, or religion of the parties to the suit. The period of limtation within which the claim is barred must be fixed and uniform, by whomsoever that claim is preferred or resisted."

Their Lordships eventually in that case, and independently of Hindu law, held *toda giras* to be immoveable property within s. 1, cl. 12 of Act XIV of 1859, being of opinion that the inamdar, there sued, was liable to pay *toda giras virtute tenurae* in respect of the village whence the *toda giras* was claimed. Their Lordships did not say whether *toda giras* claimable from villagers directly would or would not be immoveable property within the Act—nor did they however show a disposition to give any very stringent construction to the Act. That they were not so disposed may, we think, be inferred from their decision in that case. Looking to the fact that the Indian Legislature, which passed Act XIV of 1859, has not given any explanation or definition in that Act as to the scope of the phrase "immoveable property," but left suitors to their former ideas on that subject, it would be very hard upon them to draw the line very tightly, for they had no guide furnished to them which could have led them to suppose that "immoveable property" according to the Act meant anything less than what they had previously known as such. And that the Indian Legislature was not disposed to be very harsh, is shown by its subsequent more fully developed legislation on the subject of limitation which to *haks* and other periodical payments assigns the twelve years' limit. Assuming that we are in error in conceiving ourselves to be at liberty to apply, as we have done, Hindu law to the present grant, we are of opinion, nevertheless, that it is an interest in immoveable property within Act XIV of 1859, s. 1, cl. 12. This our remarks in the first portion of this judgment upon the sanad were intended to show. The grant seems to us to savour throughout of locality, and it undoubtedly is irresumable, inalienable and perpetual. **[561]** Hence we think that the Indian Legislature did not intend to exclude such property from s. 1, cl. 12 of the Act. The opposite opinion expressed by some of the other tribunals

(1) 1 I.A. 34 (51 and 52).

which have dealt with this case renders us diffident in taking this view; but of this we are certain that no Hindu would have supposed the grant to be other than immoveable property. We affirm the order of Sir Charles Sargent with costs.

Order affirmed.

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6 B. 561.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

SHANTAPA (*Original Defendant*), *Appellant v.* BALAPA (*Original Plaintiff*), *Respondent.** [24th April, 1880.]

Mortgage—Prior and puisne mortgagee—Purchase by prior mortgagee of equity of redemption at a Court sale—Evidence of intention to keep mortgage alive.

Where a prior mortgagee purchased the equity of redemption at a court sale, *held*, following the Full Bench ruling in *Mulchand Khuber* v. *Lallu Trikam* (1), that in a contest between himself and a puisne mortgagee he was entitled to fall back upon his original mortgage, and to retain possession until his mortgage was paid off.

Generally, slight evidence will suffice to show that the prior mortgagee intended to retain the benefit of his mortgage. The fact that the mortgage deed remains with the mortgagee who purchases is evidence that he intends to retain the benefit of his mortgage.

[F., 13 A. 432; R., 1 O.C. 105 (107).]

THIS was a second appeal from the decision of C. F. H. Shaw, Judge of Belgaum, confirming the decree of A. M. Cantem, Subordinate Judge (First Class) at Belgaum.

One Yesvant owned a piece of land in the village of Karalgi, taluka Bidi, of the Belgaum District. He mortgaged it to the defendant, Shantapa, when, it did not appear, the deed of mortgage nor having been produced in the case; but Shantapa obtained a decree upon it, which directed that Yesvant should pay him annually Rs. 100 until the debt, amounting to Rs. 706-10-9 was liquidated, and, in default of the punctual payment of this sum of Rs. 100, the said Shantapa was to be immediately placed in possession of the land. The stipulated sum was not paid, **[562]** and Shantapa was placed in possession in March, 1863, for a term of years.

The owner, Yesvant next mortgaged the same piece of land to one Vithalrav in 1866, who obtained a decree against him for possession, and was placed in possession in 1867. The evidence as to the possession of this land was conflicting. Each mortgagee, alleged that he had obtained possession. Vithalrav, it was alleged, continued in possession for three years, at the end of which his mortgage was paid off, and possession reverted to Yesvant.

Defendant, Shantapa, in 1867 brought a second suit against Yesvant, and in execution of his decree put up the land to sale, and purchased it himself.

On the 27th of January, 1870, Yesvant mortgaged the land to the plaintiff, Balapa, who sued him in 1873, and obtained a decree in January, 1874.

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* Second Appeal No. 387 of 1878.

(1) 6 B. 404.

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6 B. 561.

In August following the defendant, Shantapa, was again placed in possession. The plaintiff having, on the 10th of October, 1874, applied for execution was obstructed by the defendant; hence this suit.

The defendant contended that his mortgage was earlier than that of the plaintiff, and denied that his subsquent purchase of the mortgaged property affected in any way his right to the settlement of his original prior mortgage.

The Courts below held that the defendant's mortgage had merged in his purchase. They, therefore, decreed that the defendant should deliver possession of the land to the plaintiff until the plaintiff's debt was satisfied, that is to say, for a period of nine years, or that the defendant should pay to the plaintiff the sum due upon his mortgage and retain possession of the land.

The defendant appealed to the High Court.

Gokaldas Kahandas Parakh, for the appellant.

Vinayak Mahadev Pandit, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.—It has been decided by the Full Bench in *Mulchand Khuber* v. *Lallu Trikam* (1) (*a*) that the purchase by a **[563]** mortgagee of the equity of redemption does not necessarily prevent the mortgagee from falling back upon his mortgage in a contest between himself and a puisne mortgagee. The question in such cases is whether the prior mortgagee and purchaser intended to retain the benefit of his charge, and this question may be decided in the affirmative, if he have declared his intention by express words, or necessary implication, that the mortgage shall continue to subsist, or if such continuance would be for his benefit. Generally, slight evidence will suffice to establish such an intention. Now, in the present case, the defendant was a purchaser, not from the mortgagor himself, but at a Court sale, and, therefore, there could have been no agreement between the mortgagor and the defendant that the mortgage should merge, nor any restoration of the mortgage-deed to the mortgagor. The circumstance, of which we can entertain no doubt, that the mortgage-deed remained with the purchaser, would be evidence that he intended to retain the benefit of his mortgage. Moreover, the plaintiff's mortgage was registered, and defendant must be supposed to have had notice of it; and with such knowledge it would be very improbable that he should give up his own mortgage, and render himself liable to redeem a subsequent incumbrancer. It was so clearly to the benefit of the defendant that he should retain his own mortgage, and the circumstances, so far as they appear, are so clearly indicative of the probability of such an intention, that we do not think it necessary to send down an issue on the subject, which could only be decided in one way. We, therefore, determine that the defendant is entitled to remain in possession until his mortgage is paid off, and we, accordingly, reverse the decrees of the Courts below, and reject the claim with costs on the plaintiff throughout.

Decrees reversed.

(1) 6 B. 404.

6 B. 564.

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6 B. 564.

[564] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

MARUTI NARAYAN (*Original Plaintiff*), *Appellant v.* LILACHAND (*Original Defendant*), *Respondent.** [April, 1882.]

Hindu law—Minor—Mortgage by manager—Decree against manager—Sale—Suit by minor for cancelment of sale.

G., the brother of the plaintiff, executed a mortgage to the defendant during the plaintiff's minority. The deed recited that the money was borrwed to pay off a family debt, and to defray family expenses. The defendant sued G. on the mortgage, and obtained a decree. A house, which was part of the family property, was sold in execution, and was purchased by the defendant himself. The plaintiff sued to have the sale set aside, and to recover his half share in the house.

Held that the defendant was not entitled to hold the plaintiff's share in the property by virtue of the sale to him under the decree obtained against G. alone.

Held also that the plaintiff was entitled to be put into possession of the whole house, the defendant being left to his remedy by a suit for partition. The plaintiff, however, having claimed only the restoration of his half share, the decree was limited accordingly.

Held, also, that it was not competent for the Court in this suit to go into the question whether the mortgage by G. was binding on the minor plaintiff.

[N.F., 14 B. 597 (600); F., 11 B. 700; R., 8 B. 481 (489); 20 B. 338 (342); 1 S.L.R. 133 (137); 2 S.L.R. 43 (47).]

THIS was a second appeal from the decision of M. B. Baker, Judge of Ahmednagar, reversing the decree of the Subordinate Judge of Ahmednagar.

On the 26th of January, 1873, one Ganu valad Narayan, brother of the minor plaintiff, mortgaged to Lilachand, the defendant, the whole of a house situated in the city of Ahmednagar and forming part of the two brothers' ancestral property, for a sum of Rs. 200. The deed of mortgage recited that Rs. 53 were required to pay a family debt, and Rs. 148 were borrowed to defray family expenses. The plaintiff was then, and also at the date of this suit, a minor member of the family. Lilachand subsequently sued Ganu, and obtaining a decree against him, put up the house for sale, and himself became the purchaser on 24th of November, 1876. The minor plaintiff, through his representative, Dhondi, had objected to the sale, but the objection had been overruled. The present suit was brought to set aside the sale and to recover the plaintiff's half share in the house.

[565] The defendant contended that Ganu executed the deed of mortgage in order to pay an ancestral debt, and to defray the expenses of the joint family; that the sale was therefore for the benefit of the joint family, and the minor plaintiff was estopped from disputing it and from claiming a half share in the house, the whole of which passed to the defendant under the judicial sale. The Subordinate Judge decided in favour of the plaintiff; the District Judge reversed the decree and gave judgment for the defendant. The Judge, in appeal, laid down the issue whether the mortgage by Ganu was binding on the minor plaintiff. He held that the two brothers were joint, and that their family property had never been divided; that Ganu was the managing member of the family, and

* Second Appeal, No. 371 of 1881.

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6 B. 564.

the purchaser from him was only bound to inquire whether the money had been borrowed for a legitimate purpose, and, if satisfied that it was, he would be entitled to protection against the claim of any member of the family who was a minor when the transaction took place. The Judge further held that it was under necessity that Ganu had executed the mortgage and that, therefore, the minor plaintiff was bound by it.

The plaintiff appealed to the High Court.

Ghanasham Nilkanth Nadkarni, for the appellant.—The defendant's mortgage was executed by Ganu alone, and the decree obtained by him alone. Under that decree no more than Ganu's interest could be sold. That interest amounted to a half share and the sale of more than that share should be set aside. The inquiry into the nature of the debt owned by the family, and whether the minor plaintiff was bound by the mortgage which the debt necessitated, was immaterial: *Deendayal Lal* v. *Jugdeep Narain Singh* (1), which has been followed in a number of cases by the High Court at Bombay. To allow the defendant to take the interest of the plaintiff is to extend the operation of his decree: *Pandurang Kamti* v. *Venkatesh Pai* (2).

Pandurang Balibhadra, for the respondent.—The Judge has found as a fact that the debt was contracted for family purposes and in consequence of a family necessity. The plaintiff, must therefore, be held to have been bound by it. To hold otherwise would be to open a door to fraud.

JUDGMENT.

[566] MELVILL, J.—It was not competent to the Court below in this suit to go into the question whether the mortgage by Ganu was binding on the minor plaintiff. The defendant obtained a decree against Ganu alone, and in execution of that decree he purchased only the right, title, and interest of Ganu. In *Deendayal's Case* (1) the Privy Council refused, under somewhat similar circumstances, to consider the question whether there was legal necessity for the loan, in respect to which the decree had been obtained. Their Lordships said: "This issue seems to their Lordships to be immaterial in the present suit, because, whatever may have been the nature of the debt, the appellant cannot be taken to have acquired by the execution sale more than the right, title, and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than was seized and sold in execution, *viz.*, the right, title, and interest of the father. If any authority be required for this proposition, it is sufficient to refer to the cases of *Najenderchunder Ghose* v. *Srimutty Ramanee Dossee* (3) and *Baija Doobey* v. *Briji Bhookun Lal Aiwusti* (4)." There may be some difficulty in reconciling the view here expressed as to the effect of the sale of a father's right, title, and interest, with the decision of the Judicial Committee in *Girdharee Lall's Case* (5); but there has never, so far as we know, been any difference of opinion as to the effect of a sale under a decree obtained against the manager of a Hindu undivided family alone, when that manager is not the father of the other co-sharer or co-sharers. We may refer on this point to the decision of

(1) 3 C. 198. (2) Printed Judgments for 1879, p. 513.
(3) 11 M.I.A. 241. (4) 1 C. 133. (5) 1 I. A. 321.

this Court in *Pandurang Kamti* v. *Venkatesh Pai* (1) which, we believe, has been followed in several other cases.

For these reasons we must hold that the defendant cannot claim to hold the plaintiff's share in the property by virtue of the sale to him under the decree obtained against Ganu alone. No doubt, according to the decision in *Deendayal's Case*, the **[567]** plaintiff might have claimed to be put in possession of the whole of the property sold, leaving the defendant to his remedy by a suit for partition (see also *Ram Sahye Bhukhut* v. *Lalla Laljee* (2).) But as the plaintiff has only asked for restoration of his half share, it will be sufficient if we reverse the decree of the District Court and restore that of the Subordinate Judge. The defendant to bear the costs of appeal and second appeal.

Decree reversed.

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6 B. 567.

APPELLATE CIVIL.

Before Mr. Justice Pinhey and Mr. Justice Nanabhai Haridas.

PARVATI (*Original Defendant*), *Appellant v.* KISANSING (*Original Plaintiff*), *Respondent.** [26th April, 1882.]

Decree—Sale pendente lite—*Prior attachment*—Lis pendens.

On the 29th June, 1876, the plaintiff obtained a money decree by consent against Ramapa, the father-in-law of the defendant.

On the 24th of July, 1876, the plaintiff attached a house of Ramapa.

On the 12th October, 1876, the defendant sued Ramapa for maintenance, and alleged that the house in question was the property of her deceased husband and Ramapa. and she claimed the right to continue to live in it.

On the 10th of November, 1876, and during the pendency of the defendant's suit against Ramapa, the house was sold under the plaintiff's decree against Ramapa, and the plaintiff himself became the purchaser,

On the 20th of June, 1877, the defendant obtained a decree against Ramapa in terms of the prayer of her plaint.

On the 27th of August, 1879, the plaintiff brought the present suit to eject the defendant from the house.

Held that what the plaintiff bought from Ramapa was his right, title and interest in the house, which, being subject to the decree in the defendant's pending suit, the plaintiff's purchase was likewise subject to the same, and the circumstance that the plaintiff had placed a prior attachment on the house made no difference. The plaintiff therefore could not eject the defendant during her lifetime.

[R., 13 B. 101 (104); 27 B. 266 (270); 4 Bom. L.R. 355; D., 20 B. 736 (742).]

THIS was an appeal from the decision of C. F. H. Shaw, Judge of Belgaum, reversing the decree of R. S. Chinto Narayan, Joint Subordinate Judge of Belgaum.

This was a suit in ejectment. The plaintiff, Kisansing, alleged that he purchased a house at Belgaum at a court sale, but that **[568]** the defendant, Parvati, resisted his getting possession of it. The defendant contended that the house belonged to her late husband and her father-in-law, Ramapa, against whom she had obtained a decree, and that the plaintiff's purchase effected during the pendency of her suit was subject to her decree.

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* Second Appeal No. 351 of 1881.

(1) Printed Judgments for 1879, p. 513.

(2) 8 C. 149.

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6 B. 567.

On the 29th of June, 1876, the plaintiff obtained, by consent of the said Ramapa, a decree against him for the payment of Rs. 40. In execution of this decree the plaintiff attached the house in dispute on the 24th of July, 1876. On the 12th of October following the defendant sued Ramapa for maintenance. She alleged that her late husband and Ramapa were the owners of the house which Ramapa voluntarily gave up, and that she should be permitted to continue to live in it. On the 10th of November, 1876, the house was put up to auction by the Civil Court in execution of the plaintiff's decree against Ramapa, and he himself became the purchaser. On the 20th of June, 1877, the defendant obtained a decree against Ramapa, in terms of her plaint. On the plaintiff going to take possession of the house, he was obstructed by the defendant. He made an application to the Court for the removal of her obstruction, but it was rejected on the 26th of August, 1878. The present suit was brought on the 27th of August, 1879.

The Subordinate Judge held that the plaintiff being a purchaser *pendente lite* was bound by the result of the defendant's suit against her father-in-law. He, therefore, rejected the plaintiff's claim. The District Judge took a different view. He maintained that, at the date of the defendant's suit, the title to the house had certainly not vested in the plaintiff, who was a purchaser for valuable consideration without notice of the defendant's claims. He, therefore, made a decree in favour of the plaintiff.

The defendant appealed to the High Court.

Ganesh Ramchandra Kirloskar, for the appellant.—The Judge erred in holding that the doctrine of *lis pendens* did not apply : *Balaji Ganesh* v. *Khushalji* (1) ; *Gulabchand Manekchand* v. *Dhondi valad Bhau* (2) ; *Ravji Narayan* v. *Krishnaji Lakshman* (3).

[569] *Daji Abaji Khare*, for the respondent.—The plaintiff's sale is an execution sale. It is an operation of the law, and not a voluntary act of the parties : *Anundoo Moyee Dosee* v. *Dhonendro Chunder Mookerjee* (4). The principle of *lis pendens* does not apply in the case of an execution sale. In this case the attachment had been placed by the plaintiff *before* the institution of the plaintiff's suit. The decree of the District Judge is, therefore, correct.

JUDGMENT.

The judgment of the Court was delivered by

PINHEY, J.—On the 12th October, 1876, Parvati filed a suit against her husband's father, Ramapa, alleging that her husband, Ballapa, had died fifteen years previously ; that ever since his death she had lived with her husband's father, Ramapa, until lately when he had deserted her and left her in the house described in her plaint (the house in dispute in the present case) ; and praying that a decree might be passed against Ramapa awarding her maintenance and allowance for clothing at a certain rate, and declaring that she (Parvati) was entitled to occupy for her lifetime the house in the plaint described.

On the 20th June, 1877, a decree was passed in this suit in favour of the plaintiff in the terms of the prayer of her plaint (excepting as to the allowance claimed for clothing).

On the 29th June, 1876, Kisansing had obtained by consent a money decree for Rs. 40 against Ramapa, and on the 24th July, 1876, he had

(1) 11 B.H.C.R. 24.
(2) 11 B.H.C.R. 64.
(3) 11 B.H.C.R. 139.
(4) 14 M.I.A. 101.

attached the house in dispute in execution of his decree; but the house was not sold till 10th November, 1876, (that is, after the date on which Parvati filed her suit against Ramapa). The house was bought by Kisansing himself, who obtained a certificate of the sale on the 21st December, 1876.

Kisansing has instituted the present suit to eject Parvati, and it is contended on his behalf (1) that the doctrine of *lis pendens* does not affect a sale made by the Court and not voluntarily by the parties; and (2) that Parvati's decree is not binding on him, because he had actually attached the house before Parvati's suit was instituted.

Now, as to the first of these contentions, it is sufficient to remark that what Kisansing bought was Ramapa's right, title, and interest **[570]** in the house, and that right, title, and interest was certainly at that time liable to be declared subject to a limited interest in favour of Parvati whose suit was then pending. He bought no more than Ramapa had or could give. As Ramapa's title was subject to the decree in Parvati's suit, Kisansing purchased subject to the same.

Then, as to the attachment of Kisansing being prior to the institution of Parvati's suit, we are of opinion that this makes no difference. The attachment would have been unaffected by new rights created by Ramapa subsequent to the attachment; but Parvati's right was no newly created one; it existed before the attachment, and was, therefore, unaffected by it.

The District Judge has remarked that "debts take precedence of maintenance." We may assume that this is correct. But we do not say that Kisansing had no right to sell the house in execution of Ramapa's debt, and to take possession of it when Parvati's life estate falls in. We hold only that Kisansing cannot turn out Parvati during her lifetime.

We reverse the decree of the District Court, and restore that of the Subordinate Court, and order Kisansing to bear all costs in the District Court and in this Court.

Decree reversed.

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6 B. 570.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Nanabai Haridas.

SHRINIVAS (*Applicant*) *v.* RADHABAI AND MANJAPA (*Opponents*).* [30th March, 1882.]

Civil Procedure Code, Act X of 1877, *ss.* 294 *and* 295—*Competing decree-holders*—*Purchase by permission of Court.*

Where there are competing decree-holders who have applied for execution of their decrees, s. 294 of the Civil Procedure Code (Act X of 1877) must be taken as subject to the provisions of s. 295, so that the decree-holder, who has been permitted under the former section to purchase the property in execution of his own decree, must share the proceeds of the sale rateably with such competing decree-holders, and will not be allowed to set off the purchase-money against the amount due to him on his decree.

[R., 16 B. 91 (102).]

[571] THIS was an application for the exercise of the Court's extraordinary jurisdiction.

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* Application under Extraordinary Jurisdiction, No. 124 of 1881.

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APPELLATE CIVIL.

6 B. 570.

The applicant Shrinivas, the opponent Manjapa and others held decrees against Radhabai. Manjapa sued out execution, and attached some immoveable property belonging to the said Radhabai. The Court fixed a day for its sale, and granted Manjapa permission to bid for and purchase it. Before this day the applicant Shrinivas made an application for execution of his decree, and prayed that the proceeds of the advertized sale might be rateably distributed between himself and Manjapa. The sale took place, and Manjapa purchased the property for Rs. 1,345, which amount the said Manjapa claimed to set off against the amount due to him under the provision of s. 294, and refused to share it with the applicant.

The Subordinate Judge of Honavar, R. S. Manjnathaya, on the authority of *Maniklal Venilal* v. *Lakha and Mansing* (1) and *Jetha Mahdavji* v. *Najeralli* (2) rejected the applicant's prayer for rateable distribution of the proceeds.

The applicant applied to the High Court.

Shamrav Vithal, for applicant.

Ghanasham Nilkanth, for opponents.

JUDGMENT.

MELVILL, J.—We are unable to accept the construction put by the Subordinate Judge on ss. 294 and 295 of the Civil Procedure Code, Act X of 1877. There can be no principle upon which decree-holders should be deprived of their ordinary rights, merely because another decree-holder has been permitted to bid at the sale. Those ordinary rights are conferred upon them by s. 295; and while s. 294 is applicable as between the purchasing decree-holder and the judgment-debtor, and for convenience allows the former ordinarily to set off the purchase-money against his decree, instead of paying the money into Court and drawing it out again, the section must be taken as subject to the provisions of s. 295 in cases in which there are competing decree-holders who have applied for execution.

[572] For these reasons we reverse the Subordinate Judge's decision on the preliminary point of the construction of ss. 294 and 295; but before remanding the case for a fresh decision, we allow to the opponent Manjapa's pleader time to consult his client as to whether he wishes the sale set aside on the ground that he bid on the express understanding, which was justified by the order of the Subordinate Judge, dated 11th April, 1881, that he would be allowed to set off the purchase-money against his decree.

On 27th April, 1882, Mr. Ganasham, the pleader for the opponent Manjapa, informed the Court that he preferred that the sale should be set aside altogether.

It was ordered accordingly that the sale held on the 11th April, 1881, be set aside, and that the property be re-sold.

The parties to bear their own costs in this Court and the Court of the Subordinate Judge.

(1) 4 B. 429.

(2) 4 B. 472.

6 B. 572.

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ORIGINAL CIVIL.

ORIGINAL CIVIL.

6 B. 572.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Latham.

AHMEDBHOY HUBIBBHOY (*Plaintiff*) *v.* VULLEEBHOY CASSUMBHOY AND OTHERS (*Defendants*).* [18th August and 5th September, 1882.]

Practice—Civil Procedure Code (Act X of 1877), s. 135—Discovery—Inspection—Trial of issue before inspection granted.

The intention of s. 135 of the Civil Procedure Code (Act X of 1877) is to give the Court the power of raising and determining an issue for the exclusive purpose of deciding the right to discovery of evidence which is to be used at the trial, and, therefore, from the nature of the case before the hearing of the cause.

It should be a rule of practice that when an order is made under s. 135 of the Civil Procedure Code (Act X of 1877) by the Judge in Chambers, the suit should be set down for the trial of the particular issue as well as of the cause itself when it comes to a hearing before the same Judge.

SUMMONS in Chambers adjourned into Court to be heard before two Judges.

On the 29th of June, 1882, the plaintiff took out a summons calling upon the defendants to show cause why, before the plaintiff **[573]** was ordered to make discovery or give inspection of the books, papers and documents in his possession, power or control, relating to the dealings and transactions which the plaintiff had with the administrator of the estate of Cassumbhoy Nathubhoy before the decree in suit No. 401 of 1876 was passed, the following issue should not be first determined, namely, "whether assuming the allegations in the fourth paragraph of the written statements of the defendants Vulleebhoy Cassumbhoy and Satbai respectively contained to be true, and assuming that the decree in suit No. 401 of 1876 was obtained by the fraud of the plaintiff and in collusion with the defendant Fazulbhoy Cassumbhoy as in the said fourth paragraph alleged, the said decree is not now a binding and valid decree against the estate of Cassumbhoy Nathubhoy and all persons interested therein," and "whether the said decree is not now binding upon the defendants and each of them, and whether the defendants or any or either of them can now in any way object to or dispute the said decree, and why this suit should not be set down for trial of the said issue."

This suit was brought by the plaintiff to establish his right to attach a certain house, No. 28, Shamji Hussaji Street, Bombay, in execution of a decree against the estate of one Cassumbhoy Nathubhoy which he had obtained in a previous suit (No. 401 of 1876) on the 20th August, 1876. The defendants to the present suit were Vulleebhoy Cassumbhoy, Satbai, and Fazulbhoy Cassumbhoy. The first and third defendants were sons and the second defendant was the widow of the said Cassumbhoy Nathubhoy, deceased.

The plaint set forth that the said Cassumbhoy Nathubhoy died in 1864, and on the 3rd August, 1871, letters of administration, with the will annexed, were granted to the third defendant, Fazulbhoy Cassumbhoy; that on the 29th August, 1876, the plaintiff obtained a decree against the estate of the said Cassumbhoy Nathubhoy for the sum of Rs. 17,243-9-7; that he had not as yet realized any part of the said decree; that in August, 1880, in execution of the said decree he attached the right, title and

* Suit No. 486 of 1881.

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interest of the said Fazulbhoy Cassumbhoy (the third defendant) in the house No. 28, Shamji Hussaji Street, which formed part of the estate of the said Cassumbhoy Nathubhoy; that on the 2nd [574] May, 1881, the first defendant, Vulleebhoy Cassumbhoy, obtained a summons for the removal of the said attachment, and by an order of the 22nd August, 1881, made upon the hearing of the said summons, the plaintiff was referred to a suit to establish his right to attach the said house in execution. The plaintiff prayed (*inter alia*) that the said house might be declared to be liable for, and chargeable with the amount of the said decree of 29th August, 1876.

The first defendant filed a written statement in which he alleged (*inter alia*) that the decree which the plaintiff had obtained in 1876 against the estate of the said Cassumbhoy Nathubhoy, and which he now sought to execute, was obtained by fraud and in collusion with the third defendant, Fazulbhoy Cassumbhoy, the administrator of the estate; that the debt, in respect of which the said decree was obtained, was really a private debt due by the said Fazulbhoy personally to the plaintiff, and was not a debt for which the estate of the deceased was liable; that Fazulbhoy aud the plaintiff had fraudulently agreed that the estate should be made liable for this debt; and that the plaintiff had, consequently, brought his suit against Fazulbhoy as administrator, and that Fazulbhoy had fraudulently consented to the decree; that at the hearing of the suit, and upon the passing of the decree, the said Vulleebhoy had applied to the Judge (Pinhey, J.) to be made a party to the suit in order that he might expose the said fraud and collusion, and prevent the passing of the decree, but the said application was refused; and, as the only defendant to the suit (the said Fazulbhoy) consented, the decree was immediately passed against the estate for the amount claimed by the plaintiff.

The first defendant also pleaded that the said house formed part of the assets of the deceased which had long since been distributed by the third defendant as administrator, and that the plaintiff had been aware of such distribution and of all dealings with the estate, but had never made any claim. The first defendant further set forth at length the circumstances under which he had become absolutely entitled to the house in question, subject to the life-interest of the second defendant in one-third share thereof. He also pleaded limitation,

[575] The second defendant also filed a written statement which was substantially the same as that of the first defendant. She set forth in detail the circumstances under which she had acquired in July, 1876, from the third defendant, as administrator, a life-interest in a one-third share of the said house, and she pleaded that at the time she became possessed of her interest in the said house and, in fact, until the attachment of the said house by the plaintiff she had no knowledge of the decree or of the debt in respect of which the same was obtained.

In order to enable them to show that the debt for which the plaintiff obtained his decree was a private debt of Fazulbhoy's and not a debt due from the estate to the plaintiff, the defendants desired to obtain discovery and inspection of the plaintiff's books and documents, and obtained a summons for the purpose. The plaintiff contended that they were not entitled to discovery; that the decree of August, 1876, was binding upon them, and that the question of fraud and collusion could not now be raised. On the 29th June, 1882, he took out the summons above set forth. On the 12th August, 1882, it was argued before Latham, J., who adjourned the

matter into Court, that it might be heard before two Judges. The summons came on for hearing before Sargent, C. J., and Latham, J.

Inverarity for the first defendant showed cause against the summons. —We admit that if we are bound by the decree of August, 1876, the discovery we seek would be useless. The question is, whether we can plead the fraud by which we allege that decree was obtained. This summons is really a demurrer to our defence, and the point for decision is whether the Court has power to direct the proposed issue to be set down for hearing first as the plaintiff desires. The summons raises two questions—

(1) Whether the issue is to be determined before inspection is given ?

(2) Whether the proposed issue is to be tried before the other issues in the case are tried?

The application is made under s. 135 of the Civil Procedure Code (Act X of 1877). We contend that that section gives no [576] right to have one issue tried before the other issues in a case. It gives no right of demurrer. This is clear from the fact that, although the English Judicature Rules and Orders comprise a rule (Rule 19, Order XXXI) precisely similar to this section, a special rule, *viz.*, Rule I, Order XXVIII, was thought necessary to give the right to demur. The plaintiff here alleges that part of our defence is no defence at all, and he asks the Court to decide that question before it proceeds to try the other issues in the case. Section 135 was not intended to give the Court power to do this. Section 146 is the only section of the Code which enables the Court to try any single issue apart from the others. That issue must be one of law, and it must be sufficient to decide the whole case. That does not apply here. The decision of the proposed issue would not decide this suit.

Again, s. 135 gives the plaintiff here no right to make this application. He is not entitled to take the initiative by obtaining a summons. He can only raise the point in objecting to an application made by us for discovery.

The meaning of the words in s. 135 determined "first" is that the issue may be determined before discovery or inspection is granted. They do not mean that the particular issue is to be determined before the other issues. The previous part of the section deals with discovery, not with the other issue in a case. The section by these words permits the Court to order the determination of an issue before discovery is granted, but nowhere indicates that the word "first" means that one issue may be heard and determined before the other issues. Counsel referred to English Rules and Orders : Rule 6, Order XXXVI ; *Piercy* v. *Young* (1).

Kirkpatrick for the second defendant on the same side.

Hon. *B. Lang* (Acting Advocate-General), *contra*.—The word "first" in s. 135 means "in the first instance ;" that is, before any other issue is tried.

Nothing can be inferred from the absence of a section in the Code corresponding to the English Rule I, Order XXVIII. That rule was made by the English Judges, and by s. 652 of the [577] Code the Judges here have power to make similar rules. The Legislature never intended to deal with this point. It is for this Court now to lay down the rule of practice.

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(1) 15 Ch. Div, 475.

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JUDGMENT.

SARGENT, C.J.—The question for our decision is as to the construction and practical application of s. 135 of the Civil Procedure Code (Act X of 1877). This section is *verbatim* the same as Rule 19, Order XXXI, of the English Judicature Act which, it may be presumed, was framed on the lines of the practice of the Courts of Chancery. See remarks of Jessel. M.R., in *Anderson* v. *The Bank of British Columbia*(1). According to that practice, the right to discovery was limited by the "exigencies of the question or questions about to be tried" (Wigram on Discovery, p. 25, referred to in Kerr on Discovery, p. 17); and, accordingly, whenever a defendant raised a defence to a bill either by plea or demurrer, discovery was not granted (assuming it not to be required to prove the plea) until the plea or demurrer had been argued, and that because the discovery might never be required. It appears, however, that if the defence was by answer, as all the questions in the cause came to trial simultaneously, the right of the plaintiff to discovery was not excluded as to any point in the cause: Kerr on Discovery, p. 18, referred to Wigram on Discovery, p. 30. The practice, therefore, depended on the form of the pleadings.

The practice, however, under consideration as laid down in the Judicature Act and s. 135 of the Civil Procedure Code for the application of the general principle that discovery should not be granted beyond the exigency of the question in issue, is quite independent of the form of the pleadiugs, which indeed in the Courts of this country is uniform in all cases, *viz*.. by plaint and written statement and such other statements as may be made by the parties when the issues are framed and its object is clearly expressed to be that the Court should have the power to adjourn the question as to discovery until the issue or question between the parties upon which the right depends, has been determined. So far there is no difficulty in construing the section. The doubt arises upon the procedure to be adopted when the adjournment of the question of discovery is thought to [578] be desirable by the Court as contemplated by the section. The section says: "The Court may order that the issue or question be determined first, and reserve the question as to the discovery or inspection." It was argued that by "first" was not meant "before the other issues are determined," but only "before the question as to discovery is decided;" in other words, that all that is meant is that the Court may order the question as to discovery to stand adjourned until the particular issue or question is determined. In support of this construction it was pointed out that the Code does not provide (as the Judicature Act does) for an issue or question being determined before the hearing of the cause. This construction, however, would not, in our opinion, give due effect to the clear language of the section, *viz*., "that the Court may order the issue or question to be tried first." If the issue is to be determined before the question as to discovery is decided, then it must necessarily be also determined before the issues are tried for which the discovery is required by the party asking for it. In other words, the intention seems to be, to give the Court the power of raising and determining an issue for the exclusive purpose of deciding the right to discovery of evidence which is to be used at the trial, and, therefore (from the very nature of the case) before the hearing of the cause, if the application for discovery be made, as it generally is, before the trial or if made at the hearing (the possibility

(1) 2 Ch. Div. 654.

of which is contemplated by ss. 129, 130, 131), then before the issues are tried for which it is required. The practical working of the section will doubtless be to give the Judge, before whom the application is made for discovery, the power to a certain extent of directing how the case shall be tried. In the Mofussil, where the same Judge deals with the case from the admission of the plaint up to judgment, no difficulty can arise. In this Court we think any possible inconvenience will be avoided by its being made a rule of practice that when an order is made, under s. 135, by the Judge in Chambers, the suit shall be set down for the trial of the particular issue as well as of the cause itself when it comes to hearing before the same Judge.

LATHAM, J.—Nothing remains for me to add to the judgment just delivered with reference to the construction of s. 135. **[579]** That matter being now decided, I have only to say, with regard to the summons which has been argued before me, that it appears to me that the present case is eminently one in which the power conferred by s. 135 should be exercised, and that it is desirable that the proposed issue, which I have in some respects amended, should be tried before the other issues in the case. It is desirable that the question raised by that issue should be at once determined, inasmuch as, if it be decided in the affirmative, it will obviate the necessity of a troublesome inspection and discovery which would very much increase the costs of the suit. The result, therefore, is that the summons is made absolute; and I order that this suit be set down for hearing for the determination of the following issue, namely, " whether assuming the allegations in the fourth paragraph of the written statement of the defendant Vulleebhoy Cassumbhoy and the defendant Satbai respectively contained to be true, and assuming that the decree in suit No. 401 of 1876 was obtained by fraud of the plaintiff and in collusion with the defendant Fazulbhoy Cassumbhoy as in the said fourth paragraph alleged, the said decree is not, for the purposes of this suit, a binding and valid decree against the estate of Cassumbhoy Nathubhoy and all persons interested therein, and whether the said decree is not in this suit binding upon the defendants and each of them, and whether the defendants or any or either of them can in this suit in any way object to or dispute the said decree.'

Summons made absolute.

Attorneys for the plaintiff.—Messrs. *Jefferson. Bhaishunkar and Dinsha.*

Attorneys for the first defendant.—Messrs. *Payni and Gilbert.*

Attorneys for the second defendant.—Messrs. *Ardesir and Hormasji.*

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6 B. 580.

[580] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

JOHARMAL (*Original Plaintiff*), *Appellant v.* THE MUNICIPALITY OF AHMEDNAGAR (*Original Defendants*), *Respondents.**

[16th December, 1878.]

Bombay Act VI of 1873, *s.* 86—*Suit against Municipality—Limitation Act, IX of* 1871, *sch. II, arts.* 43, 143.

Section 86 of Bombay Act VI of 1873 is not applicable to suits in the nature of actions of ejectment, but only to suits for damages.

* Appeal No. 35 of 1878 from original decree.

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The limitation of three years provided in cl. 43, sch. II, of the Limitation Act, IX of 1871, applies only to suits for damages on account of trespass, and not to suits to recover immoveable property from a trespasser, for which the period of limitation is twelve years, as provided by cl. 143.

[F., 16 M. 296; R., 22 B. 289 (F.B); 25 B. 142; 16 M. 317; 16 M. 474=3 M.L.J. 124; 3 M.L.J. 223; D., 8 B. 421.]

THIS was an appeal from the decision of N. Daniell, Judge of the District Court of Ahmednagar, in original suit No. 2 of 1877, dated the 27th July, 1878.

The plaintiff Joharmal instituted this suit against the Municipality of Ahmednagar to establish his right to a certain piece of ground. He alleged in the plaint that an old terrace had formerly existed on the ground; that he had lately reconstructed it; that the municipal authorities had caused the structure to be removed. He, therefore, sued for a declaration of his right to the ground, and claimed Rs. 25 as damages. The plaint was filed in January, 1877.

The defendants answered (*inter alia*) that the ground did not belong to the plaintiff, but formed part of the public road; that the plaintiff had built the terrace without authority from the defendants, and that, therefore, they were justified in removing it.

The District Judge raised the issues, whether the ground in dispute belonged to the plaintiff, and whether the suit was barred under s. 86 of Bombay Act VI of 1873.

The following findings on the evidence were recorded by th District Judge:—That the plaintiff built the terrace in 1875 without the sanction of the defendants; that he had received a notice from them, dated the 14th July, 1875, ordering him to **[581]** remove the structure, but that he did not remove it; that the defendants pulled it down about the close of the year; that in 1876 the plaintiff petitioned the defendants for leave to rebuild it, but they rejected his petition on the 15th August, 1876; that, on the 2nd September following, he served them with a notice to the effect that he would sue them if they did not give him leave to rebuild the terrace; that on the 9th September they informed him that their former order could not be altered or reversed.

On the above facts the District Judge rejected the plaintiff's suit, holding that his cause of action accrued on the 15th August, 1876, and that it was barred under s. 86 of Bombay Act VI of 1873, as it was not brought within three months from that date.

The plaintiff appealed to the High Court.

Shivshankar Govindram, for the appellant.—The District Judge misunderstood the nature of the suit, in holding it to be time-barred under Bombay Act VI of 1873, s. 86. He cited *Sorabji Nassarvanji* v. *The Justices of the Peace for the City of Bombay* (1).

The Hon. Rao Saheb *V. N. Mandlik*, for the respondent.

JUDGMENT.

MELVILL, J.—The plaintiff in this Court does not deny that his suit, in so far as it relates to damages, is barred by s. 86 of Bombay Act VI of 1873; but he contends that, in so far as he sues to establish his right to immoveable property, the above section does not apply; and in support of this contention he relies on the decision in *Sorabji Nassarvanji* v, *The Justices of the Peace for the City of Bombay* (1). That decision

(1) 12 B.H.C.R. 250.

was passed with reference to s. 240 of Bombay Act II of 1865, the provisions of which are very similar to those of s. 86 of Bombay Act VI of 1873 ; and it was then held that the limitation of three months applies only to suits against the municipality for damages, and not to suits in the nature of actions of ejectment. We concur in that decision, and, for the reasons stated in it, we are of opinion that s. 86 of Bombay Act VI of 1873 is not applicable to the present suit, in so far as the plaintiff sues to establish his right **[582]** to the land in dispute. The defendants' pleader refers us to art. 43, sch. II of Act IX of 1871 as requiring a suit "for trespass upon immoveable property" to be brought within three years from the date of the trespass. But we think that that provision has reference only to suits for damages on account of trespass, and not to suits to recover immoveable property from a trespasser, for which the period of limitation provided by art. 143 is twelve years. For these reasons we hold that the suit, so far as it seeks to establish the plaintiff's right to the piece of ground in dispute, is not time-barred, and we, therefore, reverse the decree of the Court below, and remand the case for trial on its merits. As the plaintiff has in this Court abandoned his original ground of contention, and has succeeded upon a plea which he did not put forward in the Court below, we direct that the parties bear their own costs of this appeal.

Decree reversed and case remanded.

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6 B. 582.

APPELLATE CIVIL.

Before Sir. Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

PURSHOTAM SIDHESWAR, *Applicant v.* DHONDU AMRIT DANWATE, *Attaching Creditor.** [5th October, 1880.]

Jurisdiction—Attachment.

One Dhondu applied to the Subordinate Court of Sasvad for the attachment and sale of certain immoveable property in execution of a money decree under which the sum of Rs. 1,317-4-9 was due to him from his judgment-debtor. On the attachment of the property the applicant presented a petition to the Court to the effect that he (applicant) had a mortgage lien on the property for Rs. 10,368, and that it might be sold subject to his lien and possession as mortgagee. The Subordinate Judge raised the question whether he had jurisdiction to entertain the application and inquire into the merits of the alleged mortgage. He was of opinion that he had, and referred the question for the opinion of the High Court, which concurred in his opinion and answered the question in the affirmative.

[R., 3 L.B.R. 275.]

THIS case was referred for the opinion of the High Court by Rao Saheb R. S. Tipnis, Subordinate Judge (Second Class) of Sasvad, in the district of Poona. The following are the facts of the case :—

[583] One Dhondu Amrit obtained a money decree against Sadasheo Balwant in Suit No. 998 of 1879 on the fileof the First Class Subordinate Judge of Poona, and in execution thereof applied to the Subordinate Court of Sasvad for attachment and sale of certain immoveable property belonging to the judgment-debtor for the purpose of recovering Rs. 1,317-4-9 due on the said decree. The said property was, consequeutly, attached by an

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* Civil Reference No. 22 of 1880.

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order of the Court of Sasvad. But subsequently Rao Bahadur Purshotam Sidheshwar made an application to the Subordinate Court of Sasvad, alleging that he had a mortgage lien on the attached property to the extent of Rs. 10,368, and prayed that the property might be disposed of, subject to his mortgage lien and possession as mortgagee during the continuance of his lien.

The question, therefore, referred by the Subordinate Judge for the opinion of the High Court was "whether the Subordinate Court of Sasvad could entertain the above application objecting to the attachment, and enquire into the merits of the mortgage transaction which was alleged to be worth more than Rs. 5,000 in amount?"

The Subordinate Judge was of opinion that he could entertain the application, as he held that the subject-matter of the application was the attachment placed upon the lands of the judgment debtor, and not the mortgage lien, and that the subject-matter must be valued according to the judgment-debt sought to be recovered by the attachment, namely, Rs. 1,317-4-9. The Subordinate Judge cited the case of *Motichand Jaichand* v. *Dadabhai Pestanji* (1).

There was no appearance of parties in the High Court.

The following is the judgment of the Court:—

JUDGMENT.

PER CURIAM.—The Court concurs in the opinion of the Subordinate Judge, and answers the question referred by him to this Court in the affirmative.

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6 B. 584=7 Ind. Jur. 34.

[584] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

VISHNU DIKSHIT (*Plaintiff*) *v.* NARSINGRAV AND ANOTHER, (*Defendants*).* [10th January, 1882.]

Jurisdiction—Collateral inquiry into a mortgage lien on attached property—Insolvency of a judgment-debtor.

The plaintiff obtained a decree against N. and R, for Rs. 165 1-0 in the First Class Subordinate Court of Satara, and applied for execution against the person of R. When brought before the Court, R. applied to be declared an insolvent under s. 344 of the Civil Procedure Code (Act X) of 1877. The plaintiff then moved the Court to strike off his application for execution, and to send his decree to the second class Subordinate Court of Vita for execution. The Satara Court, accordingly, sent the decree to the Vita Court, and granted a certificate to the plaintiff under ss. 223 and 224 of the Civil Procedure Code. The Satara Court also informed the Vita Court that proceedings were pending in the Satara Court regarding the insolvency of R. On the application of the plaintiff the Vita Court attached certain immoveable property as belonging to N. and R. Thereupon one V. T. claimed a mortgage lien on it for Rs. 9,415-9-3. The Vita Court, therefore, referred for the opinion of the High Court the questions whether it had jurisdiction to inquire into the validity of the mortgage lien claimed by V. T., and whether the execution of the decree in the Vita Court was to be stayed pending the inquiry into the alleged insolvency of R. in the Satara Court.

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* Civil Reference No. 14 of 1881.

(1) 11 B.H.C.R. 186.

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6 B. 584 = 7 Ind. Jur. 34.

Held that the Vita Court had jurisdiction to inquire into the validity of the alleged mortgage lien ; that execution in that Court against R. was to be stayed pending the inquiry in the Satara Court regarding his alleged insolvency, but that there was no reason for staying the execution of the decree against N. in the Vita Court.

UNDER s. 617 of the Civil Procedure Code (Act X of 1877) this case was referred for the opinion of the High Court by the Second Class Subordinate Judge of Vita in the district of Satara.

On the 18th February, 1880, the plaintiff Vishnu Dikshit obtained a decree against Narsingrav and his brother Rangoji for Rs. 165-11-0 in the Court of the first class Subordinate Judge of Satara. The plaintiff then applied to the Court for the execution of that decree by the arrest and imprisonment of the second defendant, Rangoji. When Rangoji was brought before the Court, he applied to be declared an insolvent under s. 344 of the Civil Procedure Code (Act X of 1877), and filed a list **[585]** of his property and creditors. The plaintiff thereupon moved the Court to strike off his application for execution, and to send his decree to the Second Class Subordinate Court of Vita for execution. The Subordinate Judge of Satara accordingly sent the decree to the Subordinate Court of Vita for execution, and granted a certificate to the plaintiff under ss. 223 and 224 of the Code. The Subordinate Judge of Satara also informed the Subordinate Judge of Vita that proceedings were pending in the Satara Court regarding the insolvency of the second defendant, Rangoji. On the 25th November, 1880, the plaintiff applied to the Subordinate Court of Vita for the attachment and sale of certain immoveable property (a house and an *inam* village) belonging to Narsingrav and Rangoji. On the attachment of the property by the Court, one Vishnu Trimbak appeared before it, and claimed a mortgage lien on the *inam* village for Rs. 9,415-9-3. The Subordinate Judge of Vita, therefore, referred for the opinion of the High Court the questions whether he had jurisdiction to enquire into the alleged mortgage lien of Vishnu Trimbak, and whether the execution of the decree was to be stayed in his Court either against both the defendants or against the second defendant (Rangoji), pending the inquiry in the Subordinate Court of Satara regarding the alleged insolvency of Rangoji.

The Subordinate Judge of Vita was of opinion that he had no jurisdiction to inquire into the alleged mortgage lien of Vishnu Trimbak, inasmuch as the amount of it exceeded Rs. 5,000, which was the limit of the pecuniary jurisdiction of his Court ; that there was no necessity for staying the execution proceedings in his Court pending the inquiry into the alleged insolvency of the defendant (Rangoji) in the Subordinate Court of Satara.

G. R. Kirloskar, appeared for the plaintiff, and cited *Purshotam Sideshwar* v. *Dhondu Amrit* (1) on the question of jurisdiction.

G. N. Nadkarni, appeared for the defendants.

JUDGMENT.

WESTROPP, C.J.—We think, first, that the Subordinate Judge of Vita has jurisdiction to inquire into the validity of the alleged mortgage lien for Rs. 9,415-9-3 claimed by Vishnu Trimbak ; **[586]** that inquiry being only collateral to the main question before that Judge, *viz.*, the right and manner of attachment and sale of the *inam* village within the local jurisdiction of the same Subordinate Judge, and such attachment

(1) 6 B. 582.

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34.

and sale being in respect of the decree in favour of the plaintiff (Vishnu Dikshit) for an amount less than Rs. 5,000. See *Purshotam Sideshwar* v. *Dhondu Amrit* (1).

Secondly, we are of opinion that execution in the Court of the Subordinate Judge of Vita against the second defendant (Rangoji) ought to be stayed pending the inquiry in the Court of the First Class Subordinate Judge of Satara into the right of that defendant to be dealt with as an insolvent under the Civil Procedure Code.

Thirdly, we do not perceive any reason for staying proceedings in the Court of the Subordinate Judge of Vita against the first defendant (Narsingrav) in respect of the execution of the plaintiff's decree against the right, title and interest of Narsingrav in the *inam* village attached by that Court.

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6 B. 586=7 Ind. Jur. 35.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Melvill.

VITHAL JANARDAN (*Plaintiff*) *v.* VITHOJIRAV PUTLAJIRAV, DECEASED, BY HIS WIDOW RAKMI AND OTHERS (*Defendants*).*

[12th July, 1882.]

Certificate of sale, application for—Limitation—Act XV of 1877, *sch. II, art.* 178—*Act X of* 1877, *ss.* 316, 318 *and* 319—*Purchaser's right to certificate of sale*—Res judicata.

Clause 178, sch. II of the Limitation Act, XV of 1877, is not applicable to applications for certificates of sale.

Re Khaja Patthanjee (2) dissented from.

The provisions of the Indian Limitation Act (No. XV of 1877) do not apply to applications to a Court to do what it has no discretion to refuse, nor to applications for exercise of functions of a ministerial character.

Kylasa Goundan v. *Ramasami Ayyan* (3) followed.

[F., 30 B. 415=8 Bom.L.R. 218; 3 A.W.N. 262; Appr., 9 A. 364=7 A.W.N. 79; 7 B. 316 (322); R., 8 A. 492=6 A.W.N. 156; 8 A. 519 (534); 10 A. 350; 13 A. 78=11 A.W.N. 1; 8 B. 377 (380); 19 C. 132 (F.B.); 22 C. 425; 10 M. 51; 28 M. 127=14 M.L.J. 437; 31 M. 71=18 M.L.J. 46=3 M.L.T. 328; 6 C.W.N. 190; 12 C.W.N. 542; D., 8 B. 257; 1 Bom.L.R. 84 (86).]

[587] UNDER s. 617 of the Civil Procedure Code, Act X of 1877, this case was referred for the opinion of the High Court by Rao Saheb P. B. Joshi, Second Class Subordinate Judge of Chiplun, in the district of Ratnagiri.

Certain immoveable property was sold by the Subordinate Court of Chiplun in execution of its own decree. After three years had elapsed from the date of the confirmation of the sale, the purchaser applied for and obtained a certificate of sale from the Court under s. 316 of the Civil Procedure Code, Act X of 1877. He then applied to the Court for possession of the property, under ss. 318 and 319 of the Act. The Subordinate Judge was of opinion that the grant of the certificate of sale by his predecessor was illegal, as held in *Re Khaja Patthanji* (2). He, therefore, submitted the following question to the High Court :—" Whether it is competent to a Civil Court to give possession to the purchaser under ss. 318 and 319 of the Civil Procedure Code, Act X of 1877, when the

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* Civil Reference No. 27 of 1882.

(1) 6 B. 582. (2) 5 B. 202. (3) 4 M. 172.

certificate of sale was applied for and granted to him after the expiration of three years from the date of the confirmation of the sale?"

The Subordinate Judge was of opinion that it was not.

There was no appearance of parties in the High Court.

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6 B. 586 = 7 Ind. Jur. 35.

JUDGMENT.

SARGENT, C.J.—We are reluctantly compelled to express our dissent from the decision in *Re Khaja Patthanji* (1) that art. 178, sch. II, of the Limitation Act XV of 1877, is applicable to applications for certificates of sale. We think that the view taken by the Madras Court in *Kylasa Goundan* v. *Ramasami Ayyan* (2) correct, and that the provisions of the Limitation Act do not apply to applications to a Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character.

Holding this opinion, we are not obliged to decide what would be the value of a certificate of sale, if it were granted after the time allowed by law. But if we considered the grant of a certificate of sale to be an act of a judicial character, we should be disposed to hold on the principle stated by the Privy Council in **[588]** *Mangal Pershad Dichit* v. *Grija Kant Lahiri* (3) and by this Court in *Manjunath Badrabhat* v. *Venkatesh Govind* (4) that by the grant of the certificate the question became *resjudicata* and that it was not competent to the Subordinate Judge to go behind the act of his predecessor.

We have consulted our brothers Kemball and West and they concur in the view which we have expressed.

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6 B. 588.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Melvill.

PURSHOTAMDASS TRIBHOVANDASS AND ANOTHER (*Plaintiffs*) *v.* MAHANANT SURAJBHARTHI HARIBHARTHI (*Defendant*), AND TRIKAMLAL MANCHARAM (*Plaintiff*) *v.* MAHANANT SURAJBHARTHI (*Defendant*).* [2nd July, 1882.]

Civil Procedure Code, Act X *of* 1877, *s.* 295--*Assets realized by sale or otherwise.*

Money paid by a judgment-debtor under arrest, in satisfaction of the decree against him, are not assets realized by sale or otherwise, under s. 295 of the Civil Procedure Code, Act X of 1877.

Section 295 of the Civil Procedure Code, Act X of 1877, must be read as if the words "from the property of the judgment-debtor" were inserted after the word "realized."

[Rel., 15 C.L.J. 49 = 13 Ind. Cas. 907; **Appr.**, 8 A. 67 = 6 A.W.N. 1; 21 C. 809; **R.**, 13 C. 225; 26 C. 772; 28 M. 380 = 15 M.L.J. 202; 6 P.R. 1903; **D.**, 16 B. 91 (98); 28 B. 264 = 6 Bom. L.R. 11.]

THIS was a reference by Rao Bahadur Mukanrae, Manirae, First Class Subordinate Judge of Ahmedabad, under s. 617 of the Civil Procedure Code, Act X of 1877.

The facts of the case, as stated by the Subordinate Judge, are briefly these:—The plaintiff in the first case held a money-decree against the

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* Civil Reference No. 19 of 1882.

(1) 5 B. 202. (2) 4 M. 172. (3) 8 I. A. 123. (4) 6 B. 54.

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defendant for Rs. 1,039, and applied for the execution of it by the arrest and imprisonment of the judgment-debtor. The judgment-debtor was, accordingly, arrested under a warrant from the Court, but before he was sent to jail he paid Rs. 667-12-11 in full satisfaction of the decree, and was released. In the meantime the plaintiff in the second case, who also held a money-decree against the defendant, had applied for the execution of his decree by the attachment and sale of the defendant's [589] moveable property. This judgment-creditor now claimed a share in the money paid by the defendant as stated above, and contended that he was entitled to it under s. 295 of the Civil Procedure Code, Act X of 1877. The Subordinate Judge, therefore, submitted the following question for the decision of the High Court:—Whether money paid by a judgment-debtor under arrest, in full satisfaction of the decree against him, can be regarded as assets realized by sale or otherwise, under s. 295 of Act X of 1877, and whether other creditors who have in the meantime applied for the execution of their decrees against the same debtor can claim a share in the money under that section?"

The Subordinate Judge gave his opinion in the negative. He observed: "The word 'otherwise' used in the said section has a very broad meaning, and is likely to be misconstrued. I, therefore, think it right to obtain an authoritative decision on the point before disposing of the question. I am of opinion that s. 295 is not applicable to payments made in satisfaction of decrees by judgment-debtors under arrest. That section occurs under the heading of 'sale and delivery' of property, while the money has been realized under the provisions contained under a distinct heading, *viz.*, 'arrest and imprisonment'. The provision in the old Code (s. 270 of Act VIII of 1859) applied only to money realized by the sale of property, and the addition of the word 'otherwise' in s. 295 of the new Code cannot, I think, be intended to extend to all realizations made, except those accruing consequent on applications for execution by attachment and sale of property. Realizations may be made otherwise than by sale, such as under s. 305. Hence the necessity for inserting the word 'otherwise' in s. 295."

There was no appearance of parties in the High Court.

JUDGMENT.

SARGENT, C.J.—We think the question must be answered in the negative. Section 295 is one of a number of sections under the heading of general rules as to the sale and delivery of property, and must, we think, be read as if the words "from the property of the judgment-debtor" were inserted after the word "realized." The provisions contained in ss. 291, 305 and 322 are all modes of realizing assets from such property "otherwise," [590] than by sale, and are sufficient to account for the introduction of that expression into s. 295. This view is also confirmed by cl. (*b*), s. 341, which provides for the discharge of the judgment-debtor from arrest "at the request of the person on whose application he has been imprisoned," which seems to assume that the arresting creditor may avail himself of the arrest to enter into any arrangement he thinks proper, with the debtor behind the back and independently of other creditors who may have applied for execution.

6 B. 590=7 Ind. Jur. 36.

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APPELLATE CIVIL.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice West.

6 B. 590=7 Ind. Jur. 36.

THE COLLECTOR OF RATNAGIRI (*Original Applicant*), *Appellant v.* JANARDAN VITHAL KAMAT (*Original Plaintiff*), *Opponent.**

[20th July, 1882.]

Civil Procedure Code (*Act X of* 1877), *s.* 244, *cl.* (*c*) *and s.* 412—*Suit in* forma pauperis *—Order as to costs—Appeal—Jurisdiction.*

A Subordinate Judge admitted a plaint in *forma pauperis*, but, holding that he had no jurisdiction to try the suit, returned the plaint to the plaintiff for its presentation in the proper Court, and ordered each party to pay his own costs. After the presentation of the plaint in another Court, and before the termination of the suit, the Collector applied to the Subordinate Judge for execution of the order as to costs, by seeking to recover the amount of the stamp duty from the plaintiff. The Subordinate Judge refused to execute the order, on the ground that the pauper suit was still pending in another Court. His order was affirmed by the District Judge in appeal. On second appeal to the High Court.

Held that there was no appeal, and, therefore, no second appeal, under s. 244, cl. (*c*), of the Civil Procedure Code (Act X of 1877), against the order of the Subordinate Judge refusing execution of the order as to costs, inasmuch as the question was not between the parties to the suit.

Held, further that, under s. 412 of Act X of 1877, the Subordinate Judge had no jurisdiction to make the order for payment of Court fees by the plaintiff.

The High Court, accordingly, in the exercise of their extraordinary jurisdiction, annulled the Subordinate Judge's order about costs, and all the subsequent proceedings consequent upon that order.

[F., 18 B. 454 ; 23 M. 73=9 M.L.J. 265 ; **R.**, 27 B. 140 (143) ; **D.**, 15 B. 77 ; 20 B. 86 (98).**]**

THIS was an appeal against the decision of C. B. Izon, District Judge of Ratnagiri, affirming the order of P. B. Joshi, Second Class Subordinate Judge of Vengurla.

[591] The opponent Janardan presented a plaint in *forma pauperis* in the Subordinate Court of Vengurla. The Subordinate Judge, after inquiry, held the plaintiff's pauperism proved, but found that he had no jurisdiction to try the suit. He, accordingly, returned the plaint to the plaintiff for its presentation in the proper Court, and made an order that each party was to bear his own costs. The plaintiff thereupon filed the plaint in the Court of the First Class Subordinate Judge of Ratnagiri, and was allowed by that Court to sue as a pauper. The Subordinate Judge of Vengurla, as usual, sent a copy of his order as to costs to the Collector of Ratnagiri, in order to enable that officer to recover the amount of Court-fees from the plaintiff. The Collector thereupon applied to the Subordinate Judge of Vengurla for execution of that order, praying for the recovery of the stamp duty from the plaintiff. The Subordinate Judge on the 1st March, 1881, rejected the Collector's application, on the ground that the pauper suit was still pending in the Subordinate Court of Ratnagiri. That order was upheld by the District Judge in appeal.

The Collector appealed to the High Court.

Nanabhai Haridas, Government Pleader, appeared for the Collector.

* Second Appeal No. 485 of 1881, converted into Application No. 79 of 1882 under Extraordinary Jurisdiction.

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6 B. 590 = 7 Ind. Jur. 36.

Manckshah Jehangirshah, for the opponent, contended that, as the Collector was no party to the suit, there was no appeal, and, consequently, no second appeal, under s. 244, cl. (*c*), and s. 588 of Act X of 1877.

Nanabhai Haridas submitted that the order made by the Subordinate Judge of Vengurla as to costs was illegal under s. 412, and all subsequent proceedings, therefore, were illegal. He prayed that they might be annulled.

JUDGMENT.

MELVILL, J.—We think that there was no appeal, and, of course, therefore no second appeal, against the order of the Subordinate Judge refusing execution of the order as to costs; because the question is one arising, not between the parties to the suit (cl. (*c*), s. 244 of Act X of 1877), but between the Collector who is a third party and one of the parties to the suit. As the matter, however, has been brought before us, and inasmuch as it appears to us that the original order for payment by the plaintiff of Court **[592]** fees was not one which the Subordinate Judge had jurisdiction to make under s. 412 of Act X of 1877, we, in the exercise of our extraordinary jurisdiction, annul that order and with it all proceedings consequent upon the order, including the orders passed by the two lower Courts on the Collector's application No. 344 of 1880.

Orders and proceedings annulled.

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6 B. 592.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Melvill.

SADU (*Applicant*) *v.* SAMBHU (*Opponent*).* [27th July, 1882.]

Dekkhan Agriculturists' Relief Act XVII of 1879—*Immoveable property—Standing crops.*

Standing crops are immoveable property within the meaning of s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) as well as within the Code of Civil Procedure, and not liable to attachment and sale in execution of money decrees, unless specifically pledged.

[F., 11 M. 193; **R.**, 14 C.L.J. 515 = 16 C.W.N. 540 = 11 Ind. Cas. 729; 11 C.P.L.R. 89.]

THIS was a reference, under s. 617 of the Civil Procedure Code (Act X of 1877), from Rao Saheb J. S. B. Inamdar, Subordinate Judge of Rahimatpur.

The question submitted by him was "whether standing crops (that is, crops of sugar-cane) must be regarded as immoveable property within the meaning of s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), and, as such, whether they are attachable and saleable in execution of money decrees?"

The Subordinate Judge referred to the following cases:—*Ananda* v. *Manji* (1); *Kirpashankar* v. *Govind* (2); *Nagapa Hegde* v. *Timaya Hegde* (3).

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* Civil Reference No. 30 of 1882.

(1) Civ. Ref. No. 17 of 1880, Printed Judgments for 1880, p. 274.
(2) Civ. Ref. No. 30 of 1880, Printed Judgments for 1880, p. 329.
(3) Civ. Ref. No. 43 of 1881, Printed Judgments for 1882, p. 73.

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The Subordinate Judge was of opinion that these authorities did not touch the question submitted, and on a construction of s. 22 of the Relief Act held that standing crops were not immoveable property, and were not exempt from attachment and sale in execution of money decrees against agriculturists.

[593] There was no appearance on either side in the High Court.

OPINION.

SARGENT, C.J.—There is nothing in the Dekkhan Agriculturists' Relief Act to lead to the conclusion that the term "immoveable property" is used in any other sense than that which has been given to it in the cases under the Civil Procedure Code to which the Subordinate Judge has referred in the margin of his referring letter. Standing crops must, therefore, be held to be immoveable property within the meaning of s. 22 of the first named Act.

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6 B. 593=7 Ind. Jur. 37.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Melvill.

BABAJI (*Original Opponent*), *Appellant v.* SHESHGIRI AND OTHERS (*Original Applicants*), *Respondents.** [20th July, 1882.]

Minors—Administration—Manager—Jurisdiction—Account—Act XX of* 1864—*Undivided Hindu family.

A certificate of administration may be granted, under Act XX of 1864, for the share of a minor who is a member of an undivided Hindu family.

When a certificate is given in such a case the District Court has no jurisdiction to attach the undivided property in which the minor has a share, with a view to ascertain and divide off the minor's share. Such ascertainment and division can only be effected by a regular suit.

[R., 19 B. 309.]

THIS was an appeal from the order of E. Hosking, Assistant Judge (Full Power) at Kaladgi.

Narsapa and Bhimana were brothers carrying on a joint trading concern. Bhimana having died, Narsapa was, on the 8th of July, 1875, appointed administrator of the share of his nephews, Sheshgir, Vengrandson Babaji Shrinivas carried on the business. In 1879 the eldest son of Bhimana attained majority, and applied to the Court to take charge of the shares of his minor brothers and of himself. The Senior Assistant Judge, Mr. Scott of Kaladgi, in pursuance of this application, attached a shop at the village of Ilkal, and had the accounts examined by two commissioners, who presented their report on the 1st of April, 1880. Two days afterwards Mr. Scott directed, with the consent of the applicant [594] Sheshgir, that Babaji should continue to carry on the business, on his finding security for Rs. 55,000, until further orders. Babaji, having found the security, was put in charge of the business. On a consideration of the accounts furnished and the objections urged by each party, Mr. Hosking, who succeeded Mr. Scott on the 27th of August, 1880, informed

* Appeal No. 14 of 1881 under Act XX of 1864.

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the parties that he would attach the business, arrange for the recovery of debts due to the firm, and that an enquiry would be made into the past management, the effect of which seemed to be to reduce the business in four years from Rs. 1,09,741 to Rs. 61,823, or nearly one-half its former value. Subsequently Babaji's younger brother was joined as an opponent with Babaji, and the Court made an order declaring Babaji and Lakshman sole owners of the joint business at Ilkal, on condition that they pay Sheshgir and his brothers Vankapa and Tipana Rs. 72,000 principal and Rs. 13,200 interest by fifteen instalments.

Babaji applied to the High Court.

Branson (with him *Shamrav Vithal*), appeared for the applicants.—The proceedings of the lower Court are irregular and without jurisdiction. The applicant before that Court, Sheshgir, had attained majority when he asked the Court to take charge of his shares and the shares of his minor brothers. Act XX of 1864 does not contemplate such an application. Regarding the application of Sheshgir only as one for the appointment of an administrator, the Court had no jurisdiction to attach the property and remove Babaji from the management: *Doorga Persad* v. *Kesho Persad* (1). Sheshgir's remedy is by a suit only without which there could be no partition. The family is undivided, and Act XX of 1864 does not apply: *Bhagirthibai* v. *Sadashivrav* (2); *Guracharya* v. *Svamirayacharya* (3).

Manekshah Jehangirshah, for the minors Venkapa and Tipana.—The objection as to jurisdiction was not taken in the Court below. The brothers Narsapa and Bhimana were separate, although the shop at Ilkal and at two other places were kept joint. Babaji was appointed to manage the joint shop on furnishing security for Rs. 55,000, and can be called to account under section [595] 16 of the Minor's Act. Babaji consented to Mr. Hosking making a division of the property, and cannot complain of it now. A suit for division against an administrator can be brought only in the District Court: *Utamram* v. *Damodardas* (4). Mr. Hosking had, therefore, jurisdiction to make the division.

JUDGMENT.

SARGENT, C. J.—The application of Sheshgir in 1879, so far as it was made on his own behalf, was clearly not within the Minors' Act. So far as it was an application for the appointment of an administrator of the estate of his minor brothers, the decision of the Privy Council in *Doorga Persad* v. *Kesho Persad Singh* (1) would seem to show that the Court could have made such appointment, but it clearly had no right on that application to attach the shop or remove Babaji from the management of it. The rights of other persons than the minors in the joint shop could only be dealt with in a regular suit instituted by a person properly representing the minors. The order of Mr. Scott attaching the shop on 1st April, 1880, which was then in the occupation and under the management of Babaji, was, therefore, clearly beyond his jurisdiction. As to the order of 3rd April, made with the consent of Sheshgir and Babaji, it is clear that it does not appoint Babaji administrator of the minors' estate, but simply reinstates Babaji temporarily in the management of the shop on the terms of his giving 55,000 rupees security. This, however, would not confer any jurisdiction on the Assistant Judge to require Babaji to account as contemplated by s. 16 of the Minors

(1) 9 I. A. 30.
(2) Printed Judgments for 1881, p. 155.
(3) 3 B. 431.
(4) 9 B.H.C.R. 39.

Act. All that the Assistant Judge could do, if he was not satisfied with the management by Babaji, was possibly to enforce the security against him. We must, therefore, annul the order as made without jurisdiction, and leave Sheshgir and the minors to their remedy by suit. Parties to pay their own costs throughout.

Order annulled.

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APPELLATE CIVIL.

6 B. 593 = 7 Ind. Jur. 37.

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6 B. 596.

[596] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

LOTLIKAR (*Original Plaintiff*), *Appellant v.* WAGLE (*Original Defendant*), *Respondent.** [22nd August, 1882.]

Temple property—Guravki—Sale of right, title and interest of holder—Service land.

The property of a temple cannot be sold away from the temple; but there is no objection to the sale of the right, title and interest of a servant of the temple in the land belonging to the temple which he holds as remuneration for his service; the interest sold being subject in the hands of the alienee to determination by the death of the original holder, or by his removal from his office on account of his failure to perform the service.

[F., 15 M.L.J. 10; D., 27 B. 500 (509); 5 Ind. Cas. 455 = 7 M.L.T. 349.]

THIS was a second appeal from the decision of J. L. Johnston, Acting Assistant Judge of the District of Ratnagiri, confirming the decree of the Subordinate Judge of Ratnagiri.

The plaintiff sued the defendant to recover rent for three years of a piece of land. The piece formed part of the land belonging to a Hindu temple which several Guravs held as remuneration for their service, and which, for the sake of convenience, they divided amongst themselves. One Bacha bin Babling was one of such Guravs, and he held the land in dispute as his share of remuneration. In execution of a decree against him it was sold by the Civil Court, and purchased by one Saheb Khan, who sold it to the plaintiff on the 17th of March, 1874, and put him in possession. The defendant lived on the land as the tenant of Bacha, and refused to acknowledge the plaintiff's title or pay him any rent, alleging that the land belonged to the temple, and could not be sold by Bacha, who was a mere trustee. The plaintiff brought this suit.

The Subordinate Judge as well as the Assistant Judge allowed the defendant's contention, and rejected the plaintiff's claim. They held that the sale by Bacha to Saheb Khan was a sale of land held on behalf of a charitable or religious institution within the meaning of Bombay Act II of 1863, s. 8, cl. 3, and, therefore, iliegal and of no effect.

The plaintiff appealed to the High Court.

[597] *Yashvant V. Athlye*, for the appellant.—The Courts below have mistaken the question for decision. A religious office may be unsaleable, but the land attached to an office or a religious institution may be sold.

S. S. Wagle, for the respondent.—The land admittedly belongs to the office of "Gurav," and goes with it. The office is not divisible or alienable; nor is the land belonging to it: *Muncharam* v. *Pranshankar* (1).

[MELVILL, J.—This case and the cases cited in it refer to the sale of an

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* Second Appeal No. 629 of 1881.

(1) 6 B. 298.

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office, and have no application to the sale in the case, which is a sale of service land.]

JUDGMENT.

MELVILL, J.—The Assistant Judge was, no doubt, right in holding that land, which is the property of a temple, cannot be sold away from the temple. But what was sold in this case was the right, title, and interest of one Bacha, a servant of the temple, who held the land in dispute as remuneration for his service. I think that, in the absence of any statute to the contrary, such interest as a holder of service land has in the land may be alienated subject, of course, in the hands of the alienee, to the determination of such interest by the death of the original holder, or by his removal from his office on account of his failure to perform the service for which the land was held. In the present case there appears to be no objection on the part of the temple authorities to the sale of Bacha's interest, and we are informed that Bacha still continues to perform the service of the temple. Under these circumstances I do not think that it is open to the defendant, who is a mere tenant of Bacha, to refuse payment of rent to the purchaser of Bacha's interest.

The decree of the Assistant Judge, which proceeds wholly on the ground that the sale to the plaintiff was illegal, is reversed, and the case remanded for a decree to be passed on the merits. Costs to follow final decision.

PINHEY, J.—Plaintiff purchased the right, title and interest of Bacha, who holds the land in suit as remuneration for his services as Gurav of the temple of Shri Vishweshwar. Bacha still lives, and still performs service for the temple. The assignment of the land to Bacha has never been terminated. Therefore, during [598] the three years named in the plaint, the plaintiff is entitled to recover the rent which Bacha would have recovered from the defendant, Bacha's tenant, if Bacha's rights had not been sold. Plaintiff's rights over the land were Bacha's and will last as long as Bacha continues assignee of the land from the temple authorities,—that is, possibly as long as Bacha lives, if Bacha continues to render efficient service to the temple—possibly only until the trustees of the temple consider it right or advisable to eject Bacha.

I agree that the decrees of the lower Courts must be reversed, and the suit remanded for trial on its merits.

Decree reversed.

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6 B. 598.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

RAMCHANDRA MANTRI (*Original Defendant*), *Appellant v.*
VENKATRAO AND B. MANTRI (*Original Plaintiffs*), *Respondents.**
[12th June, 1882.]

Saranjam Jaghir—*Grant of revenue—Grant of soil—Pensions Act XXIII of* 1871—*Evidence—Burden of proof—Impartibility—Primogeniture.*

The grant in *jahir* or *saranjam* is very rarely a grant of the soil, and the burden of proving that it is in any particular case a grant of the soil lies very heavily upon the party alleging it.

* Regular Appeal No. 21 of 1880.

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6 B. 598.

It is for the Government to determine how *saranjams* are to be held and inherited, and in cases where the Civil Courts have jurisdiction over claims relating to *saranjams* in consequence of the non-applicability of the Pensions Act XXIII of 1871, or otherwise, they would be bound to determine such claims according to the rules, general or special, laid down by the British Government. In the absence of such rules the Courts would be guided by the law applicable to impartible property.

Semble, that a *saranjam* is impartible, and on the death of the eldest son descends to his son, in preference to his surviving brother.

[R., 29 B. 415=7 Bom. L.R. 439 ; 29 B. 480=7 Bom. L.R. 497 ; 30 B. 101=7 Bom. L.R. 659 ; 32 B. 432=10 Bom.L.R. 531 ; 36 B. 151 (154)=13 Bom. L.R. 103 ; 34 C.753=5 C.L.J. 583=12 C.W.N. 193.]

THIS was an appeal from the decision of Rao Bahadur P. S. Binivale, Subordinate Judge (First Class) of Satara.

The material facts of the case are as follows :—

The plaintiffs and the defendant are members of the Mantri family, the last head of which was one Vyankatrao, who died on the 19th of August, 1863. He left three sons Narayanrao, Madhavrao and Bhaskarrao. The first of these was the eldest, **[599]** and was the father of the defendant Ramchandrarav ; the second was the father of the plaintiff Venkatrao ; and the third is the plaintiff No. 2. The propositus owned considerable property moveable and immoveable, amongst which were the villages of Bagni and Kameri in the Satara district, Kochare in the Ratnagiri district, and Pandharpur in the Sholapur district. The plaintiffs alleged that they and the defendant were undivided, and sued for division in the Court of the First Class Subordinate Judge of Satara, who was empowered by the High Court to try the suit. The defendant contended among other things, that he was a sardar exempt from the jurisdiction of the ordinary Civil Courts by Reg. XXIX of 1827; that the village of Bagni was impartible and descendible to the eldest son only as being a grant in *saranjam*. He also contended that the grant was a grant of the revenue, and not of the soil, and that without a certificate from the Collector of Satara the Civil Court had under the Pensions' Act XXIII of 1871 no jurisdiction to try the suit. The Subordinate Judge, holding that a *saranjam* was necessarily a grant of the soil, awarded the bulk of the plaintiff's claim. The defendant appealed to the High Court.

Jardine and Hon. *V. N. Mandlik*, for the appellant.—Our contention is that the grant of Bagni in *saranjam* was an alienation of the land revenue and not of the soil of the village, and that a *saranjam* was impartible. The evidence adduced shows that *saranjams* are grants of revenue. The *onus* was on the plaintiffs to show that such is not the case ; and they have not discharged their *onus*. The leading case in support of our proposition is *Krishnarav Gonesh* v. *Rangrav* (1) and is followed in *Vaman Janardan Joshi* v. *The Collector of Thana* (2) and *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh* (3) and other cases. *Saranjams* are of three classes, but as to impartibility there is no distinction between them. They are all impartible, and descend to the eldest son and senior representative of the family.

Inverarity and *Shantaram Narayan*, for the respondents, the original plaintiffs.—We submit that the evidence shows that the soil, and not merely the revenue of the village of Bagni, was alienated ; **[600]** that the defendant was a sardar for rank and precedence only, his name being included in the red portion of the Saranjam List, and that

(1) 4 B.H.C.R.A.C.J. 1. (2) 6 B.H.C.R.A.C.J. 191. (3) 2 B. 346.

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the rulings cited as to the nature of a *saranjam* were considerably modified by the ruling in *Ravji Narayan Mandlik* v. *Dadaji Bapuji Desai* (1). It is not invariably the case that a grant in *saranjam* is an alienation of the revenue merely. The Pensions' Act is, therefore, not applicable to this matter, and no certificate of the Collector is required.

JUDGMENTS.

MELVILL, J.—This is an appeal from the decision of the First Class Subordinate Judge of Satara, who has allowed the claim of the plaintiff to a partition of certain ancestral immoveable property.

The suit was for a division of lands, situated in the villages of Bagni in the Satara District, Kameri in the same district, Kochre in the Ratnagiri district, and Pandharpur in the Sholapur district. The plaintiffs also demanded a share in certain moveable property alleged to be in the defendant's possession.

The defendant claimed exemption from the jurisdiction of the Civil Courts, on the ground that he is a privileged sardar. He objected to a partition of the Bagni village, on the ground that it is a grant in *saranjam*, and, as such, impartible; and he further contended that the claim thereto is barred by the provisions of the Pensions' Act of 1871. He alleged that, as regards the villages of Kochre and Pandharpur, the suit is defective for want of parties. He claimed to be entitled himself to a share of certain property, moveable and immoveable, in the possession of the plaintiffs. Finally, he took a general objection to the whole claim as being barred by limitation; but this objection was not seriously pressed, and has clearly nothing to support it; for Venkatrav, the ancestor of the parties, and the last holder of the estate, died in 1863, and the suit was brought in 1872. It is, moreover, admitted that there has never been any partition between the parties, and that each is in enjoyment of some portion of the family property.

The objection to the jurisdiction is equally untenable. The defendant has put in the *Bombay Government Gazette* of the 18th [601] July, 1872, which contains a "List of the Three Classes of Sardars," to which is appended a note that "the names in red ink are those of the Sardars for Rank and Precedence only." The defendant's name is one of those entered in red ink. It is clear, therefore, that the Government did not intend to grant to the defendant the privileges which belong to certain sardars under Reg. XXIX of 1827; and, although it was contended that the Government could not deprive a sardar of those privileges, when his name has once been entered in the list prepared under the Regulation, yet the answer to this is that there is no evidence that the defendant's name was ever entered in the list prepared and furnished to the Judge under s. iii, cl. 2 of the Regulation. It was held in *Maharajgir* v. *Anandrav and another* (2) that a sardar, whose name is entered in red ink, is not thereby exempted from the jurisdiction of the ordinary Civil Courts; and we see no reason to dissent from that decision.

The principal contention in the case is in regard to the village of Bagni; and, as respects this village, two questions arise, namely, first, whether the claim is barred by the provisions of the Pensions' Act, No. XXIII of 1871, and, secondly, if it be not so barred, whether the village, being admittedly a grant in *saranjam*, is impartible.

(1) 1 B. 523.

(2) 8 B.H.C.R.A.C.J. 25.

The Subordinate Judge, before whom the case first came, decided that the claim to Bagni, (and indeed the whole claim, though it is not clear how the same reason could apply to the whole claim), was taken out of the cognizance of the Civil Courts by the Pensions' Act, inasmuch as he held that the grant of Bagni was a grant, not of the soil, but of the land revenue only, and the plaintiffs had not produced the certificate of the Collector, which is necessary to enable the Civil Court to deal with a claim relating to a grant of land revenue.

The case came before the High Court in appeal, and on the 15th January, 1879, it was remanded to the Subordinate Judge, in order that the parties might have an opportunity of giving evidence as to the real nature of the grant, and of showing whether it was a grant of the soil, or only of the revenue; it **[602]** appearing to the High Court that the grant, or continuance, of a village in *saranjam* does not necessarily, and in terms, import either the one estate or the other.

The present Subordinate Judge has now taken the evidence offered by the parties: but it does not appear to have influenced his decision. He has disposed of the question before him in the same summary way as his predecessor; and has come to an opposite conclusion on equally insufficient grounds. The former Subordinate Judge held that a grant in *saranjam* is necessarily a grant of land revenue, and nothing more: his successor seems to hold that it is necessarily a grant of the soil. We cannot, without some qualification, support either conclusion: but, we think, that the former comes nearer to the truth than the latter.

In *Krishnarav Ganesh* v. *Rangrav* (1) Westropp, C.J., said: "Sanadi grants in inam, saranjam, jagir, wazifa, wakf, devasthan, and sevasthan, are, generally speaking, more properly described as alienations of the royal share in the produce of land, *i.e.*, of land revenue, than grants of land, although in popular parlance, and in this judgment, occasionally so-called." This observation has frequently been quoted with approval, and the principle involved in it was the foundation of the decision in *Vaman Janardhan Joshi* v. *The Collector of Thana* (2), which has been followed in many subsequent decisions. In *Rowji Narayan* v. *Dadaji Bapuji* (3) Westropp C.J., repeated his former observation as being undoubtedly true, though he qualified it by adding that "if words are employed in a grant, which expressly, or by necessary implication, indicate that Government intends that, so far as it may have any ownership in the soil, that ownership may pass to the grantee, neither Government nor any person subsequently to the date of the grant deriving under Government, can be permitted to say that the ownership did not so pass." He then added: "In the *sanad* in evidence here, whosoever framed it, was apparently determined that no ambiguity should exist as to what the force of the term 'village' might be;" and, in order to be explicit, he added to the grant of the village in *inam* the words "including the waters, the trees, the stones, including, quarries, **[603]** the mines, and the hidden treasures therein." Consequently, in that particular case the Chief Justice refused to hold the Pensions' Act applicable; remarking that "an enactment of a character so arbitrary as Act XXIII of 1871, which purports to deprive the subject of his right to resort to the ordinary Courts of Justice for relief in certain cases, ought to be construed strictly, and the Courts should not extend its operation further than the language of the Legislature requires." But the principle

(1) 4 B.H.C.R. A.C.J. 1. (2) 6 B.H.C.R. A.C.J. 191. (3) 1 B. 523.

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that grants in *inam* are ordinarily to be regarded as grants of land revenue, and nothing more, is in no way weakened by the decision in that case.

If this principle be true as regards grants in *inam* generally, it appears to us to be specially applicable to grants in *jaghir* or *saranjam*.

Of these two terms Colonel Etheridge says in the Preface to the List of Saranjams, published by him as the same stood on the 1st August, 1874, "Under the Mahomedan dynasty such holdings were known as *jaghir*, under the Mahratta rule as *saranjam*. If any original distinctive feature marked the tenure of *jaghir* and *saranjam*, it ceased to exist during the Mahratta Empire; for, at the period of the introduction of the British Government, there was no practical difference between a *jaghirdar* and a *saranjamdar*, either in the Deccan or Southern Mahratta Country. The terms, *jaghir* and *saranjam* are convertible terms in these districts. The latter is now almost universally adopted These holdings, being of a political character, were not transferable, nor necessarily hereditary, but, as a rule, were held at the pleasure of the Sovereign. On succession a nazrana was levied. When of a personal nature, they were termed *Zat Saranjam*, when for the maintenance of troops *Fouj Saranjam*."

Colonel Etheridge's observation that *jaghirs* were not necessarily hereditary, hardly conveys a correct idea of the fact. It would have been more correct if he had said that *jaghirs* were not necessarily grants for life only, but might occasionally be hereditary. This is how the fact is stated by the Judicial Committee in *Gulabdas Jagjivandas* v. *The Collector of Surat* (1), where their Lordships say that a *jaghir* must be taken, *prima facie*, to **[604]** be an estate only for life, although it may possibly be granted in such terms as to make it hereditary. Similarly, in the Fifth Report from the Select Committee on Indian Affairs (p. 86) it was said: "With regard to the *jaghirs* granted by Mahomedans either as marks of favour, or as rewards for public service, they generally, if not always, reverted to the State on the decease of the grantee, unless continued to his heir under a new *sanad*: for the alienation in perpetuity of the rights of Government in the soil was inconsistent with the established policy of the Mahomedans, from which they deviated only in the case of endowments to the religious establishments and offices of public duty, and in some rare instances of grants to holy men and celebrated scholars."

The circumstance that grants of this kind were ordinarily of so temporary a nature, raises a presumption, even stronger than that which exists in regard to *inams* generally, that the grants were ordinarily grants of the land revenue, and not of the soil. And the best authorities on the subject agree in so defining the nature of *jaghirs* and *saranjams*. Colonel Etheridge, in the preface to which we have already referred, says: "It was the practice under former Governments, both Mahomedan and Mahratta, to maintain a species of feudal aristocracy for State purposes by temporary assignments of revenue, either for the support of troops for personal service, the maintenance of official dignity, or other specific reason. Holders of such grants were entrusted at the same time with the powers requisite to enable them to collect and appropriate the revenue, and to administer the general government of the tract of land which produced it. Under the Mahomedan dynasty such holdings were known as *jaghir*; under the Mahratta rule as *saranjam*." Professor Wilson

(1) 3 B. 186.

in his Glossary defines *saranjams* as "temporary assignments of revenue from villages or lands for the support of troops, or for personal service, usually for the life of the grantee; also grants made to persons appointed to civil offices of the State to enable them to maintain their dignity. They were neither transferable, nor hereditary, and were held at the pleasure of the Sovereign." The term *jaghir* he defines as "a tenure common under the **[605]** Mahomedan Government, in which the public revenues of a given tract of land were made over to a servant of the State, together with the powers requisite to enable him to collect and appropriate such revenue, and administer the general government of the district." Mr. Steele (Hindu Castes, p. 207) says: "Grants by the Native Government in *jaghir* were either *Fouz Saranjam*, subject to the performance of military service, or Jat *Saranjam*, personal jagbir. The subject of these grants were the whole or particular portions of the revenues of villages belonging to the Sarkar * * * * * Usually the grants depended on the pleasure of the Sovereign, and the fidelity of the grantee * * * * * * *. They were not, in general, hereditary; sanads seldom exist. on the first grant it was usual to give the grantee a *khat* or order addressed to the Government officers of the district." Mr. Neil Baillie, in his Essay on the Land Tax of India, says (page xliv): "The *jaghir* is, properly speaking, an order upon the *khiraj* of particular lands, which are said to be granted by way of jaghirs. Two examples of it are given in the Appendix; and the terms in which they are expressed are worthy of attention. In both a sum of money, so many *lakhs* of *dams* is said to be bestowed out of a particular pergunnah, the officers and inhabitants of which are directed to account for their just rents and dues of the Divani (that is of the Civil Government), to the agent of the jaghirdar, up to the sum specified, from which they are forbidden to withhold or deduct a single *dam*." He then goes on to say: "Though the jaghir was, in form, an order for the payment of the *khiraj*, there is no doubt that the jaghirdar was treated, in some respects, as the zamindar, or holder of the land. Thus No. IV of the Appendix is a perwannah, addressed to the agent of a jaghirdar, in which he is required to do justice to a complainant; and though the purpose of the jaghir was to make a provision, by an order on the revenue, yet this was said to be by way of jaghir, as if some holding or taking of the land itself was necessary to give due effect to this object. The jaghir is thus sometimes treated as an estate in land, not only in the Regulations of the Indian Government, but also in the decisions of the Courts of Justice, and in this sense it is considered to be, **[606]** essentially, an estate for life. There is reason, however, to think this view of the *jaghir* to be erroneous. As an order for payment of the *khiraj* to a particular person, it necessarily fell to the ground on his death, unless some other persons, by name or description, were included in the grant. Such other persons might be his children: and if a *jaghir* were granted to a man and his children, there seems to be no just reason why it should not pass to them at his death; much less is there any just cause for suspecting the genuineness of a document constituting a *jaghir*, because it contains such words, as seems to have been done in the case above alluded to." We understand Mr. Neil Baillie as expressing in this passage a clear opinion that, although the etymology of the word *jaghir* has sometimes given rise to the idea that the term involves a taking of land, or an estate in land, and although a *jaghirdar* has been treated as having some of the powers of a land-holder, yet, in fact, the grant is nothing more than an assignment of land revenue. And the case of *The*

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East India Company v. *Syed Ali* (1) shows that it was upon this ground that the Madras Government justified the resumption of *jaghirs*, when it assumed the Government of the Carnatic in 1801. At p. 575 of the Report is the plea of the East India Company, that "even when the language of the grants might seem to convey a proprietary interest in the soil, the grantees confessedly possessed no such interest, the subject-matter of the grant being a mere *jaghir*, portion of public land revenue, together with the Government powers of collecting the same."

The authorities which we have quoted, (and none have been shown to us which support a different conclusion) may, we think, be taken as at least establishing that a grant in *jaghir* or *saranjam* is very rarely a grant of the soil, and that the burden of proving that it is in any particular case a grant of the soil lies very heavily upon the party alleging it. If it had not been that in the present case, in which there is no *sanad*, a Division Bench remanded the case for the taking of evidence, we should have been disposed to say that such a contention could not be made out by any evidence, except such a *sanad* as was produced [607] in *Ravji Narayen* v. *Dadaji Bapuji* already referred to. As, however, other evidence has, by the direction of this Court, been taken, we feel bound to consider it: but we have no difficulty in coming to the conclusion that it not only fails to discharge the plaintiffs from the burden which lies upon them, but that it supports the defendant's contention that the grant of the village of Bagni was nothing more than the grant of the land revenue. The evidence on the point is meagre, as was to be expected: but it shows that the *jamabandi* of the village is made by the Collector, and that the village officers are appointed and paid by the Government. It shows (Ex. 313) that, if dry-crop land was converted into garden land, and so became liable to a higher rate of assessment, the *saranjamdar* had to obtain the permission of the Mamlatdar to levy the increased assessment. There is nothing to show how the village was entered in the Government accounts previously to the year 1863-64, but the *tharavbund* for that year (Ex. No. 62) shows the village to be described as "*Khalsa Ryatava* land," *i.e.*, land cultivated by Government tenants, and it is stated that out of the assessment Rs. 6,847-9-0 is to be continued to the Inamdar. Further on, the amount (which is liable to deductions for certain payment) is stated as Rs. 7,902-9-0, "Purbhara Juma Khurch," *i.e.*, to be levied by the Inamdar without reference to Government. The *tharavbund* for 1872-73 (Ex. No. 336) shows that the village was ordered to be entered under the heading "Political," and the dumaldar's (or *saranjamdar's*) interest in it is stated as Rs. 6,610-9 0, payable in cash. Some stress was laid by the plaintiffs' counsel on the circumstance that in Colonel Etheridge's List of Saranjams "the entire village of Bagni" is entered under the heading "Description of Saranjam," while in many other cases the entries show merely a grant of the whole or part of certain '*Amuls*,' or items of revenue. We do not, however, think that this difference in the mode of description indicates an intention on the part of Colonel Etheridge to draw a distinction between the grant of the soil in one case and the grant of the revenue in another. Having regard to the general description of *saranjams*, which we have quoted from his Preface, it is very unlikely that he should, without any explanation, declare that in certain [608] cases there had been an exceptional grant of the soil of a village. If he did intend to make

(1) 7 M.I.A. 555.

such a declaration in the case of Bagni, we can only say that he appears to us to have had no sufficient grounds for so doing. It is not suggested that he had any materials in 1874 which are not before us now: and we are quite unable, on the evidence before us, to come to any other conclusion than that the plaintiffs have wholly failed to prove that the grant of the village of Bagni was anything more than a grant of the land revenue.

It follows that, in our opinion, the Pensions' Act is applicable; and as the plaintiffs have failed to produce a certificate from the Collector, their claim, so far as it relates to the village of Bagni, must be rejected.

Some argument has, indeed, been addressed to us, founded on the circumstance that certain lands in Bagni are described in the pleadings as "*sheri*" lands, which are explained to be lands which were unoccupied at the time of the grant, or in which tenant-rights have since lapsed. It was contended that the *saranjamdar* might deal with these lands as he pleased, and that, therefore, he is, as regards them, something more than an alienee of the land revenue. But we are unable to appreciate this argument. The *saranjamdar* may, of course, deal with all unoccupied lands as may be best for the purposes of revenue, and may either cultivate them himself or through tenants; but this is because he is entitled to realise as much revenue as he can, and as best he can, and not because he has a grant of the soil of unoccupied lands.

Our decision upon this preliminary point of the application of the Pensions' Act puts it out of our power to give any decision on the second question which we have mentioned as arising in regard to the village of Bagni, namely, whether the grant being one in *saranjam*, the plaintiffs would be entitled to claim a partition of the village. As, however, the case may go before a higher tribunal, it may not be out of place to offer a few remarks upon this question.

The history of the manner in which Deccan *saranjams* were dealt with by the Government of India and the East India [609] Company, when it succeeded to the Government of the Peishwa, is succinctly stated in Colonel Etheridge's Preface. The correspondence cited by him shows clearly enough that, when on the advice of Mr. Mountstuart Elphinstone, then Commissioner at Poona, it was determined that all *saranjams* granted prior to A.D. 1751 should be considered hereditary, this concession was made, not as of right, but as an act of grace and State policy, and the Government reserved to itself the power of determining, whenever occasion might arise, the nature and extent of its own bounty. This reservation of the power of Government has been recognised in all the legislation on the subject since Mr. Mountstuart Elphinstone, as Governor of Bombay, framed his Code of Regulations. Section 38 of Reg. XVII 1827 provides that "land held exempt as *jaghir* shall be liable to resumption and assessment under the general rules at the pleasure of Government." This is explained in cl. 3, s. I, Reg. VI of 1833, which says: "*Jaghir* or other lands held on service tenure are declared to be resumable at the pleasure of Government, under the forms laid down in Clause First, s. 38, Reg. XVII, A.D. 1827," it being understood that the expression used in the said clause, *viz.*, "under the general rules," meant "such rules as Government may think proper to issue from time to time." Act XI of 1852, after providing for rules for adjudicating upon titles to exemption from payment of land revenue, says (s. 10): "These rules shall not be necessarily applicable to *jaghirs*, *saranjams* or other tenures for service to Government, or tenures of a political nature the title and continuance of which shall be determined, as heretofore"

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under such rules as Government may find it necessary to issue form time to time." So, in Bombay Act II of 1863, which was an Act to facilitate the adjustment of unsettled claims, to exemption from the payment of Government land revenue in those parts of the Bombay Presidency which are subject to the operation of Act XI of 1852, s. 1, cl. 2, says: "The excepted cases, to which the authority of adjustment and guarantee vested in the Governor-in-Council by this provision shall not extend, are the cases of lands held as follows:—

1st. * * * * * * *

[610] 2nd. Lands granted or held as *jaghirs* or *saranjams* or on similar political tenure."

And then, lest any question should be raised (as was attempted to be raised in the argument in this case) whether the mere order of Government that land should be entered in the accounts under the heading "Political" is conclusive as to the political character of the grant, s. 16 of the Act goes on to say: "Political tenure is defined to be tenure created from, or dependent upon, political considerations, the existence of which shall be determined by the Government." So, in Bombay Act VII of 1863, which is a similar Act relating to districts not subject to the operation of Act XI of 1852, s. 2, cl. 2 provides that "lands granted or held as *saranjam*, or on similar political tenure, shall be resumble or continuable in such manner, and on such terms as Government, on political considerations, may from time to time see fit to determine;" and s. 32 contains a definition of the term "political tenure," similar to that which we have quoted from Bombay Act II of 1863. The Regulations and Acts which we have cited show beyond all question that it is for the Government to determine how *saranjams* are to be held and inherited, and that, if the Civil Courts had jurisdiction over claims relating to *saranjams*, they would be bound to determine such claims according to the rules laid down by the Government. It would, therefore, be useless to refer, as in this case we have been referred to evidence tending to show, that, under the Native Government, the ancestors of the parties dealt with their *saranjam* villages as if they were proprietors of the soil, and partitioned the villages among their families. The questions which the Courts would have to consider would simply be, what are the terms of the grant by which the British Government continued the *saranjam*? and what is the rule of succession laid down by the British Government for *saranjams* in general, or for this *saranjam* in particular?

In the case before us the *saranjam* was continued in the family of Venkatrav Bhaskar, the father and grandfather of the parties, by a Resolution of Government in the Political Department, No. 1819, dated 17th June, 1864; that Resolution is as follows:—

[611] "The Honourable the Governor-in-Council is of opinion that it has been satisfactorily shown that the village of Bagni was held as a personal *saranjam* by the family of Venkatrav Bhaskar for a century before the introduction of British rule. It should now be pronounced a *saranjam* of the first class, and be continued hereditarily to the representative of the first British grantee, Venkatrav Bhaskar."

Unless it were an accident (and in so important a document this is unlikely) that the singular word "representative," and not the plural, was used, the Resolution indicates that it was the intention of Government that the *saranjam* should descend always to the eldest member of the family for the time being, and should not be divided amongst all the representatives of the last incumbent. That this was the view

taken by the Revenue authorities in 1865 may be gathered from an order of the Revenue Commissioner, dated 13th September, 1865, of which we have allowed a certified copy to be put in in appeal. It appears to be an answer to a petition from Madhavrav, the second son of Venkatrav, and father of the present minor plaintiff Venkatrav. Venkatrav's eldest son, Narayanrav, had died during his father's life-time, and thereupon the *saranjam* had been continued to Narayanrav's son, the present defendant Ramchandrarav, and not to Venkatrav's eldest surviving son, Madhavrav. Madhavrav, having obtained a certificate of heirship or administration to Venkatrav (and no doubt he was properly recognized as having the best right to administer such portion of Venkatrav's estste as was governed by the ordinary rules of inheritance or survivorship) seems to have applied to have the *saranjam* continued to him as the senior representative. The reply of the Revenue Commissioner was as follows:—

"Madhavrav Venkatesh Muntri is informed, in reply to his petitions of the dates marginally noted, that the Alienation Settlement Officer, S.D., has reported that the village of Bagni was decided to be continuable, as a first class personal saranjam hereditarily, to the representative of the first British grantee Venkatrav; that on Venkatrav's death it was restored, in accordance with the saranjam rules, to Ramchandrarav, the eldest **[612]** surviving son of Venkatrav's eldest son; and that the certificate of heirship granted to the petitioner by the Judge of Poona cannot divert the succession of the holding, which is a political one, from the representative line. Under these circumstances, the Acting Revenue Commissioner, S.D., sees no reason to interfere with the order of the Collector of Satara, against which the petitioner complains.

From this document it would appear that, under "the Saranjam rules" an hereditary *saranjam* is considered by the Revenue authorities to descend entire to the eldest representative of the last holder, and that, if the eldest son pre-deceases his father, his son takes precedence of the next surviving son of the last holder. If this be the rule, the defendant's title in the present case is established. During the hearing of this appeal we caused a letter to be written to the Government, asking that we might be favoured with a copy of the Saranjam Rules; and, in reply, we have been informed that the only rules are those contained in the Preface to Colonel Etheridge's List of Saranjams, to which we have so repeatedly referred. As the Regulations and Acts which we have quoted contemplate that *jaghirs* and *saranjams* should be continuable under general rules to be issued from time to time by Government, it seems strange that no rules should be forthcoming, bearing the authorization of the signature of a Secretary to Government. We must, however, take it that Colonel Etheridge speaks under the authority of Government when he says, in the Preface to which we have been referred, that succession to *saranjam* is restricted to lineal male heirs in the order of primogeniture; and that the eldest son is the heir in the first instance. Colonel Etheridge says that in *saranjams* of the second class, if the eldest son of the first British grantee die before his father, but leave a son, that son, on his grandfather's death, is to be considered the second generation, and the whole *saranjam* will be continued to him. But, curiously enough, Colonel Etheridge does not say whether the same rule of succession would be applicable to hereditary *saranjams*; and on this point, therefore, we are left without any distinct rule. The rule to which the Revenue Commissioner referred

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in 1865, as giving to the son of a pre-deceased eldest son a preference, [613] over his uncle, is not forthcoming in the Secretariat; nor does Mr. Nairne in his Handbook mention any such rule, except that which we have already quoted from Colonel Etheridge's Preface, as applicable to *saranjams* of the second class. In the absence of a rule made by Government, the Courts would, if they had jurisdiction in the matter, be obliged to decide according to the ordinary rule of Hindu law applicable to impartible property; and although, as stated by Mr. Mayne in his work on Hindu Law (s. 461), there is rather a want of authority as to the rule to be adopted where an eldest son, who has never taken the estate, has died, leaving younger brothers, and also a son, yet the Courts would probably hold that the grandson took in preference to his deceased father's eldest surviving brother. In the present suit it is to be observed that the second plaintiff, Bhaskarrav, who is Venkatrav's only surviving son, does not claim the *saranjam*, to the exclusion of his nephews, as being himself the eldest representative, but joins with one nephew in claiming a partition from the other. It would, therefore, be a sufficient answer to the present suit for partition, if the Court were merely to say that a *saranjam* is impartible, and it would not be absolutely necessary to determine whether the defendant, Ramchandrarav, as the son of Venkatrav's eldest son, or the plaintiff Bhaskarrav, as Venkatrav's only surviving son, is entitled to be regarded as Venkatrav's representative.

As regards the question of the impartibility of a *saranjam*, the rule stated by Colonel Etheridge is in accordance with the orders conveyed in a despatch from the Court of Directors, No. 27, dated 12th December, 1855. In para. 20 of that despatch they say: "We agree with you that saranjams should not be sub-divided, but that the holders should be required to make a suitable provision for their younger brothers." A *jaghir*, to which service is attached, is certainly not divisible, but descends to the eldest son: *Hurlall Singh* v. *Jorasun Singh* (1), cited with approbation by Lord Kingsdown in 6 Moore's Indian Appeals, 125, and *Rajah Nilmoney Singh* v. *Bakranath Singh* decided by the Privy Council, 10th March, 1882. There is some evidence in the present case that the *saranjam* was originally given for the maintenance of a body [614] of horse, and was, therefore, in its inception a *jaghir* held for service. But independently of this, and of any Government rule, the same principle would probably be applied to all *saranjams* on the ground stated by Mr. Mayne (Hindu Law, s. 393), that an estate, which has been allotted by Government to a man of rank for the maintenance of his rank, is indivisible, as otherwise the purpose of the grant would be frustrated.

The claim of the plaintiffs, so far as it relates to the village of Bagni, being rejected, the remaining questions at issue between the parties are not of an important character.

The plaintiffs' right to a share in the lands mentioned in the plaint as situated in the village of Kameri in the Valva Taluka of the Satara District, does not appear to have been disputed, and the Subordinate Judge's award of this share must be confirmed.

As regards the lands in Pandharpur and Kochre, it is in evidence that these lands have never been divided, but that they are held jointly by the parties to the suit and other co-parceners. The income derived from Pandharpur is said to be devoted to religious purposes, while the

(1) 6 Calc. S. D. 169, 204.

rents and profits of the lands in Kochre are divided among the co-parceners. If the plaintiffs desire that these lands should be divided by metes and bounds, they must make all the co-parceners parties to their suit; but they are not entitled to a decree for partition in a suit so defectively constituted as the present. Nor can they recover anything from the defendant as mesne profits of the village of Kochre. It is not proved that the defendant has received any profits from that village, which should have been paid to the plaintiffs. On the contrary, as the Subordinate Judge observes, the evidence of witness No. 91, who was called for the plaintiffs, shows that the plaintiff Bhaskarrav and his deceased brother Madhavrav have received their share of the proceeds, though the accounts have not been made up for two or three years.

It is admitted that the house and other property at Poona, which is mentioned in the plaint, is in the possession of the plaintiffs. The defendant is entitled to a share in this property.

[615] We agree with the Subordinate Judge in holding that the plaintiffs have not proved that the defendant has any moveable property in which they are entitled to share. On the other hand, the defendant has endeavoured to show that there is a very large quantity of moveable property in the plaintiff's possession which ought to be brought into hotchpot. Although he raised an issue in regard to the existence of this property, the Subordinate Judge does not appear to have recorded any definite finding on the subject. The defendant relies chiefly upon a document, Ex. No. 232, which purports to be a testamentary disposition of his property made by Venkatrav shortly before his death. It enumerates all the estate belonging to Venkatrav, and distinguishes those portions of the moveable property which were at the time in the possession of Madhavrav, Bhaskarrav and Ramchandrarav, respectively. The defendant refers to this document as showing that, at the time of Venkatrav's death, Madhavrav and Bhaskarrav had a much larger share than he had of the family jewels and other valuables, and he argues that the plaintiffs are bound to account to him for his proper share of this property. We are not aware of any rule of evidence by virtue of which the statements contained in the document, Ex. No. 232, could, even if the document be genuine, be admitted as establishing the existence of property in the hands of the plaintiffs. But, in fact, the document was considered by the Subordinate Judge to be a forged document; and we see no sufficient reason for dissenting from his conclusion. The account given by the witnesses (Nos. 260, 262, 263 and 265) of the manner in which the document came into the hands of the defendant at a late period of the suit is very unsatisfactory; and, considering how much it was to the defendant's advantage that effect should be given to Venkatrav's will, it is almost incredible that for twelve years the witness No. 260, who was in the defendant's employ, should not even have informed his master of the existence of the will.

We have been referred to the evidence of a number of witnesses (Nos. 178,180,183,184,187 to 192 and 194) as showing that the plaintiffs have, at some time or other, been in possession of valuable ornaments and other moveable property. We have **[616]** carefully perused the depositions of these witnesses; but we find that they are of too vague a character to enable us to say with any certainty that the plaintiffs are, or have been, in possession of any particular articles which are liable to partition, or, if such articles exist, to determine their nature and value. It is clear that, until the present suit was brought, the defendant never

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thought of claiming a share in the moveable property in the hands of the plaintiffs; and it is not likely that he would have acquiesced, from Venkatrav's death in 1863 until this suit was brought in 1872, in such a very unequal apportionment of the family jewels, &c., as he now alleges to have been made. On the whole, therefore, we are of opinion that the Subordinate Judge properly declined to make a decree in regard to the moveable property in favour of either party.

We amend the decree of the Subordinate Judge, and direct that the defendant do deliver to the plaintiffs two-thirds of the property in the village of Kameri which is mentioned in the plaint, and that the plaintiffs do deliver to the defendant one-third of the house and other property at Poona mentioned in the plaint. The rest of the plaintiffs' claim is, for the reasons stated in this judgment, disallowed.

The plaintiffs must bear all costs throughout.

Decree varied.

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6 B. 616=7 Ind. Jur. 38

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Before Mr. Justice Kemball and Mr. Justice Pinhey.

BAPUJILAKSHMAN (*Original Plaintiff*), *Appellant* v. PANDURANG AND ANOTHER (*Original Defendants*), *Respondents.** [29th June, 1882.]

Hindu law—Inheritance—Divesting— Son of excluded person—Deaf and dumb from birth.

One Bapuji, a Hindu, died, leaving him surviving Lakshman, his undivided son, born deaf and dumb, and the defendant, Pandurang, his (Bapuji's) brother's son. Lakshman being disqualified from inheriting, the defendant, Pandurang, at Bapuji's death succeeded to the entire family estate, and subsequently sold a part of it. Lakshman subsequently married and had a son, the plaintiff, who sued to recover his half share in a certain village.

[617] *Held* that, according to Hindu law obtaining in Western India, the family estate vested in the defendant, Pandurang, at the death of Bapuji to the exclusion of his deaf and dumb son; and the subsequent birth of the plaintiff did not divest the defendant of the inheritance which had solely vested in him.

Kalidas Das and others v. *Krishna Chandra Das* (1) followed.

[F., 32 B. 455=10 Bom. L.R. 559]

THIS was a second appeal from the decision of C. E. G. Crawford, Assistant Judge of Thana, reversing the decree of the Subordinate Judge of Mahad.

The facts proved or admitted, in so far as they are material, are as follows:—

One Bapuji, the grandfather of the plaintiff, and his nephew, Pandurang, the defendant Ramchand's father, were members of an undivided family. Bapuji had a son named Lakshman, who was deaf and dumb from birth, and, therefore, according to Hindu law, disqualified from inheritance and entitled only to maintenance. Bapuji died, and Pandurang inherited the whole of the property, and his son sold some of it to his co-defendant. The disqualified son, Lakshman, subsequently married and had a son, the plaintiff, who brought this suit to recover his half

* Second Appeal No. 217 of 1881.

(1) 2 B.L.R.F.B. 103=11 W.R. Appeals from Orig. Jur. 11.

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share of the khoti village of Varangi in taluka Malad of the Thana District.

The defendant, Pandurang, did not appear to defend the suit. His vendee appeared and answered, among other things, that his vendor became sole owner of the family property at the death of the plaintiff's grandfather, Bapuji. The inheritance having then vested in his father, the subsequent birth of the plaintiff did not divest him of it. Pandurang, therefore, had full authority to sell. The Subordinate Judge awarded the plaintiff's claim. The Assistant Judge rejected it. The plaintiff appealed to the High Court.

Hon. *V. N. Mandlik*, for the appellant.—The Judge was not right in finding that the plaintiff was born after the death of his grandfather. [KEMBALL, J.—That is a finding of fact, and this Court is bound by it.] The defendant has admitted that the father of the plaintiff, although deaf and dumb, was in a position to effect partition, and did, in fact, effect partition, and he is estopped from saying otherwise. The defendant's father, **[618]** as manager and senior male member of the family, must have been instrumental in getting the plaintiff's father married, and he is, therefore, equally estopped from saying that the son born of the marriage should not inherit. Hindu law does not recognize the doctrine of vesting and divesting, and according to the doctrines prevalent in Western India, the plaintiff is entitled to succeed. The District Court has rested its decision upon the case of *Kalidas Das* v. *Krishna Chandra Das* (1); but this is a Bengal case, decided according to the doctrines of the Dayabhaga, the paramount authority on Hindu law in Bengal: (Burnell's Dayabhaga 13). The text of Manu, which excludes disqualified persons from inheritance, is as follows: "Eunuchs, and outcasts, persons born blind, or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage" (2). But the son of a disqualified person, if he be free from disqualifying defects, is capable of inheriting: (Vivad Chintamani by Prosonno Coomar Tagore, pp. 244, 245, 246 and 247). The power of the son, the grandson, and the great-grandson to claim division exists in the case of an undivided family, and it is only when the proper occasion arises for a division that a capacity is exercised: Vyavahar Mayukh, ch. 4, s. 1 (3). Yajnavalkya says: "An impotent person, an outcast and his issue; one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified) must be maintained, excluding them, however, from participation"(4). This passage must be construed to mean that the share of an excluded person will remain unallotted or held as it were in abeyance, and will not pass to the other heirs. There is no provision that the son who is to be capable of inheriting is to be born within the lifetime of the ancestor as heir of whom he will take. If the disqualification of the excluded person be removed even after partition, notwithstanding such partition, a share must be given to him: Vyavahar Mayukh, ch. iv, s. 9, para 2 (4). See also Mitakshara, ch. ii, s. 9, para. 9 (5). Narada also enjoins similarly **[619]** in favour of the inheritance of disqualified persons (6). See also West and Bühler, 2nd ed., pp. 71 and 272 (7); Macnaghten's Principles and

(1) 2 B.L.R. F.B. 103.
(2) Manu, ch. ix, v. 201.
(3) Stokes' H.L. Books, 42 *et seq.*
(4) Stokes' H.L. Books, 107.
(5) Stokes' H.L. Books, 110.
(6) Stokes' H.L. Books, 457.
(7) Morley's Digest, 1338.

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Precedents of Hindu Law (3rd ed.), page 130 (1). See also the judgment of Norman, J., in the Bengal case. The general rule is that a son, grandson, and a great-grandson succeed to the father, grandfather, and great-grandfather from the moment of birth, and, unless some exceptional rule excludes them, they must be held entitled to succeed. According to the doctrine of the Mitakshara, which is of paramount authority in Western India (except Gujarat), birth is the one thing which gives to the son, the grandson, and the great-grandson, his right to inherit. That is not so in Bengal, where a Hindu can do what he likes with his property. The Bengal case, therefore, is no authority in Bombay.

Ganesh Ramchandra Kirloskar as *amicus curiæ*, for the respondent.—The case of *Kalidas Das* v. *Krishna Chandra Das* and that of *Pareshmani Dasi* v. *Dinnath Das* (2) are conclusive on the question raised. The authorities which Sir Barnes Peacock cites in support of his decision in the former case apply to Bombay as well as Bengal. The Dayabhaga is undoubtedly of paramount authority in Bengal and the Mitakshara in Bombay; but on this point they both agree. It is a principle of universal law that the heir must be living (in the womb or otherwise) at the death of the propositus. According to Hindu law, heritage is defined to be wealth in which property dependent on relation to the propositus arises on his death. When inheritance descends from father to son or grandfather to grandson and so on, it is *apratibandh* or unobstructed. It extinguishes property in the last owner when his heir or heirs succeed: Mitakshara, ch. 1, s. 1 (3). There is a text of Gautama (4) which says: "An idiot and an eunuch must be supplied with food and raiment, but the offspring of an idiot may claim a share;" and the commentary upon it runs thus: "From the use of this term, *claim*, it must be understood as made evident, that, if he is the heir, on the death of the paternal grandfather, then only **[620]** shall he take a share." The great canon of succession which applies to others than sons, grandsons, and great-grandsons, illustrates and supports the proposition that the heir must be living at the time of the death of the person to whom the heir succeeds. The rules as to the succession of brothers (5) and of *bandhus* (6) also support it. The Hindu law does not, in so many words, recognize the doctrine of vesting and divesting, but some of its rules undoubtedly tacitly recognize it. For instance, the rule propounded by Manu, that a son, born after a division, shall alone take the paternal wealth (7) and the rules which follow it (5). There is also the case of the adulterous woman. Adultery is a disqualifying defect, but when an inheritance is once vested in a woman, her subsequent adultery does not divest her of it (8). Lastly, there is the case of an adoption. The result of the authorities would, therefore, seem to be that if this incapable son should have a son born afterwards, that son, if capable, would stand in his father's place, and inherit that property which his father would have inherited, if capable, if the son be in existence at the time of his grandfather's death, and not otherwise.

JUDGMENT.

KEMBALL, J.—The case before us may be shortly stated as follows:—

Pandurang Dadaji, the father of defendant No. 2, and one Bapuji were the joint proprietors of a family estate. Bapuji died, leaving him

(1) 2 Colebrooke's H. L., 425.
(2) 1 B.L R.A.C. 117.
(3) Stokes' H.L. Books, 364 and 365.
(4) 2 Colebrooke's H. L. 439.
(5) Stokes' H. L. Books, 445.
(6) Stokes' H. L. Books, 449.
(7) Stokes' H. L. Books, 394.
(8) West and Bühler, pp. 49 and 282.

surviving, one son Lakshman, born deaf and dumb, and his co-parcener Pandurang aforesaid; and some time subsequent to Bapuji's death, Lakshman, had a son, the minor plaintiff, who was born without any disqualifying defects.

This suit was brought on the plaintiff's behalf to recover, in right of inheritance, certain of the admittedly ancestral property, and the Assistant Judge, upon the facts above stated, which we must take as conclusively proved, held, on the authority of *Kalidas Das and others* v. *Krishna Chandra Das* (1) decided by the Full Bench of the Bengal High Court, that, on the death of Bapuji, Pandurang became absolute owner of the family estate, **[621]** Lakshman being excluded by Hindu law from inheriting, and that the property having once vested in Pandurang could not be divested in favour of the son subsequently born to Lakshman.

It is not pretended that the plaintiff was begotten and in the womb at the time of his grandfather's death, and it is, moreover, admitted in argument to be settled law in this Presidency that a congenital defect, such as Lakshman's, excludes from inheritance, and that the son of an excluded person, if free from disqualifying defects himself, is entitled under ordinary circumstances to inherit. The case, however, attempted to be made in appeal is that the Full Bench decision relied on by the Assistant Judge, though containing good law as regards Bengal, is opposed to the Hindu law as administered on this side of India, and in the course of the argument various texts were cited from the Hindu law books, some of authority here and others applicable to Bengal alone. Admittedly not one of the books referred to lays down anything with respect to the rights of inheritance of after-born qualified sons of excluded persons where an estate has already vested in a member of the family by right of survivorship, and the argument which the learned pleader for the appellant wished to found on one text relating to the rights of faultless sons of disqualified persons born after partition (the only case cited in which any analogy was possible) was pressed upon the Bengal Full Bench, and was fully considered and disposed of upon authorities clearly applicable to this side of India. A rule, according to the view of Vidnyanesvaracharya "ought to be restricted (in its effects) by virtue of a text only that admits of no other explanation (*i.e.*, no explanation that brings it into harmony with the first)."—*Vide* West and Bühler, p. 517, para. 23. We think that the judgment of the learned Chief Justice of Bengal proceeds upon principles common alike to this Presidency and to Bengal. We must take it that, on the death of plaintiff's grandfather, Pandurang became sole proprietor, and that the estate of Pandurang having once vested in possession could not be defeated and divested by the subsequent birth of plaintiff, and holding as we do that the law in these respects is the same here as in Bengal, we shall follow the rulings of the Bengal High Court. We say rulings, as prior to the Full Bench **[622]** ruling there had been a similar decision by a Division Bench, *Pareshmani Das* v. *Dinanath Das* (2), though the judgment was exceedingly short.

We are indebted to Mr. Kirloskar, who obligingly argued the case for the respondent who was not represented here.

We affirm the decree of the lower Court.

Decree affirmed.

(1) 2 B.L.R.F.B. Rul. 103.

(2) 1 B.L.R.A.C. 117.

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Before Mr. Justice Kemball and Mr. Justice Pinhey.

EMPRESS *v.* MAGANLAL.* [29th June, 1882.]

Jurisdiction—Offence in foreign territory—Extradition—Acts XXI of 1879 *and XI of* 1872*—Native Indian subject.*

A Native Indian subject of Her Majesty committed an offence (*viz.*, theft in a dwelling-house) in the territory of a Native State in alliance with Her Majesty, and was discovered in the territory of another Native State in alliance with Her Majesty, and from there brought down or came of his own accord to Ahmedabad. A certificate was granted by the Political Agent that the offence ought, in his opinion, to be inquired into in British India. At Ahmedabad a preliminary inquiry was held by a Magistrate, who committed the accused for trial by the Court of Session.

Held that the Session Court at Ahmedabad was competent to try the offence committed in foreign territory as if it had been committed in the Ahmedabad District under s. 9 of the Foreign Jurisdiction and Extradition Act XXI of 1879, for when the accused was brought from foreign territory to Ahmedabad, he was "found" at a place in British India within the meaning of the section. The expression "was found" used in this section must be taken to mean not where a person is discovered, but where he is actually present.

[F., 13 B. 147 (149); R., 35 B. 225=13 Bom. L.R. 296=12 Cr. L.J. 356=10 Ind. Cas. 956; 12 Cr. L.J. 113=9 Ind. Cas. 677=1 P.R. 1911 (Cr.)=84 P.L.R. 1911=4 P.W.R. 1911 (Cr).]

THIS was an appeal against a sentence modified, under s. 18 of the Code of Criminal Procedure (X of 1872), by S. H. Phillpotts, Sessions Judge of Ahmedabad.

The accused Maganlal was arrested without warrant by a member of the Ahmedabad District Police at the village of Kharedi, in the Native State of Sirohi, Rajputana Agency, on a **[623]** charge of criminal breach of trust in respect of six currency notes of Rs. 1,000 each. He was brought down to Ahmedabad in custody, and placed before a Magistrate, First Class. The Political Agent, Rajputana, under s. 9 of the Foreign Jurisdiction and Extradition Act, 1879, granted a certificate for the trial of the accused in British India. Another Magistrate of the First Class at Ahmedabad thereupon made a preliminary inquiry, and committed the accused to the Court of Session for trial on a charge of the theft of the six notes from the possession of one Devidatt from a house at Sambhar in the territory of the Prince of Jodhpur, who as well as the Prince of Sirohi are in alliance with Her Imperial Majesty. The trial was by Mr. Unwin, Assistant Session Judge. The prosecution adduced evidence to show that the accused was a native Indian subject of Her Majesty, and an inhabitant of Ahmedabad. That he stole the notes at Sambhar, and going to Bombay, exchanged three of these notes there. It was contended on behalf of the accused that, though his father was an inhabitant of Ahmedabad, where he himself was born, he was a resident of the Native State of Palanpur; that his arrest at Kharedi, in Sirohi State, was illegal; and that the Ahmedabad Courts had no jurisdiction to try him. The Assistant Judge held that the accused was an inhabitant of Ahmedabad, and was subject to the jurisdiction of the Courts there, and finding the evidence established the charge preferred, convicted him of it, and sentenced him to undergo rigorous imprisonment

* Appeal No. 78 of 1882.

for five years, and to pay a fine of Rs. 6,500, or, in default, to suffer further rigorous imprisonment for six months. He also directed that out of the fine, if paid or recovered, Rs. 6,000 should be paid to the complainant Devidatt. The sentence was passed subject to the confirmation of the Session Judge.

Before the Session Judge it was again contended, amongst other things, that the trial was without jurisdiction, and the contention was allowed. Mr. Phillpotts held that the accused was "found," not at Ahmedabad, but at Kharedi, in foreign territory, within the meaning of s. 9 of Act XXI of 1879. He, however, agreed with the Assistant Judge in holding that the accused was a native Indian subject of Her Majesty, and, **[624]** finding on the evidence that the accused assisted in disposing of the stolen notes at Bombay, convicted him, under s. 414, Indian Penal Code, and reduced the sentence of imprisonment to three years, leaving the rest of the sentence untouched.

The accused appealed to the High Court.

Branson, with him *Jefferson*, *Bhaishankar* and *Dinshah*, for the appellant.—The Ahmedabad Courts had no jurisdiction. There is a marked difference in the wording of the Extradition Acts of 1872 and 1879. Section 9 of Act XI of 1872 runs thus: "All British subjects, European and Native, in British India may be dealt with, in respect of offences committed in any Native State, as if such offences had been committed in any place within British India in which any such subject may be or may be found." In re-enacting this provision in s. 9 of Act XXI of 1879 the Legislature intentionaliy dropped the words "may be," and retained only the words "may be found." The former expression implies presence; the latter discovery. So that, although the older Act authorized the trial of a person if he was present at a place in British India, or if he was discovered there, the more recent Act limited the authority to the latter circumstance only.

[KEMBALL, J.—The two expressions would seem to have the same meaning and the Legislature dropped one of them to avoid tautology.] Grammatically the expressions bear a different meaning, although it must be admitted that the construction suggested by the Court has been placed in England in the case of *Queen* v. *Lopes* (1). The conviction there was, no doubt, on an Act similarly worded; but here the Legislature purposely changed the language of the Act. Then, we submit, it is not proved that accused is a native Indian Subject. The evidence is defective on that point, and is insufficient to establish the guilt of the accused. The mere fact that he was born in Ahmedabad is not sufficient to make him such. He has been carrying on trade in Palanpur, a foreign State.

Nanabhai Haridas, Government Pleader, for the Crown, was called upon to reply on certain points in the evidence.

JUDGMENT.

[625] KEMBALL, J.—The appellant in this case was tried before the Assistant Sessions Judge of Ahmedabad and convicted on a charge of theft in a dwelling-house situated in Rajputana, and was sentenced to five years' rigorous imprisonment and a fine of Rs. 6,500, or, in default, six months' further rigorous imprisonment. On the proceedings going up

(1) 27 L.J. 48.

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for confirmation of the sentence, the Sessions Judge held that the prisoner could not be tried for an offence committed in foreign territory, because he was found, not in Ahmedabad, but in the Sirohi Territory, whence he was brought by certain police officers to Ahmedabad; but he altered the conviction to one of aiding in the disposal of stolen property, knowing it to be stolen, and he altered the sentence to one of three years' rigorous imprisonment, leaving the sentence of fine and alternative imprisonment untouched.

In the course of argument the question of the jurisdiction of the Assistant Sessions Judge to try the appellant for an offence committed in foreign territory has been again raised both on the above ground and on the ground that he, the appellant, was not a native Indian subject of Her Majesty.

With regard to the first question, we are unable to concur in the view taken by the Sessions Judge.

Mr. Branson at once very candidly and properly admitted that there was an English case, *Queen* v. *Lopes*, directly opposed to the Judge's decision, but he contended that the cases were distinguishable; he based his contention on the circumstance that in the Extradition Act, XXI of 1879, s. 9, the words "may be or," which appeared in the corresponding section of Act XI of 1872 before the words "may be found," had been omitted, and argued from the omission the intention of the Legislature to limit the jurisdiction with the view to prevent illegal arrests. But, looking to the purpose of these Acts and to the fact that the words "may be," "may be found" really mean one and the same thing, we think the alteration in the more recent Act was merely to avoid redundancy, and the expression "found" used in it must be taken to mean, not where a person is discovered, but where he is actually present.

With regard to the second objection, it has been contended that the *onus* was on the Crown to show that the appellant was **[626]** a subject of Her Majesty, and that no evidence had been offered on the point. But in the first place, when called upon to plead to the charge, the appellant took no objection to the jurisdiction, the question having been raised for him for the first time in arguing the case; and, secondly, assuming that the question had been properly raised, we think, looking to the evidence that Ahmedabad was the home of his parents, that he himself was born and educated there, and that he only went 1½ years ago to Kharedi in Rajputana for purpose of trade, living, during that time, sometimes in Ahmedabad and sometimes in Kharedi; that there was a legal presumption in favour of appellant being a native Indian subject of Her Majesty, and, therefore, amenable to the jurisdiction of the Court of Ahmedabad, where he was found.

6 B. 626.

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6 B. 626.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

RAMCHANDRA GANESH (*Applicant*) *v.* DEVBA AND OTHERS (*Opponents*).* [4th July, 1882.]

Limitation—Part payment—Execution sale—Act XV of 1877, *s.* 20.

A sum realized by an execution sale cannot be considered part payment within the meaning of s. 20 of the Limitation Act, XV of 1877, so as to give a new period of limitation.

THIS was an application for the exercise of the High Court's extraordinary jurisdiction against the decree made by A. M. Cantem, Subordinate Judge of the First Class at Belgaum.

The suit was brought in 1880 on a registered bond bearing date the 27th of June, 1861, to recover a money claim of Rs. 232-4. The principal debt was secured on service land. it being agreed that the debtors were to retain possession of the said land, and to pay the rent annually to the creditor in lieu of interest. But the creditor being unable either to obtain punctual payment of the rent, or to get possession of the land instituted the present proceedings for the recovery of the principal money **[627]** together with arrears of unpaid interest. The first issue in the case was "Is the claim time-barred," and upon this the Subordinate Judge passed the following judgment:—"It is contended that a decree was obtained by the plaintiff against one of the defendants for rent of the land mortgaged by the bond and the amount recovered through the Court in 1879, and that, therefore, the claim is not time-barred. But such payments do not give a new period of limitation: *Rughoo Nath Doss Cookman* v. *Ranee Shiromenee Pat Mahadabee* (1). The claim is, therefore, barred, and is rejected with costs." The suit being of a nature cognizable by the Court of Small Causes, there is no appeal against this decision, and the plaintiff, therefore, applied to the High Court to exercise its extraordinary jurisdiction.

Ghanasham Nilkanth Nadkarni, for the applicant.—There was an acknowledgment of his debt by the defendant in 1876, and this suit having been brought within six years of the acknowledgment, the claim was not time-barred. The plaintiff had recovered judgment for certain arrears of rent—in other words, of interest—in a suit filed by him, and in execution of his decree had received payment in 1879.

The Court granted a rule *nisi*.

Ganesh Ramchandra Kirloskar, for the defendants, showed cause.—The decision cited by the Subordinate Judge is right, and should not be disturbed. The case quoted by him is sufficient authority for the proposition that a sum realized in execution of a decree cannot he considered as part payment, so as to give a new period of limitation. The payment to the Nazir of the Court in satisfaction of the judgment debt is not a payment to the creditor of interest as such: *W. Moran* v. *Dewan Ali Sirang* (2). An acknowledgment must contain an express or implied promise to pay: *Smith* v. *Thorne* (3). Payment of interest under a judgment recovered not being such that promise to pay the principal could be inferred in fact

* Application No. 142 of 1881 under Extraordinary Jurisdiction.

(1) 24 W.R. C.R. 20. (2) 8 B.L.R. 418. (3) 18 Q.B. 134.

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from it is not sufficient to take the principal debt out of the statute of limitations: *Morgan* v. *Rowlands* (1). The principle underlying all the statutes of [628] limitation is that a payment to prevent the barring by statute must be an acknowledgment by the person making the payment of his liability and an admission of the title of the person to whom the payment is made: see *Harlock* v. *Ashberry* (2).

Ghanasham Nilkanth Nadkarni, contra.

JUDGMENT.

The Court discharged the rule with costs.

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6 B. 628.

ORIGINAL CIVIL.

Before Mr. Justice Latham.

MERWANJI HORMUSJI (*Plaintiff*) *v.* RUSTOMJI BURJORJI AND NUSSERWANJI ARDESIR WADIA (*Defendants*).*

[1st, 2nd and 3rd May, 1882.]

Partnership—Limitation—Suit by representative of a deceased partner for a share of a specific asset of the partnership recovered after the right to a general partnership account is barred.

A suit may be brought by the representative of a deceased partner against the surviving partner of a firm to recover a share in a sum received by the surviving partner in respect of a partnership transaction within the period of limitation, although a suit to take partnership accounts generally would be barred.

H. J., the plaintiff's father, and the defendant R. were partners in the firm of Hormusji and Rustomji, which carried on business in China. In the year 1862 the firm of N. K. & Co. was largely indebted to the firm of Hormusji and Rustomji. At the end of that year the latter firm ceased to do business, but no formal dissolution of the partnership ever took place. In 1869 the defendant R. filed a suit (No. 461 of 1869) in the High Court of Bombay in his own name and that of H. J., his former partner, against the firm of N.K. & Co., for an account of the dealings of that firm with the firm of Hormusji and Rustomji, and by a decretal order, dated 19th March, 1870, the suit was referred to the Commissioner to take the accounts as prayed for. On the 17th December, 1872, H. J. died at Hongkong intestate. On 22nd February, 1873, the defendant R. assigned to the second defendant W. for Rs. 20,000 the claim of the firm of Hormusji and Rustomji against the firm of N. K. & Co. The plaintiff did not know of this arrangement, and he only became aware of it in 1880. The plaintiff alleged that of the said sum of Rs. 20,000 the second defendant W. paid to the first defendant R. Rs. 10,000 in 1878, and for the remaining Rs. 10,000 gave a promissory note payable in July or August, 1881. The plaintiff took out letters of administration to his father H. J., and brought this suit on 16th July, 1880, claiming a moiety of the Rs. 10,000 already paid by the defendant W. to the first defendant R. [629] and praying that he might be declared entitled to a moiety of the remaining sum of Rs. 10,000 payable by the defendant W., and that the same might be paid over to him.

The defendant R. alleged that he had assigned the claim against the firm of N. K. & Co. to the defendant W., and had received the consideration for such assignment in February, 1873, and contended that if the plaintiff had ever any claim to any portion of the said money (which he denied), such claim was barred by limitation. He also alleged that he had carried on the suit No. 461 of 1869, without any assistance from the plaintiff's father H. J., or from the plaintiff, who,

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* Suit No. 344 of 1880.

(1) L.R. 7 Q.B. 493.

(2) 19 L.R. Ch. Div. 539, reversing Fry, J.'s, judgment in 18 Ch. D. 229.

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although applied to, refused to assist him, and he submitted that under no circumstances was the plaintiff entitled to any of the monies claimed by him without giving credit to the defendant for his (plaintiff's) share of the expense of prosecuting the said suit and for the amount of proper remuneration to the defendant for the time and labour bestowed by him in the said suit. He also claimed that the partnership accounts of the firm of Hormusji and Rustomji should be taken, and alleged that on such accounts being taken a large sum would be found due to him from the partnership. The second defendant W. paid into Court the Rs. 10,000 due on the promissory note above mentioned, and was dismissed from the suit. At the hearing the Judge found that, of the other moiety of the consideration for the assignment of February, 1873, a sum of Rs. 1,000 was paid by the defendant W, to the defendant R. in January 23, 1878, and a sum of Rs. 6,000 on September 13, 1879.

Held that the suit was not barred by limitation in respect of the said sums of Rs. 1,000, Rs. 6,000, and Rs. 10,000, and that the plaintiff was entitled to recover a half share of these sums from the defendant R., deducting all sums expended by the defendant in the prosecution of the suit No. 461 of 1869, no allowance, however, being made to him as remuneration for conducting the suit.

Held, also, that the defendant might deduct the amount (if any) which might be found due to him on taking the partnership accounts, although a separate suit for such account would be barred by limitation.

[**F.**, 28 M. 344 ; **R.**, 26 C. 254=3 C.W.N. 299 ; 34 M. 112=7 Ind. Cas. 811=20 M.L.J. 987=8 M.L.T. 231=(1910) M.W.N. 446 ; 8 Ind. Cas. 999 (1013)=97 P.R. 1910 =142 P.W.R 1910 ; **D.**, 34 B. 515=11 Bom. L.R. 1354=4 Ind. Cas. 837.]

IN this case the plaintiff, who was the son of a deceased partner of the firm of Hormusji and Rustomji, alleged to have been dissolved in 1862, sued to recover from the first defendant, as surviving partner, a half share of a sum of money paid by the second defendant to the first defendant in 1873 as the purchase-money of a claim which the firm of Hormusji and Rustomji had against the firm of Nursey Kessowji and Company.

The plaint alleged that, prior to the year 1862, Hormusji Jiwanji, the father of the plaintiff, had been in partnership with the first defendant and had carried on business at Hongkong and at Macao in China under the firm of Hormusji and Rustomji as merchants, brokers and commission agents as partners with equal shares. About the end of the year 1862 the first defendant **[630]** was tried in China on a criminal charge, and was convicted and sentenced to eight years' imprisonment. The plaintiff stated that he believed that after that time the firm carried on no fresh business, but that no formal dissolution of the partnership ever took place.

Prior to the events above stated, the firm had had dealings with Nursey Kessowji and Company, and in respect of those dealings Nursey Kessowji and Company was largely indebted to the firm.

In the year 1869 the first defendant, a part of whose sentence had been remitted, filed a suit (No. 461 of 1869) in the High Court of Bombay in his own name and that of his partner (the plaintiff's father), Hormusji Jiwanji, against the firm of Nursey Kessowji and Company, praying for an account of the dealings between the said firm and the firm of Hormusji and Rustomji. By a decretal order, dated 19th March, 1870, the said suit was referred to the Commissioner to take the accounts as prayed for.

The plaintiff's father, Hormusji Jiwanji, died at Hongkong on the 17th December, 1872, intestate.

On 22nd February, 1873, the first defendant assigned to the second defendant, Nusserwanji Ardesir Wadia, for the sum of Rs. 20,000 (together with certain other claims of the firm) the claim of the said firm of Hormusji and Rustomji against the firm of Nursey Kessowji and Company. The said assignment was made without the knowledge of the

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plaintiff, who only became aware of it early in 1880. The plaint further alleged that of the said sum of Rs. 20,000, the said Nusserwanji Ardesir Wadia paid Rs. 10,000 to the first defendant in 1878, and that for the remaining Rs. 10,000 a promissory note was given to the first defendant payable in the month of July or August 1880.

The plaintiff took out letters of administration to his father, Hormusji Jiwanji, in July 1880, and then brought this suit, which was filed on the 16th July, 1880, claiming a moiety of the sum of Rs. 10,000 already paid by Nusserwanji Ardesir Wadia to the first defendant, and praying that he might be declared entitled to a moiety of the remaining sum of Rs. 10,000 **[631]** payable by Nusserwanji Ardesir Wadia, and that the same should be paid over to him.

In his written statement the first defendant denied that he had assigned to the second defendant the claim of the firm of Hormusji and Rustomji against the firm of Nursey Kessowji and Company, but admitted that he had assigned *his own claim* against the said firm to the second defendant, and he alleged that he had received the consideration for such assignment in February, 1873, and submitted that if the plaintiff ever had any claim to any portion of the said monies (which he denied) such claim was barred by limitation. He further stated that he had received from the second defendant a sum of Rs. 6,000 (not Rs. 10,000) and a promissory note for Rs. 10,000.

The concluding paragraphs of the first defendant's written statement were as follows:—

6. "This defendant (without prejudice to the defences hereinbefore raised) says that he filed the said suit No. 461 of 1869 without any assistance, pecuniary or otherwise, from the plaintiff's father or the plaintiff himself, and this defendant thereafter at great labour and expense to himself and without receiving any assistance, pecuniary or otherwise, from the plaintiff's father or the plaintiff prosecuted the said suit until the date of the assignment hereinbefore mentioned to the second defendant. This defendant was obliged to assign his interest in the said suit in consequence of his being without any means to prosecute the said suit, this defendant having had to pay large sums for his solicitors' and counsel's costs in the said suit. The plaintiff, although frequently applied to by this defendant, always refused to assist this defendant by contributing monies towards the expenses of the said suit, or by helping this defendant to raise money from others. The plaintiff, who is a lawyer's managing clerk, also declined to give any personal help or advice to this defendant in and about the said suit. This defendant submits that under no circumstances is the plaintiff entitled to any of the monies claimed by him without giving credit to the defendant for the plaintiff's share of the expenses of prosecuting the said suit and for the amount of proper remuneration to this defendant **[632]** for the time and labour bestowed by this defendant on the said suit. This defendant will, if necessary, seek to set off the said amounts, and will also, if necessary, ask to have all necessary accounts taken and directions given. This defendant will also contend (as the fact is) that the plaintiff has abandoned all interest or claim in the said suit.

7. "This defendant says that, when he was convicted and sentenced as alleged in the plaint, the plaintiff's father took possession of all the property, assets, books, &c., of the said firm of Hormusji and Rustomji, and appropriated the same to his own use, and neither the plaintiff's father nor the plaintiff have ever accounted to this defendant for the said partnership

property or proceeds thereof, nor have the partnership accounts ever been adjusted. This defendant says that, on the accounts being taken, a large sum will be found due to this defendant from the said partnership, and this defendant will contend that under no circumstances is the plaintiff entitled to anything except to have credit in the said account given to him for his share (supposing him to have any) of the monies claimed in this suit.

8. " The share of this defendant in the said partnership was twelve annas, and of the plaintiff's father four annas in the rupee."

The second defendant filed a written statement in which he alleged that the assignment to him of the 22nd February, 1873, was an assignment of the whole claim of the firm of Hormusji and Rustomji against Nursey Kessowji and Company, and not merely an assignment of the first defendant's share therein. The second defendant subsequently paid into Court Rs. 10,000 due on the promissory note above mentioned, and by an order of the Court dated 22nd March, 1882, he was dismissed from the suit.

At the hearing the following issues were raised :—

1. Whether the plaintiff's claim was not barred by limitation ?

2. Whether the plaintiff had not abandoned all interests in and claims to the monies which formed the subject-matter of the suit No. 461 of 1869 and of the assignment of 23rd February, 1873 ?

[633] 3. Whether the first defendant received from the second defendant any and what sum over and above the Rs. 6,000 admitted in his written statement ?

4. Whether the plaintiff was entitled to any and what share in the sums received by the first defendant, and paid into Court in respect of the said assignment ?

5. Whether the first defendant was not entitled to credit for the sums of money expended by him in and about the prosecution of suit No. 469 of 1869, and for remuneration to him for the time and labour expended by him in prosecuting the said suit ?

6. Whether the defendant was not entitled to have the partnership account of the firm of Hormusji and Rustomji taken under the direction of the Court ?

Starling (*Lang* with him) relied on *Knox* v. *Gye* (1) as showing that the plaintiff's claim was not barred by limitation.

Branson (*Inverarity* with him), for the first defendant.—If this suit were brought against the firm it is improperly framed, for it is brought for a share in a specific transaction without claiming a general account : *Dayal Jairaj* v. *Khatav Ladha* (2). The fact that the plaintiff is not a partner, but the representative of a deceased partner, makes no difference. This case also shows that, if plaintiff gets a decree, the defendant is entitled to have the whole of the partnership account taken.

Even assuming that *Knox* v. *Gye* (1) and *Dayal Jairaj* v. *Khatav Ladha* (2) recognize the right of the representative of a deceased partner to sue the surviving partner for a share of a specific asset recovered, although the right to a general partnership account is barred, yet that right (if the plaintiff ever had it) is now barred, as his suit must be for money had and received to his use. The money for the assignment was paid by the second defendant to the first defendant in 1873 : Limitation Act XV of 1877, sch. II, cl, 62. The ignorance of the plaintiff, that the money had been paid, would not in the absence of fraud prevent limitation

(1) L.R. 5 Eng. & Ir. Ap. 656.

(2) 12 B.H.C.R. 97.

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from running : *Azroal Singh* v. *Lalla* **[634]** *Gopeenath* (1). The only way in which plaintiff can evade limitation is by alleging a fiduciary relationship on the part of the first defendant, but *Knox* v. *Gye* (2) is against this contention. There would, moreover, have to be an express trust for a specific purpose under the Limitation Act XV of 1877, s. 10: *Kherodemoney* v. *Doorgamoney* (3); *Greender Chunder Ghose* v. *Mackintosh* (4); *Saroda Pershad* v. *Brojo Nath* (5).

We contend that *Dayal Jairaj's* (6) case is distinguishable from this. The Limitation Act does not apply to a defendant who sets up his right to an account, but only to the case of a plaintiff. A plaintiff who has neglected to sue within the time allowed cannot by that neglect prevent a defendant in his defence from claiming to have the accounts taken. If this were so, a plaintiff would be permitted to take advantage of his own laches.

JUDGMENT.

LATHAM, J.—The first defendant and Hormusji Jiwaji Motha, the father of the plaintiff, about 1859, were partners in business carried on at Hongkong and Macao under the name of Hormusji and Rustomji. The business of that firm continued until 1862, when the defendant was convicted by the Criminal Court of Hongkong, apparently on a charge of theft, but the conviction is not in evidence. No business seems to have been done by the firm after this, but the partnership was not formally dissolved. The defendant was discharged from custody, and came to Bombay about 1868, and in 1869 filed a suit (No. 461 of 1869) in the name of himself and his co-partner Hormusji against Kessowji Naik and another to recover monies alleged to be due by the firm of Nursey Kessowji and Company to the Hongkong firm. A decree referring that suit to the Commissioner was made on March 19, 1870. The suit is still pending in the Commissioner's office, and the proceedings in that office have been the subject of appeal to this Court. Hormusji died towards the end of 1872, and on the 22nd of February, 1873, the defendant, the surviving partner and plaintiff in that suit assigned his claims against Nursey Kessowji and Co. as well as those against other specified persons to Nusserwanji Ardesir Wadia for the consideration of Rs. 20,000. The present **[635]** suit is brought by the plaintiff as administrator of his father Hormusji to recover a half share of the sum of Rs. 20,000, or of the monies paid under the assignment.

The partnership between the first defendant and Hormusji was dissolved at latest by the latter's death in 1872, and any suit to take the accounts and obtain a share of the profits of that partnership is long since barred: Limitation Act XV of 1877, sch. II, art. 106. The plaintiff, however, contends that he is entitled to a share of the monies paid under the assignment of 1872, and that a suit in respect of these particular monies is not barred, although a suit to take the general accounts of the partnership would be so. In support of the contention he relies on *Knox* v. *Gye* (2).

I think that the opinions of the majority of the Law Lords in that case do establish that a suit may be brought by the representative of a deceased partner against the surviving partner to recover a share in a sum

(1) 8 W.R. C.R. 23.
(2) L.R. 5 Eng. & Ir. Ap. 656.
(3) 4 C. 455.
(4) 4 C. 897.
(5) 5 C. 910.
(6) 12 B.H.C.R. 97.

received by the surviving partner in respect of partnership transactions within the period of limitation, although a suit to take the partnership accounts generally would be barred. Such is the interpretation put on the case by Green, J., in his judgment in *Dayal Jairaj* v. *Khatav Ladha* (1). (His Lordship read portion of the judgment of Green, J. See 12 Bom. H.C. Rep., pp. 107—111).

In that case Green, J,, extended the principle of those opinions to the case of a suit for contribution to a partnership debt paid by one partner within the period of limitation, and allowed a surviving partner to sue as plaintiff. That decision was overruled on a minor point as to the effect of the Limitation Act of 1871 in *Abdul Karim* v. *Manji Hansraj* (2), but the principles laid down on the point now at issue are not affected by the later case. I think that Lord Westbury would probably have dissented from this view (3), and it was he who moved the judgment of the House in *Knox* v. *Gye*: nevertheless the opinions of majority of the Law Lords appear clearly to be the other way.

[636] It seems strange that no relief was given to the plaintiff in that suit in respect of the sum of Rs. 2,500 by the receipt of which these opinions were suggested. I can only suppose that the pleadings in that case must have accounted for this, but the report does not enable me to find a satisfactory explanation.

The main question, therefore, is, was the amount received by the defendant under the assignment of February 22, 1873, or any and what part thereof, received at such a time or times that the present suit in respect thereof instituted on July 23, 1880, is not barred by limitation? It is admitted by Mr. Starling that his client cannot claim the benefit of s. 10 of the Limitation Act XV of 1877, and I think that the admission is clearly right. But he claims the benefit of s. 18 of that Act, on the ground that the plaintiff has by the first defendant's fraud been kept from the knowledge of his right. I cannot accede to this argument. I see nothing in plaintiff's evidence to show misrepresentation by the defendant. I am not going to attempt to define what fraud would suffice to satisfy that section, nor do I say that there may not be silence under such circumstances as itself to be fraud within this meaning; but I see none such here. Moreover, diligence is required of a plaintiff who claims the benefit of that provision: *Willis* v. *Lord Howe* (4); and when I find the plaintiff, a solicitor's clerk, professing ignorance of the assignment till nearly three years after it was filed in the Commissioner's office, I cannot credit him with diligence.

The real point, then, is what was the date on which the consideration for the assignment was received? The first defendant alleges that the consideration of Rs. 20,000, mentioned in the assignment of February 22, 1873, was paid on that date in the presence of the late Mr. Arthur Peile, who attested the receipt for that sum indorsed on the deed of assignment. He says that a few days later, he deposited Rs. 19,000 out of the Rs.20,000 with Nusserwanji Ardesir Wadia, and that he subsequently brought suit No. 506 of 1878 against Nusserwanji Ardesir Wadia to recover the balance of that deposit after deducting some trifling payments. It was to settle that suit **[637]** that Wadia on September 13, 1879, paid defendant Rs.6,000, and gave him the promissory note for Rs. 10,000, the amount of which has

(1) 12 B.H.C.R. 97.
(2) 1 B. 295.
(3) L.R. 5 Eng. & Ir. Ap. 673—676.
(4) 29 W.R. 70 (Eng.).

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been now paid into Court. The defendant contends, therefore, that limitation runs from February 22, 1873. But I am not satisfied with the evidence of payment on that date. The defendant comes into Court with a stain on his character for honesty, and gives his evidence with a volubility on favourable and a collapse of memory on unfavourable points which does not incline me to accept his statements on points where he is uncorroborated. Mr. Peile's signature shows that the receipt of the consideration was acknowledged in his presence, but I do not think it fair to attach further weight to it in the absence of any specification in the receipt as to how the money was paid. The defendant says the money was paid in two cheques—one on the Oriental, the other on the Mercantile Bank, the amounts of which he cannot fix; that he cashed these cheques, and a few days after returned Rs. 19,000, part of the proceeds to Wadia. Wadia has not been called to corroborate this statement, nor have the cheques or any evidence from the Banks been produced. When I refer to the proceedings in suit No. 506 of 1878, I can see a remarkable change in defendant's attitude after Wadia had acknowledged this deposit by his affidavit of September 1, 1877. I cannot help suspecting that that affidavit was a manœuvre in the campaign between Wadia and Kessowji Naik, of which the defendant took a skilful advantage. Be this as it may, I am by no means satisfied that the Rs. 20,000 was paid at all on February 22, 1873; but without deciding on this, when I have regard to the return of the Rs. 19,000 and the subsequent proceedings, I am satisfied that if any money passed from Wadia to the first defendant, it was a mere jugglery, and that the only real payment on that date was Rs. 1,000. The real dates of the payments by Wadia to the defendant before September 13, 1879, I take from Ex. C to defendant's plaint in suit No. 506 of 1878, Ex. No. 2 in this suit, and the result is that the present suit is not barred in respect of Rs.1,000, paid on January 23, 1878, Rs. 6,000 paid on September 13, 1879, and Rs. 10,000 paid into Court by Wadia in this suit.

[638] The defendant next contends that the plaintiff has abandoned all interest in suit No. 461 of 1869 and the assignment of February 22, 1873. This contention may be very shortly dealt with. The defendant's own evidence, if implicitly believed, does not show such abandonment. His application to the plaintiff in 1873 for loans to carry on the suit was made to a wrong person, as at that time Hormusji was alive. The conversation on the point after the assignment as reported by the defendant is full of defendant's allegations why he should have the whole of the consideration-money, but the report shows that the plaintiff, so far from abandoning asserted his right to a share of that consideration. Further, for the reasons above given, I am not disposed to accept the defendant's evidence on these matters with implicit confidence.

I have next to consider in what shares the plaintiff, as his father's representative, and the defendant are entitled to the amount above mentioned. Plaintiff says that his father told him at Hongkong, at the time of entrusting him with the partnership accounts, that the shares were equal, and Hongkong witnesses have been called whose evidence may be received to the extent that they know nothing to displace the ordinary presumption to that effect. The defendant stated that he had a twelve annas' share in consideration of his influence and of his providing the partnership funds. I have already said that I was not favourably impressed with the plaintiff's evidence; nor does his previous income, as

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a servant, of Rs. 25 a month make his possession of influence or his superiority of capital probable. I cannot accept his evidence as displacing the ordinary presumption embodied in the Contract Act, s. 253, cl. (2), and I hold the shares equal.

Next comes the question, what deductions the defendant is entitled to make from this amount? He is clearly entitled to deduct therefrom all sums expended by him in the prosecution of the suit, and I see no reason for limiting these sums to those expended before 1870. The arrangement of that year was superseded by the assignment of 1873; it is, of course, for him to prove the amount so expended. I cannot allow him any **[639]** remuneration for conducting the suit; no authority has been cited in support of such a claim, and until late, *i.e.*, 1872, he was plainly acting as a partner on behalf of the firm, and the claim is excluded by Contract Act, s. 253, cl. (4). After that date Wadia seems to have been really conducting the suit.

A more difficult question is, can defendant deduct the amount (if any) which may be found due to him on taking the partnership accounts, a suit in respect of which is admittedly barred? I think he can, on the authority of the same cases which established plaintiff's right to maintain the suit. I think that Lord Westbury would have denied the right to this deduction, but then he would have denied the plaintiff's right to maintain the suit. Lord Hatherley expressly says that such a defence is admissible: *Knox* v. *Gye* (1). Lord Colonsay passes over the point *sub silentio*, and Lord Chelmsford says (p. 687) that "the surviving partner may defend himself by alleging and proving that the whole of the sum received had been applied, or was applicable, to the payment of partnership liabilities." He does not define what liabilities, but I see no reason why they should not be explained in Lord Hatherley's works. The same view was taken by Green, J., in *Dayal Jairaj* v. *Khatav Ladha*(2) and the defence might be possibly considered less appropriate in such a case than in the present. I may add that the rule in *Clayton's Case* (3) as to the appropriation of payments seems to me not without bearing on this question, though not directly in point. Here, again, the burden of proof will be on defendant to establish that there was a debt due to him from the partnership and its amount. From the evidence given in the case I apprehend that it would be impossible for him to establish this; nor indeed do I believe that the affirmative of any matter relating to the accounts of the partnership can now be proved. I feel, however, bound by authority to allow him the opportunity, if he desires it, of making this defence; and I am the less loth to do so, as there is money enough in Court to provide for plaintiff's half share, even if no deduction be proved.

(1) L.R. 5 Eng. & Ir. Ap. 656.
(2) 12 B.H.C.R. 97 (111).
(3) 1 Mer. 1, Tudor's Lead. Cas.

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Before Mr. Justice Latham.

In re THE CARWAR COMPANY, LIMITED (IN LIQUIDATION).
[7th September, 1882.]

Company—Winding up—Order for dissolution of company—Voluntary winding up—Winding up under supervision of Court—Official liquidator—Indian Companies Act VI of 1882.

As a general rule a winding up of a company under supervision of the Court should be terminated in the same way as a purely voluntary winding up, *i.e.*, under ss. 186 and 187 of the Indian Companies Act VI of 1882.

Although, under s. 195 of the Indian Companies Act VI of 1882, the Court has power to make an order dissolving a company in the course of winding up subject to its supervision, such cases must be exceptional and can only occur when the Court has deemed it proper to carry on the winding up under supervision in a manner such as clearly to approximate to a winding up by the Court. The ordinary rule is the other way, and it is reasonable that it should be so; as, generally, a winding up under supervision is not conducted under so intimate a control of the Court as to put the Court in a position to judge of the correctness of the liquidators' action and the completeness of the winding up.

So far as the Court does not interfere, a winding up under supervision remains essentially a voluntary winding up; but the Court in a winding up under supervision has full authority to interfere and to exercise to any extent the power which it might have exercised if an order has been made for winding up the company by the Court.

The words "official liquidator" in s. 160 of the Indian Companies Act VI of 1882, do not include the liquidators in a winding up under supervision.

Motion for an order for the dissolution of a company wound up under supervision of the Court, refused.

MOTION for an order (under Rule 61 of the Rules framed under the Indian Companies Act X of 1866) that the Carwar Company, Limited, be dissolved from the date of the order, and that the official liquidators do deposit with the Prothonotary of the High Court the books and documents relating to the company in their possession as such official liquidators.

By a resolution passed by the shareholders of the Carwar Company, Limited, on the 4th October, 1879, it was resolved that the said company should be wound up voluntarily under the provisions of the Indian Companies Act X of 1866. W. M. Macaulay and S. L. Macnaghten were appointed liquidators, and forthwith took charge of the affairs of the company.

[641] By an order made by the High Court on 17th November, 1879, it was ordered that the winding up of the said company should be continued subject to the supervision of the Court.

The liquidation was subsequently proceeded with, and on the 26th July, 1882, the liquidators filed an affidavit in which they stated that the affairs of the company were then fully wound up, and they annexed a balance-sheet containing the summary of the accounts showing how the assets of the company had been dealt with. The affidavit also stated as follows:—

4. "There is now in the Hongkong and Shanghai Bank standing to the credit of our account as official liquidators of the said company a balance of Rs. 2,456-0-10 and a sum of Rs. 2-5-8 in cash in our hands, making together the sum of Rs. 2,458-6-6, as appears from the balance-sheet

hereto annexed; and we are desirous to deposit thereout the sum of Rs. 635-4 10 with the Accountant-General of this Honourable Court to the credit of an account to be called 'The account of the unclaimed dividends due to certain creditors of the Carwar Company, Limited (in liquidation).'

5. "Hereto annexed, and marked C, is a list of the creditors of the above-named company to whom the unclaimed dividends are due and payable.

6. "We are desirous, after depositing the aforesaid sum of Rs. 635-4-10 with the Accountant-General of this Honourable Court, to pay out of the balance that will remain to Messrs. Smith and Frere, the attorneys to the official liquidators, a sum of Rs. 1,450 in respect of their costs due and unpaid to them from the 6th day of April, 1882, till the company is fully wound up and dissolved, and to appropriate the sum of Rs. 371-1-8 for the costs and expenses of the establishment and for advertisement and the other incidental expenses and for office rent till 31st July, 1882, which said payments and appropriations will completely absorb the said balance; and we further say that the said sum of Rs. 1,450 is, we are informed and believe, less than the sum that would be found due to the said Messrs. Smith and Frere for costs to the close of the liquidation if the same were taxed."

[642] On the 27th July, 1882, the official liquidators obtained a Judge's order declaring that they had passed their final account as official liquidators, and that the affairs of the company had been completely wound up. The said Judge's order also directed that advertisements to the above effect should be published in certain specified newspapers, and it was further ordered that the official liquidators should deposit with the Accountant-General the sum of Rs. 635 4-10, mentioned in the affidavit of the official liquidators, accompanied by a true copy of the list of the creditors to whom the unclaimed dividends were payable to the credit of an account to be called "The account of the unclaimed dividends due to certain creditors of the Carwar Company, Limited, in liquidation," and that the said official liquidators be at liberty, after depositing the aforesaid sum of Rs. 635-4-10 with the Accountant-General as aforesaid, to pay the sum of Rs. 1,450 to Messrs. Smith and Frere in full discharge of all their attorneys' costs due to them up to the close of the liquidation, and Rs. 371-1-8 for official establishment and rent.

An affidavit was filed, stating that the directions contained in the above Judge's order had been complied with.

Russell for the official liquidators now moved for an order that the said Carwar Company, Limited, be dissolved from the date of such order, and that the official liquidators should deposit with the Prothonotary of the High Court all books and documents relating to the company in their possession as such official liquidators. He referred to Rule 61 of the Rules framed under the Indian Companies Act X of 1866.

LATHAM, J., raised the point as to whether liquidators of a company in liquidation under the supervision of the Court were in the same position as the liquidators of a company in voluntary liquidation, and whether they could apply to the Court for the order now sought for.

Russell referred to the Indian Companies Act X of 1866, ss. 131, 149, 171, 164, 167, and the corresponding sections in the English Companies Act, 1862 (Stat. 25 & 26 Vic., cap. 89), ss. 111, 133, 155, 148, 151.

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JUDGMENT.

[643] LATHAM, J.—The application in this case is that the Court do make an order that the company be dissolved. The company is in course of voluntary winding up under the supervision of the Court; and the question for decision is, whether a company in such a position ought, for the purpose of its dissolution, to be treated as being wound up by the Court, or as being wound up voluntarily, there being no express provision in the Companies Acts for the dissolution of a company in course of voluntary winding up under supervision.

Section 159 of the Indian Companies Act, No. VI of 1882, corresponding with s. 131 of Indian Act, No. X of 1866, and s. 111 of the English Act of 1862, provides for the dissolution of a company being wound up by the Court. It is the last of a series of sections regulating the functions of the Court in such a winding up. Sections 186 and 187 of the Act of 1882, corresponding with ss. 158 and 159 of the Act of 1866 and ss. 142 and 143 of the English Act, provide for the dissolution of a company in course of voluntary liquidation. Section 195 of the Indian Act of 1882, corresponding with s. 167 of the Indian Act of 1866 and s. 151 of the English Act, describes the effect of an order for a winding up subject to the supervision of the Court. Lord Justice Lindley, in his work on Partnership (2nd ed.), pp. 1410 and 1422, discusses the difference between a voluntary winding up and a winding up subject to supervision. The result appears to be that, so far as the Court does not interfere, a winding up under supervision remains essentially a voluntary winding up; but that the Court in a winding up under supervision has full authority to interfere and to exercise to any extent the powers which it might have exercised if an order had been made for winding up the company by the Court. In effect, a winding up under supervision may be hardly distinguishable from a purely voluntary winding up, or hardly distinguishable from a winding up by the Court.

I think that, as a general rule, a winding up under supervision should be terminated in the same manner as a purely voluntary winding up, *i.e.*, under ss. 186 and 187. Sections 160 and 161 of the Indian Act of 1882 appear to contemplate only cases in which there is an official liquidator, nor do I think that the term [644] 'official liquidator' in s. 160 can be construed by the help of s. 195 so as to include the liquidator in a winding up under supervision; moreover, the rules and orders made under the Indian Act of 1866 and the English Act of 1862, and especially the English Rules 65 and 66, do not seem to have contemplated any winding up other than a winding up by the Court being terminated by the order of the Court.

I do not wish to lay down that the Court has not power, under the words of s. 195, to make an order dissolving a company in the course of winding up subject to its supervision; or that there may not be cases in which the Court will think it expedient to exercise such power. But I think such cases must be exceptional, and can only occur when the Court has deemed it proper to carry on the winding up under supervision in a manner such as closely to approximate to a winding up by the Court. The ordinarly rule is, I think, the other way; and it seems reasonable that it should be so; as, generally, a winding up under supervision is not conducted under so intimate a control of the Court as to put the Court in a position to judge of the correctness of the liquidator's action and the completeness

of the winding up. In the present case I do not think that any special grounds have been shown for invoking the Court's assistance; and I must refuse the motion, leaving the liquidators to proceed under ss.186 and 187.

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Motion refused.

Attorneys for the company.—Messrs. *Smith and Frere.*

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[645] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Melvill.

ADAMKHAN (*Original Plaintiff*), *Appellant v.* ALARAKHI (*Original Defendant*), *Respondent.** [14th August, 1882.]

Mahomedan law—Sale—Possession.

A sale among Mahomedans, unlike a sale between Hindus, is valid as against a third party, even though the vendor was not at the time of the sale in possession of the property sold.

THIS was a second appeal from the decision of J. W. Walker, Judge of the district of Thana, reversing the decree of the Subordinate Judge of Panvel.

The plaintiff as well as the defendant were Mahomedans. The former sued the latter to obtain from him possession of a house, alleging that he had purchased it from one Mahomed Karim. The defendant answered that Mahomed Karim was not in possession of the house at the date of the alleged sale. The Subordinate Judge allowed the claim. The District Judge reversed that decree, holding that, under the Mahomedan as well as the Hindu law, possession was necessary for this validity of the sale. The plaintiff thereupon appealed to the High Court.

Pandurang Balibhadhra, for the appellant.—The District Judge erred in applying the Hindu law rule to Mahomedans. Want of possession in the vendor does not, according to Mahomedan law, render a sale of the immoveable property invalid: *Mt. Shurfun* v. *Sheikh Gholam Mohummud* (1); *Sheikh Gholam Mohummud* v. *Shiekh Ruhum Ali* (2); *Seetaram Raee* v. *Munohur Raee* (3); *Mahomed Noor Buksh* v. *Budunchund Bebee* (4).

Manekshah Jehangirshah, for the respondent.—The Bengal cases refer to sales of rights or to suits by purchasers against vendors. The rule of the Mahomedan law is the same as the rule of the Hindu law: Macnaghten's Mahomedan Law, 201.

JUDGMENT.

MELVILL, J.—The only question raised in this appeal is whether the District Judge was right in applying to a sale between **[646]** Mahomedans the same rule [*Bai Suraj* v. *Dalpatram* (5)] which has been held to govern sales between Hindus, *viz.*, that a bill of sale executed by a person who

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* Second Appeal No. 551 of 1881.

(1) Calc. S. D. Rep. (1848), 448.
(2) Calc. S.D.R. (1848) 450.
(3) Calc. S D. Rep. (1848), 505.
(4) Calc. S.D.R. (1852) 885.
(5) 6 B. 380 (F.B.).

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is not in possession cannot operate as a present conveyance, nor enable the purchaser to sue in ejectment.

The decision of this Court as to the effect of a sale of this nature made by a Hindu is based upon the observations of the Judicial Committee in *Raja Sahib Perhlad Sein* v. *Baboo Budhoo Singh* (1) and *Ranee Bhobosundree* v. *Issurchunder Dutt* (2). Their Lordships say: "It is not easy to see what principle of an English Court of Equity, supposing such to be properly applicable to the case, would support the conclusions to which the Judges of the Sadar Court have come upon the facts before them. They seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession, giving to the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a construction would be warranted in any case is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases cited in the judgment under review, in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency, of which the purchaser may claim a specific performance if he comes into Court, showing that he has himself done all that he was bound to do." Here the principle laid down by the Judicial Committee seems clearly to be this, that as in England, before the passing of the Statute of Uses, a feoffment without livery of seisin was not effectual to pass the estate, so under Hindu law transfer of possession is essential to the creation of a valid title in the purchaser as [647] against a third party, although a sale without such transfer is valid in the sense that it gives to the purchaser a right to sue the vendor for specific performance of the contract. The Hindu law upon this subject is elaborately discussed, and the conclusion arrived at by the Judicial Committee is enforced, by Mr. Justice West in *Lalubhai* v. *Bai Amrit* (3).

The question now before us is whether by Mahomedan law, equally with Hindu law, transfer of possession is necessary to pass an estate. The authorities all seem to state in general terms that seisin is necessary to the validity of a gift, but is not an essential condition of a sale. In Macnaghten's Principles, Chapter IV, Case 15, this is put very clearly: "Seisin is requisite to the validity of a gift, and the gift cannot be said to be established until the parties shall have made seisin, but the property conferred remains, as formerly, at the disposal of the donor." A gift, therefore, without seisin, not only does not pass the estate, but cannot even be enforced by the donee against the donor. Then the law officer goes on to say: "Authorities extracted from the Commentary of Chulpee: 'I have given to you this slave for this garment of yours or for one thousand dirms'." To which proposal the person addressed assents. This is a contract of sale, both as it regards the condition and the effect, agreeable to the doctrine maintained in the *Kifaya*, and universally in other authorities. So also in the *Shurhi Viqaya*: "A contract of sale is established by conferring a right to one thing in lieu of another." So also in the *Hedaya*:

(1) 12 M. I. A. 275 (307). (2) 11 B.L.R. 36. (3) 2 B. 299.

The expressions "I have given you this for that," or "take it for somuch" have the same signification as the terms "I have sold or purchased from you." So also in the *Viqaya*: "Where these exist, the sale is complete.' By these are meant declaration and acceptance, and when these are found to exist, the sale is binding, from which it follows that seisin is not a condition, and where these do not exist, the sale is not binding."

In the passage it is not perfectly clear whether, when it is said that a binding sale is effected by declaration and acceptance, without transfer of possession, it is meant that the sale is binding as [648] against third parties, and not merely as between the vendor and purchaser. But as a contrast is drawn between a gift and a sale, and as in the case of a gift it is said that, without seisin, "the property remains, as formerly, at the disposal of the donor," it is a fair inference that, in the case of a sale, the property passes without seisin. In the Appendix, among the Principles of Decision applicable to Sales. (Nos. 8 and 18), Mr. Macnaghten refers to certain decisions of the Bengal Sadar Adalat as showing that "the want of possession in the person of the seller does not vitiate the sale of immoveable property." We have referred to the cases cited, and find that they are either suits by the purchaser against the vendor, or cases in which the vendor only professed to sell his right of entry; so that they do not give us any great assistance. But in Case 11 of the Precedents of Sale, the case is put of an absolute sale by a mortgagor's widow of property in the mortgagee's possession, and the answer is: "Such sale is legally valid, but its operation is suspended on the pleasure of the conditional purchaser," *i.e.*, the mortgagee. "He may give it effect if he pleases, but he cannot annul it. It depends also on the pleasure of the absolute purchaser. If he pleases, he may wait till the expiration of the term, or he may immediately return to the conditional purchaser the money borrowed from him, having recourse, if necessary, to a judicial decision to set aside the conditional sale; because the effect of a conditional sale and a pledge are legally the same; and if a pawnor sell a pledge without the permission of the pawnee, the sale is valid, but the effect of the sale is suspended on the pleasure of the pawnee. The purchaser also is at liberty to wait until the redemption of the pledge, or to cause its redemption by an appeal to a judicial tribunal." This is a clear authority for the validity of a sale by a Mahomedan of mortgaged property of which he is not in possession. In Case No. 6 of the Precedents of Gifts, the question is as follows:—"A person executed a deed of gift in favour of his nephew, conferring upon him the proprietary right to certain lands, of which he (the donor) was not in possession, but to recover which he had brought an action, then pending, against his wife * * * * * *. About a month after executing the deed, the donor died, and the donee, in virtue of the gift, lays [649] claim to the litigated property. Under these circumstances, is his claim, under the deed, allowable?" To this the answer is: "The gift of a thing not in the possession of the donor during his lifetime is null and void, and the deed containing such gift is of no effect, because, in cases of gift, seisin is a condition; gift is rendered valid by tender, acceptance, and seisin; but in gift seisin is necessary and absolutely indispensable to the establishment of proprietary right. * * * * * *. The Prophet has said, a gift is not valid without seisin. So also if the thing given be pawned to, or usurped by, a stranger." But, as we have just seen, the sale of a pawn is valid; and the argument in the last quotation is based so exclusively upon the necessity of seisin to the validity of a gift that the

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only inference is that, if the question had related to a sale, the answer would have been that the sale was valid, even against a usurper, inasmuch as seisin is not necessary to the completion of a sale. And this is stated in so many words by Mr. Neil Baillie in his works on the Mahomedan Law of Sale. At p. 150 he says: "When usurped property is sold to another person than the usurper, the sale is in suspense; if the usurpation be acknowledged by him, the sale is complete and binding on the usurper; and though denied by him, the result is the same, provided the rightful owner has evidence: if he have no evidence, and [? or] the thing sold perishes before it can be delivered, the sale is dissolved." The last words are not very clear; but the meaning of the whole passage seems to be that a sale by the owner of property in the possession of a trespasser is valid, and that the purchaser may establish his claim if he can: but if he is unable to do so, he may treat the sale as cancelled, and may recover the purchase-money.

These authorities justify us in holding that a sale among Mahomedans is valid as against a third party, even though the vendor was not at the time of the sale in possession of the property sold. We must, therefore, reverse the decree of the District Judge, and remand the case for a decision as to the plaintiff's title. Costs to follow the final decision.

Decree reversed.

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6 B. 650 = 7 Ind. Jur. 91.

[650] APPELLATE CIVIL.

Before Mr. Justice Melvill, Mr. Justice Kemball and Mr. Justice Pinhey.

MOHINUDIN (*Original Plaintiff*), *Appellant v.* MANCHERSHAH (*Original Defendant*), *Respondent.** [21st August, 1882].

Mahomedan law—Gift—Possession—Possession with mortgage—Sale—Minors.

A Mahomedan lady executed a deed of gift in favour of the plaintiff, who was at the date of its execution a minor, of certain lands (including the land in dispute) of which she professed to have obtained possession under a decree against her co-parceners. The plaintiff on the strength of the deed of gift sued for a declaration of his right to the land, alleging that the donor had actually recovered possession in execution of her decree. The original and appellate Courts found that the defendant was at the date of the deed of gift in actual possession under a mortgage executed by the donor's co-parceners, and that she had failed, in executing her decree, to eject the defendant.

Held (KEMBALL, J., *diss.*) that at the date of the deed of gift the donor was simply the owner of property which was in possession of a mortgagee, and could not, under Mahomedan law, make a gift of it, although she could sell the same.

When the donee is a minor, possession may be had by a trustee on his behalf.

[Diss., 8 Ind. Cas. 307 = 86 P.R. 1910 = 171 P.L.R. 1910 = 130 P.W.R. 1910; F., 13 B. 156 (159); R., 11 A. 1 = 8 A.W.N. 266; 21 A. 165; 23 B. 682 (684); 27 B. 31 (39).]

THIS was a second appeal from the decision of S. Hammick, Acting Assistant Judge of the District of Surat, confirming the decree of Rao Saheb Chandulal Mathuradas, Second Class Subordinate Judge of Surat.

The facts of the case, in so far as they are material for the purposes of this report, are as follows:—

The plaintiff Mohinudin sued to establish his right of proprietorship to certain lands and for a declaration that the defendant Manchershah

* Second Appeal No. 461 of 1881.

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was not entitled to attach and sell them in execution of a decree obtained by the defendant against one Saheb-ul-Nissa and another person. The plaintiff alleged that the lands originally belonged to the plaintiff's father's mother Nurbibi, and that she bestowed them upon him by a deed of gift dated the 10th of February, 1877. The defendant having attached the said lands, the plaintiff had made an application to raise the attachment, but it proved unsuccessful. Hence the present suit.

[651] The defendant (*inter alia*) contended that, under the provisions of s. 42 of the Specific Relief Act I of 1877, the suit was not maintainable; that Nurbibi had no title to the property which she pretended to give away; that the property had been mortgaged to him with possession by Saheb-ul-Nissa; that he had been in possession since 1871; that he had obtained a decree against it; that the plaintiff could not compel him to raise the attachment which he had placed in execution of that decree, and that the deed of gift was invalid according to Mahomedan law, there having been no possession accompanying the gift.

The substantive part of the deed of the gift ran as follows:—

"To Mohinudin valad Gulam M., by caste, a Mahomedan, age about twenty years, inhabitant of Badekha's Chakla in Surat. Executed by Bai Nurbibi, the widow of Tajudin, aged about ninety-five years. To wit: I give in writing this deed of gift to you as follows:—You are the son of my deceased son. Consequently I protected you, and brought you up from your infancy; and as you render me service and attend on me I give you in gift all my undermentioned property which was caused to be put into my possession by the Nazir under the order of the Assistant Judge of the Court of Surat by virtue of the decree passed in my favour, together with the profits thereof from the year 1877. And I deliver the property into your possession. Therefore, you are the owner thereof in every respect. Do you, therefore, enjoy and manage the same. Therein any objection raised by my heir shall not prevail. Should they raise any, the same shall be void* * * * * *

*. In Suit No. 2592 of 1872 on the file of the Court of the Subordinate Judge and No. 18 of 1875 on the file of the District Court, the Assistant Judge at Surat passed a decree directing that the land belonging to my share should be given to me. The same was confirmed by the High Court in Regular Appeal No. 221 of 1876 on the 30th of August 1876. Having executed the said decree I have taken the said property into my possession; and there remains some property of which possession is still to be taken. The remaining right under the said decree I have also given you in gift. You are, therefore, entitled to execute the said decree and take possession of the **[652]** said property. I have made over the said decrees to you." * * * * * * *

The Court of first instance found the claim not barred, the suit having been instituted by the plaintiff within one year of the day on which the Court disallowed the plaintiff's objection to the defendant's attachment of the property in question. But that Court was of opinion that the defendant had been in continued possession of the lands ever since his mortgage in 1871. It thought that assuming that Nurbibi had received possession of the lands in execution of her decree, it was probable that she lost it as soon as she had got it, and, that it was impossible to believe that Nurbibi was in possession of the property, the subject of the gift, at the date of the gift in 1877. Holding the gift invalid, it rejected the plaintiff's claim on that ground and also on the ground that Nurbibi had not wholly relinquished the lands.

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In appeal the only issue tried was as to the validity of the gift. The Assistant Judge said: "In the present case it is the possession of the donor which has been disputed. The question is one of the evidence, and I find it recorded that certain lands were measured and marked out with pegs as the lands which fell to Nurbibi's share under the decree gained by her against her relatives, Saheb-ul-Nissa and others. I find that there is no other act shown to have been done by her, on her behalf, which would prove that she had really taken possession of the land to hold it against all comers, and it appears that the defendant, so far from acknowledging Nurbibi's possession, protested in person against the land being measured and marked out and he was never ejected from it. The act of measuring and marking out the land may perhaps amount to a taking possession by Nurbibi as against her relations, the defendants in her suit; but I consider that as regards the present defendant, who was not a party in that suit, and who was in actual possession of the land at the time, the fact that Nurbibi's friends measured and marked out her share is quite inadequate to prove that defendant lost possession of the land and that Nurbibi acquired it.

On these grounds the appellate Court agreed with the Court of first instance in holding this deed of gift invalid.

[653] The plaintiff appealed to the High Court.

The appeal in the High Court was heard on the 31st of July, 1882, by KEMBALL and PINHEY, JJ.

Nanabhai Haridas (Government Pleader), for the appellant.—The District and Subordinate Courts were in error in thinking that actual possession was necessary to validate a gift under the Mahomedan law. In some cases it would be impossible to give physical possession. The case at pp. 201 and 202 of Macnaghten's Principles of Mahomedan Law (4th ed.) lends apparent support to the view held by the lower Courts, but that this view is erroneous is shown by the reply to case 10 at pp. 207 and 208, where, according to Buhroo-rayiq, "a man makes over his outstanding debts by gift to a person who is not indebted to him, directing the donee to collect such debts and take them for his own use; this gift is valid." Power to take possession is equivalent to taking it: Baillie's Muhammadan Law, 514. The gift of a debt to any other than the debtor is lawful on a liberal construction where the donee is directed to take possession of it, and I ask for a liberal construction: Baillie's Muhammadan Law, 522. As to what may be given, there is no restriction. Anything which may be the subject of property or of contract may be the subject of gift. A bond can be given away by the conveyance of it to the donee: Elberling, pp. 126 and 129, paras. 270 and 272. In *Navab Umjad Ally Khan* v. *Mt. Mohumdee Begum* (1) a gift, *inter vivos*, of Government promissory notes by a father to his son accompanied by a delivery of possession and transfer into the son's name without any reservation of the dominion over the *corpus* by the donor, except a stipulation for the right to the accruing interest on the notes during the donor's life, to be applied by him to certain religious and charitable purposes, was held by the Privy Council to be a valid gift according to the Sheah school of Mahomedan law. Effect should be given to the manifest intention of the parties. Suppose a Mahomedan landlord grants a lease for twenty years, and has a reversion. He has undoubted right to give it away. The law does not necessitate his

(1) 11 M.I.A. 517.

waiting for twenty years. [654] Take the case of alienations of land revenue by Mahomedan rulers to donees of the same persuasion. No right to resume such alienations has ever been put forward on the ground of want of possession in the donor and want of seisin in the donee. The Hindu law is in this respect the same as the Mahomedan law. Directly the share of Nurbibi became defined, it became separate property and she could give it away, especially after the demarcation of the lands by authority of the Court. It is reasonable that the same principle should be applied whether the gift is to be enforced against the co-sharers or third parties.

Manekshah Jehangir Shah, contra.—The defendant having been in possession of the lands claimed hy the plaintiff Nurbibi could not give possession of them to the plaintiff. Under the Mahomedan law a thing mortgaged, lent out, or sued for in the Court cannot be the subject of gift: Elberling, page 129, para. 272; Macnaghten's Principles, pp. 50, 51, 201 and 202. The case at p. 201 is clearly in our favour.

Nanabhai Haridas in reply.—The Mahomedan law must be construed liberally. *Choses* in action cannot be delivered except by declaration, nor a work which a man writes and registers, nor an invention of which the inventor takes out a patent. It is not to be supposed that these cannot be given away. These kinds of property were not known to the Prophet, and no precise provision therefore exists. The plaintiff was a minor at the date of the gift, and, therefore, transfer of possession was not indispensable.

JUDGMENT.

KEMBALL, J.—It appears that two Mahomedans, by name Saheb-ul-Nissa and Abdul Rahim, the mother and uncle respectively, of the plaintiff, mortgaged in 1871 a portion of the family property, of which they were tenants jointly with their relative Nurbibi, the grandmother of the plaintiff, to the defendant in this suit. Subsequently defendant obtained a decree against his mortgagors, and in satisfaction thereof proceeded to attach and sell the property mortgaged. Plaintiff applied for the removal of the attachment, alleging that the said property had belonged to his grandmother Nurbibi, who had [655] made a gift of it to him. His application being unsuccessful in the summary investigation which followed, plaintiff brought this suit to have it declared that the property in dispute was his, and was not liable to be attached and sold in execution of defendant's decree against Saheb-ul-Nissa and Abdul Rahim.

It further appears that the aforesaid Nurbibi had brought a pauper suit in 1872, which, however, was registered as of 1875, for partition against Saheb-ul-Nissa and Abdul Rahim, and obtained a decree in 1876, and in execution of that decree the land mortgaged to the defendant was, as the Assistant Judge finds, "measured and marked out with pegs as the land which fell to Nurbibi's share under it." Subsequently to this, *i.e.*, on the 10th February 1877, Nurbibi executed the deed of gift on which the plaintiff bases his claim.

There is no dispute as to the above facts, but the plaintiff's claim has been thrown out in both the Courts below, on the ground that the gift was void under the provisions of the Mahomedan law, inasmuch as the donor was not herself in possession of the land in dispute, the Assistant Judge being of opinion that, though the Act of measuring and marking out the land might amount to a taking possession by Nurbibi as against her relatives

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against whom she obtained her decree, it was quite inadequate to prove that defendant lost possession and Nurbibi acquired it.

A further ground for holding the gift bad was found in the circumstance that there had not been an entire relinquishment on the part of the donor.

Now, it is beyond dispute that to make a valid gift under the Mahomedan law, it is requisite that there should be acceptance with seisin or taking possession; and it is no doubt an essential condition, as observed by the Assistant Judge, that the donor should be in possession of what he or she professes to give, but the question which naturally suggests itself in this case is, can a gift be valid as against one person and void as against another; in other words, was there the possession in Nurbibi requisite to complete the intention, which the words of the deed clearly import that she had, to make a complete gift and transfer of [656] possession of the property in dispute as against her relatives, but not as against the mortgagee.

That Nurbibi was at one time in possession of the whole of the family property is clear from the circumstance that the tenancy was joint, and although land being joint property cannot be bestowed by the contract of *nibah*, it is equally clear upon the authorities that immediately her share became defined, *i.e.*, became a separate property, it would have been competent to her to have made a valid gift of it. That being so, *a fortiori* it was competent to her to make a gift of her share after it was separated off by metes and bounds, and reason requires that the same principle should be applied, whether the gift is to be enforced against the other co-sharers or against a third person claiming to have possession under them. None of the text-books with which I am acquainted contain, so far as I am aware, any decision or reference to this point, and, moreover, assuming that no possession had been given under the decree as against any one, I know of no reason why the transfer of the decree to the plaintiff should not be valid so as to enable him, if his claim be in other respects good, to succeed upon it as against a trespasser. Having regard to the circumstances of the property, and to the fact that the decrees relating to the property were handed over with the deed of gift to the plaintiff, it would be idle to contend that there has been no livery of seisin. Possession arises from abandonment of the donor, and the Assistant Judge has quoted this passage from the Tohfa, p. 59 of Volume 4: "The declaration of the donor that he has given possession is sufficient to denote real possession."

It is true that the Assistant Judge has found that Nurbibi interfered with the management of the property, after the declaration of giving possession, from which he concluded that there had not been an entire relinquishment by Nurbibi, but he appears to me to have left out of consideration one question of vital importance, *viz.*, the status of the plaintiff at the time of such interference; for if the plaintiff was then a minor and living under the guardianship of his grandmother, the conclusion was not justifiable. See the decision of the Judicial Committee of the [657] Privy Council in *Ameerunissa Khatoon* v. *Abdoonissa Khatoon* (1) in which it was held that where there is on the part of a father or other guardian of a minor a real and *bona fide* intention to make a gift to the minor, the Mahomedan law will presume the subsequent holding of the property by the father or guardian to be on behalf of the minor. There is indication in the papers put in by the defendant of the plaintiff

(1) 2 I.A. 87.

having been to a late period under the guardianship of Nurbibi, but it is necessary that there should be a distinct finding by a competent Court on the point. On the case going back therefore, an issue should be framed accordingly and evidence received. If this issue be found in favour of the plaintiff, it will still remain to be determined whether, the gift to the plaintiff being valid, the defendant was entitled to attach and sell the property so conveyed. Why the particular portion of the family property was marked out and measured in execution of Nurbibi's decree is not intelligible. I think this is clearly not a case of a *hiba* set up to defeat the claims of creditors. The suit for partition was instituted very shortly after the mortgage to defendant, and it was through no fault of Nurbibi apparently that three years were consumed in deciding on her claim to sue as a pauper. There is nothing to show that Nurbibi had knowledge of the mortgage. It is hardly possible that an old woman between 90 and 95, as she is stated to have been, would have been active in getting land, that had been mortgaged by her relatives, allotted to her share, and the idea of her being in league with these relatives would appear to be negatived by the fact that while her execution proceedings were pending, these same relatives allowed an award to be made against them at the instance of their mortgagee, which award was immediately filed in Court.

I would reverse the decree of the Court below, and return the case for retrial. Costs to follow the final decision.

PINHEY, J.—I am of opinion that the decree of the District Court is right, and should be confirmed.

It has been found as a fact by the District Court, and it is indeed admitted, that the defendant Manchershah has been in **[658]** possession of the land in dispute from the time when it was mortgaged to him in 1871 up to the present time; and from this it seems to me to follow as a necessary consequence that Nurbibi was not in possession of the said land, and could not, therefore, under Mahomedan law, pass it by way of gift to the plaintiff on the 10th February, 1877, the date of the deed of gift, Ex. 30, on which plaintiff relies.

The land was mortgaged, with possession, to the defendant Manchershah in 1871 by Saheb-ul-Nissa and Abdul Rahim, the mother and uncle of the plaintiff, and defendant Manchershah has obtained a decree against the mortgagors for the recovery of the amount of his mortgage lien. Plaintiff has instituted this suit to prevent the defendant Manchershah from executing his decree against the mortgaged property, on the ground that the said property, together with other property, was assigned to the plaintiff on the 10th February, 1877, by a deed of gift executed by his grandmother Nurbibi, the mother of his father and the mother-in-law of Saheb-ul-Nissa, one of defendant Manchershah's mortgagors.

Nurbibi is described as an old pardah woman of ninety or ninety-five on the date of the deed of gift, and she has since died. As she was a Mahomedan, it would not be strictly correct to describe her as a member of a joint undivided family, because that is a technical description applied to Hindus; but, at all events, the property of the family, to which she belonged, had never been divided into shares and allotted to the different members of the family.

Some time after the mortgage of the property in dispute (which is only a small portion of the property that then belonged to the family) to the defendant Manchershah, Nurbibi instituted a suit against defendant's mortgagors and other members of their and her family for the recovery of

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her share of the family property. She did not make Manchershah a defendant in that suit. She obtained a decree awarding her share of the family property.

After obtaining her decree, Nurbibi proceeded to execute it. The decree was executed by marking or pegging out a portion of the property as her share.

[659] I remark, but I need not base any argument on the fact, that in allotting and marking off the share of Nurbibi, instead of marking off a portion of the property in the undisputed possession of her judgment-debtors, she or those acting for her got a portion of the property allotted to Nurbibi, which included the land previously mortgaged to Manchershah and in his possession. As Manchershah's possession has never been disturbed to this day, it is clear that Nurbibi never got possession of the land mortgaged to Manchershah, although she may have got possession of the land all round it. Nor did she file any suit against Manchershah to eject him or to get rid of his lien on the land in his possession. What she did was this. She executed to her grandson, the plaintiff, the son of one of the mortgagors and the nephew of the other, the deed of gift, Ex. 30, whereby she professed to make over to the plaintiff all she had obtained or was to obtain under her decree. And under this deed of gift plaintiff now sues to prevent Manchershah from executing his decree against the mortgaged property in his possession, or, in other words, to get possession of the land now in Manchershah's possession without paying the lien with which it is burdened. I am very strongly of opinion that the plaintiff is not entitled, under Mahomedan Law, to succeed: for the land in dispute being in the possession of Manchershah and not of Nurbibi, the latter could not and did not give possession of the land in dispute to plaintiff, and that, therefore, the deed of gift is, according to Mahomedan law, invalid, and fails so far as the land in dispute is concerned, although the gift may be valid and good as to the rest of the property which it purports to convey to the plaintiff. And it is to me at all events satisfactory to find a technical rule of law subserving the justice and equity of the case: for it is clear that, apart from legal considerations, it would be a great wrong and injustice if plaintiff, who has not paid a pie for the property, were enabled to take possession of the property without paying off the charge on it put by his own mother and uncle, and to defeat the mortgage granted to defendant *bona fide* and for valuable consideration.

What I have said above disposes of the case on its merits, according to my view of it. But I should like to make one further remark on another point noticed by the District Court. **[660]** The District Court held the gift invalid, not only because Nurbibi not having possession could not have given possession to plaintiff, but also because Nurbibi never entirely relinquished the property, as she was proved to have taken leases from tenants for a portion of the property after the deed of gift. I understand my brother Kemball to consider the taking of these leases by Nurbibi as not inconsistent with an entire relinquishment of the property, as plaintiff was at the date of the deed of gift only twenty years of age, and, therefore, legally a minor, and Nurbibi may therefore have been acting as plaintiff's guardian. It seems to me, however, that no such presumption arises, nor indeed that any such inference is probable in this case. In the first place, as plaintiff's mother was alive, she, and not Nurbibi, would be plaintiff's guardian according to Mahomedan law; and, in the second place, it is much more probable that a Mahomedan male of twenty would give leases of land than that an old pardah woman of ninety or ninety-five would

undertake such a duty. And if her manager (witness 17) took the leases as agent for the owner of the property, it is much more probable that he would take the leases in the name of plaintiff if he were the owner than in the name of Nurbibi if she were not the owner and had entirely relinquished the land.

I do not, however, rest my judgment on this second point. I prefer to rest it on the first, *viz.*, that the gift to plaintiff of the land in Manchershah's possession was invalid according to Mahomedan law, as this seems to me to meet the justice of the case.

I would confirm the decree of the District Court with costs.

KEMBALL and PINHEY, JJ., having differed in opinion, the case was referred to MELVILL, J., before whom the same pleaders appeared and argued as before.

FINAL JUDGMENT.

MELVILL, J.—The instrument of gift on which the plaintiff founds his claim purports to convey to the plaintiff, first, certain lands (including the land in dispute), of which the donor Nurbibi professess to have obtained possession under a decree against her co-parceners, and, secondly, all rights which might be recoverable under the decree, in so far as it had not been executed at the date of the gift. It is not necessary to consider what would be the effect, under the Mahomedan law, of the latter provision, because **[661]** the plaintiff is not now seeking the benefit of that provision. He does not come into Court to execute the decree, but to establish his right by suit to land, which the deed of gift alleges, and the plaintiff alleges, to have been actually recovered by Nurbibi in execution of the decree. The question, therefore, is that which has been put in issue by the Courts below, *viz.*, whether Nurbibi had such possession as would enable her to make a valid gift according to Mahomedan law. Now, it has been found by the Courts below,—and by that finding this Court is bound,—that the defendant was, at the date of the gift, in actual possession under a mortgage executed by Nurbibi's co-parceners; and that Nurbibi, in executing her decree, failed to eject him. The possession which she obtained was only such symbolical possession as could be obtained under s. 224 of Act VIII of 1859; and though such possession is, as against the defendant in the suit, equivalent to actual possession, it is of no avail against a third party—*Juggobundhu Mukerjee* v. *Ram Chunder* (1); *Lokessur Koer* v. *Purgun Roy* (2). It must, therefore, be held that at the date of the gift Nurbibi was simply the owner of property which was in possession of a mortgagee. In a recent case (Second Appeal No. 551 of 1881, decided 14th August, 1882) it has been held that a Mahomedan so situated may sell the property; but the inference from that judgment is that he cannot make a gift of it. And this seems to be the result of the authorities. In Macnaghten's Precedents of Gift, Case No. 6 is very clear on the point. The case is thus stated:—

"Q. A person executed a deed of gift in favour of his nephew, conferring upon him the proprietary right to certain lands, of which he (the donor) was not in possession, but to recover which he had brought an action, then pending, against his wife. By the same deed he made over to him certain other landed property of which he was possessed. About a month after executing the deed, the donor died, and the donee, in virtue

(1) 5 C. 584.

(2) 7 C. 418.

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of the gift, lays claim to the litigated property. Under these circumstances, is his claim, under the deed, allowable?

"R. The gift of a thing not in the possession of the donor during his lifetime is null and void, and the deed containing such [662] gift is of no effect, because, in cases of gift, seisin is a condition. Gift is rendered valid by tender, acceptance and seisin; but in gift, seisin is necessary and absolutely indispensable to the establishment of proprietary right. According to the Hedaya: 'Gifts are rendered valid by the tender, acceptance and seisin. The Prophet has said, a gift is not valid without seisin. *So also if the thing given be pawned* to, or usurped by, a stranger.' So also is the *Surhi Viqaya*: 'A gift is perfected by complete seisin.' As the gift, therefore, is null, the claim of the donee is inadmissible, and the deed is invalid, as far as regards the lands of which the donor was never possessed. But, with respect to the other lands conveyed at the same time, the donee is entitled to them, if the donor put him into possession. If, however, the donor died, without conferring possession, the claim of the donee to them also is inadmissible."

To this case Mr. Macnaghten has subjoined the following note:—"The reason of the rule is, that seisin and delivery cannot be effected when the thing is not in the possession of the donor. It is of no consequence how the possession has been parted with, even though the proprietary right be expressly retained, or claimed, *as in the case of a pledge* or of an usurpation; but if, after the donor recover it, he put the donee in possession, it is sufficient." It was contended by Mr. Nanabhai that the plaintiff was a minor at the time of the gift, and that Mahomedan law does not require transfer of possession when the donee is a minor. But the authorities seem to go no further than this, that when the donee is a minor, possession may be had by a trustee on his behalf. They certainly do not seem to justify me in holding that a person out of possession may give to a minor what he could not give to an adult.

For these reasons I think that the decree of the District Court must be confirmed with costs.

The decree of the District Court was, in accordance with the opinion of the majority of the Judges, confirmed with costs.

Decree confirmed.

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6 B. 663.

[663] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

DANDEKAR (*Applicant*) *v.* DANDEKARS (*Opponents*).*

[14th August, 1882.]

Arbitration – Award—Oral award—Written award not signed by all the arbitrators—Setting aside award – Practice—Procedure – Civil Procedure Code Act X of 1877, ss. 525, 526, 520, cl. (a)—Arbitration without the intervention of Court.

The term "to show cause" in ss. 525 and 526 of the Code of Civil Procedure, Act X of 1877, does not mean merely to allege cause nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court.

Matters in dispute between the parties were referred to seven arbitrators without the intervention of a Court. The arbitrators, or so many of them as could

* Extraordinary Civil Application No. 233 of 1881.

be got together, held sittings extending over some months, and at each sitting they came to a decision, either unanimously or by a majority, on different questions submitted to them. These decisions were entered on the minutes of their proceedings; and at their last sitting the arbitrators all agreed and informed the parties that the decisions so arrived at constituted the final award, and gave directions for embodying those decisions in the shape of a formal document, which was drawn up on a subsequent day, but was signed by four only out of the seven arbitrators. The remaining arbitrators not being asked to sign it, they never did sign it.

Held that the actual award was an oral award made by all the arbitrators on the last day of their joint sitting, and the drawing up of the formal award was a purely ministerial act to give effect to the previously completed judicial act. The omission to take the signatures of the minority of the arbitrators to the document, which formed the record of the award, was not fatal to the award.

Amongst other matters the arbitrators were asked to make a division of certain fields to which the parties were equally entitled. The arbitrators decided the other matters, but as regards the fields said that it was inconvenient to do so in consequence of the rains, and ordered the parties "to receive the profits half and half and to pay the assessment half and half."

Held that the award left undetermined one of the principal subjects of dispute; and as the Court had no power to remit the award to the arbitrators, the applicant was entitled to a judgment setting aside the order for filing the award.

[F., 8 A. 340=6 A.W.N. 107; 16 A. 231=14 A.W.N. 60; 9 C. 575; 11 C. 166; **Appl.**, 20 B. 208 (210); **R.**, 17 A. 21=14 A.W.N. 187 (**F.B.**); 27 A. 526=2 A.L.J. 416 =A.W.N. (1905) 86; 7 B. 316 (322); 7 B. 341 (**F.B.**); 9 B. 82 (86); 20 B. 596; 28 B. 287=6 Bom.L.R. 15; 16 C. 482; 21 C. 213 (**F.B.**); 15 C.L.J. 110=16 C. W.N. 256=13 Ind. Cas. 118; 2 C.P.L.R. 202 (207); 15 Ind. Cas. 819=5 S.L.R. 240; **D.**, 17 B. 674 (677); U.B.R. 1892—1896, 276.**]**

THIS was an application for the exercise of the Court's extraordinary jurisdiction for the setting aside of an award of arbitration which was directed to be filed by R. B. Gopal G. Phatak, First Class Subordinate Judge of Nasik.

The parties are members of the Dandekar family of the village of Mahim in the Thana Collectorate. The applicant and the father of the opponents were brothers living in union. They **[664]** separated, but before the separation could be fully effected the father of the opponents died. The applicant and the opponents thereafter divided among themselves so much of the property as they could amicably agree to take, and with regard to the rest, appointed seven persons arbitrators on the 17th of November, 1877, to partition it within a year. An award was accordingly made, which Gopal Ramrav Dandekar applied to the First Class Subordinate Judge of Nasik to file under s. 525 of Act X of 1877. His nephews, Sakharam, Abaji and Vaman opposed the application on the grounds (*inter alia*) that the award was not signed by all the arbitrators; that it was not unanimous; that it was not made known to all the parties; that it was not made on the day it bore date; that it was incomplete, and left undetermined important points submitted to the arbitrators' decision.

The Subordinate Judge directed the award to be registered.

The applicant applied to the High Court.

Inverarity and *Pandurang Balibhadra*, for the applicant.

K. T. Telang and *M. C. Apte*, for the opponents.

JUDGMENT.

MELVILL, J.—This is an application to set aside an order of the First Class Subordinate Judge of Nasik, by which he directed that an arbitration award should be filed under the provisions of s. 526 of Act X of 1877.

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Sections 525 and 526 relate to arbitration awards which, as in the present case, have been made without the intervention of the Court. Section 525 provides that an application to file such an award shall be numbered and registered as a suit, and that notice shall be given to the parties, other than the applicant, requiring them to show cause why the award should not be filed. Section 526 says: "If no ground, such as is mentioned or referred to in s. 520 or 521, be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter."

It was contended for the applicant that it was not competent to the Subordinate Judge, under the provisions of this section, to order the award to be filed, inasmuch as certain *bona fide* objections, of the nature mentioned in ss. 520 and 521, were **[665]** taken to the award, though they were not established to the satisfaction of the Subordinate Judge.

The case principally relied upon was that of *Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (1) in which Mr. Justice Pontifex said: "It is true that, in cases under s. 525, the parties cannot obtain the advantages of the provisions contained in ss. 518 and 520, and, therefore, an appeal might be more necessary under s. 525 than under s. 522. But, in my opinion, this goes to show that it was not intended that an award should be filed under s. 525, if either of the parties to the reference showed cause against it by affidavit or verified petition within the provisions of s. 520 or 521. In such cases I think it would be the duty of the Court, without inquiring into the validity of the cause so shown, to refuse the application to file the award, and to leave the applicant to his remedy by suit." The reasons given for this opinion seem to be that questions of considerable delicacy and difficulty may be raised under ss. 520 and 521, and that grave inconvenience and possible injustice might arise if a Subordinate Court were allowed to dispose of such questions finally and without appeal. It appears to us, however, that, while this may be a very good reason for an alteration of the law in respect to appeal, it is not a sufficient reason for putting upon the words of the existing law a construction other than that which they would ordinarily bear. Moreover, it would be unreasonable to suppose that the Legislature intended that a mere allegation of the existence of cause, without any inquiry whatever into the validity of the cause alleged, should be sufficient to prevent the filing of an award. This would be to render the filing of the award impossible in almost every case. Mr. Inverarity admitted this, but suggested that the Court to which the award is presented may inquire into the cause shown, so far as to ascertain whether there is a *bona fide* contention, but no further; and he referred us to an unreported decision of Mr. Justice West in Chambers (*Moolchand Ranchode* v. *Chotalal Hurlochand*, 8th December 1881), in which it appears from the learned Judge's notes that he expressed an opinion that when a *prima facie* substantial case is made out against an award, the Court **[666]** should refuse to file it, and should leave the applicant to this remedy by a suit on the award. We confess that we feel great difficulty in adopting this construction of s 526; and we think that, if the Legislature had intended it, it would have expressed its intention in much more distinct words. The term "to show cause" is a technical term, having a well-understood meaning. It does not mean merely to allege cause, nor

(1) 7 C. 490.

even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court. We think we may safely say that the term is used in this sense in every other part of the Code in which it occurs (*e.g.*, in ss. 479 and 485); and we do not see how we should be justified in putting a different construction upon it in ss. 525 and 526.

Two principal grounds were shown against the award before the Subordinate Judge, and have been relied on in this Court. The first is that the award was drawn up and signed by four only out of the seven arbitrators, and that the remaining three were not asked to sign, and never did sign it. It is proved, and is, indeed, admitted, that this is true in regard to the document in which the award is set forth, and which was signed on the 5th October, 1878. But the case made for the opponents before us was that the award was not effected by the document in question, nor on the date on which it was signed, but that what really took place was this. The arbitrators, or so many of them as could be got together, held sittings extending over some months, and at each sitting they came to a decision, either unanimously or by a majority, on different questions submitted to them. These decisions were entered on the minutes of their proceedings; and at their last sitting on the 25th August, 1878, the arbitrators all agreed and informed the parties, that the decisions so arrived at constituted the final award, and gave directions for embodying those decisions, in the shape of a formal document. Thus, the actual award was an oral award made by all the arbitrators on the 25th August, and the drawing up of the document was a purely ministerial act to give effect to the judicial act already completed. If this contention be made out, we think that the omission to take the signatures of the minority of the arbitrators to the document, which formed the record of their award, would not be fatal to the award; and the **[667]** Subordinate Judge has held that the contention is made out. He says: "The judgment of the *panch* was pronounced on the 25th August, 1878. The formal award, of course, was not ready for sometime, and the want of signatures to it of three out of the seven arbitrators does not, in my opinion, render the award now before the Court invalid. The statements now made by the arbitrators, Rungo, Ganesh and Trimback, are untrustworthy and corrupt. I hold that the award before the Court was made by the said persons, and that there is no reason why the award should not be filed." This is a very clear finding on a question of fact; and sitting as a Court, not of appeal, but of revision, we are bound to accept that finding, unless it appears that there is no evidence on which it could be supported. We have read the evidence bearing on the question and though possibly we might not have arrived at the same conclusion as the Subordinate Judge, we cannot say that there is no evidence to support that conclusion. The deposition of the arbitrator Pandurang (witness No. 33) contains statements which if believed, would justify the finding of the Subordinate Judge that, as set forth in the document (Ex. 3) itself, "the arbitrators heard what both the parties had to say, and their evidence, and at different times settled the subjects of division, according to the opinion of the majority or of all the arbitrators, and finally on the 25th August, 1878, finished and decided the whole matter regarding the division referred to the arbitrators."

The second objection to the award is, in our opinion, such as to entitle the applicant to a judgment in his favour. This objection is that the award has left undetermined a matter, and a very important matter, referred to arbitration, *viz.*, the partition of certain field lands, situated in

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twelve villages, regarding the division of which the parties were at issue. The agreement of reference says: "Partition of some of the property was made by ourselves, and the rest has remained undivided. As there is no certainty of the same being divided by ourselves, the arbitrators have been appointed." It is admitted by both sides (Exs. 56 and 68) that at the time of the reference the parties received the rents of the undivided lands, and paid the assessment, in equal moieties. It is, therefore, quite clear that the object of the reference **[668]** was, so far as regarded these lands, to obtain a division by metes and bounds, which the parties were unable to make for themselves. Now, how is this matter dealt with in the award? Paragraph 23 is as follows:—

"As it is not now convenient to divide and take the field lands mentioned below, it is decided that the parties should act in respect thereof as stated below. The lands are, &c.: (the lands are then enumerated). At present it is not convenient to divide and take the above field lands. Therefore, it is decided that the two parties are entitled to the lands in equal moieties; and, until the same are divided and taken, the two parties are to receive the profits thereof half and half, and to pay the assessment half and half."

It is admitted that the incovenience referred to in this paragraph was simply the incovenience which the arbitrators would experience in going upon the lands in the rainy season—a very insufficient reason for the omission to divide the lands, inasmuch as the award need not have been given till the 17th November, *i.e.*, at least a month after the rains would have ceased. But even if the reason assigned were better than it is, it would not alter the fact that the award leaves unsettled one of the principal subjects of dispute and reference. In respect to the field lands it leaves the parties in exactly the same position in which they were before. It declares them to be equal sharers—a matter regarding which there was no dispute; but instead of partitioning the lands, it obliges the parties to do this for themselves, or to have recourse to litigation, although the whole motive of the reference to arbitration was that the parties could not agree to a partition among themselves, and wished to avoid the necessity of litigation. It seems to us that, as ground has been shown against the award, such as is mentioned in s. 520, cl. (*a*), and affecting the award in an important particular; and as we have no power to remit the award to the arbitrators for reconsideration and amendment, the applicant is entitled to a judgment setting aside the order for filing the award.

We reverse the Subordinate Judge's order accordingly, with costs on the opponents, Sakharam, Ganesh and others, throughout.

Order reversed.

6 B. 669.

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[669] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Acting Chief Justice, and Mr. Justice Melvill.

GANGA MULIK (*Plaintiff*) *v.* BAYAJI (*Defendant*).*
[29th June, 1882.]

Mortgage suit—Account—Evidence—Burden of proof.

In a mortgage suit, where the defendant admitted that he was in possession of the property in dispute as a mortgagee under the plaintiff, but refused to put in evidence the mortgage-deed which was insufficiently stamped.

Held that the plaintiff was entitled to redeem, on paying what was due from him on the mortgage, together with the costs of the suit, and that if the mortgagee refused to pay the penalty and put the mortgage-deed in evidence, he could only be credited in the account with the sum which the plaintiff admitted to be the amount of the principal, and must be debited with the income derived from the land since he (mortgagee) had been in possession.

In taking the account on a mortgage, it lies upon the mortgagee to prove what is due from the mortgagor in respect of principal and interest.

UNDER s. 617 of Act X of 1877 this case was referred for the opinion of the High Court by Rao Saheb Gulabdas Laldas, Second Class Subordinate Judge of Vita, in the district of Satara.

The plaintiff Ganga sued for possession of certain land, alleging that it had been mortgaged to the defendant for Rs. 49; that the defendant had been in possession and enjoyed the profits of the land; that the mortgage-debt had been satisfied; and that the plaintiff, therefore, was entitled to the possession of the property. The defendant produced the mortgage-deed, which was dated the 13th July 1870, and pleaded that he had a right to continue in possession under it. The Court held the mortgage-deed to be insufficiently stamped and inadmissible in evidence, unless the defendant paid the penalty with the amount of the deficient stamp duty. The defendant refused to pay it, but contended through his pleader that the plaintiff was not entitled to recover possession of the land, except on payment of the amount of the mortgage, as admitted by him in the plaint. The Subordinate Judge was of opinion that the plaintiff had a right to recover the land without paying anything to the defendant, who refused to pay the penalty and put the mortgage-deed in evidence. He, therefore, referred to the High Court the question whether the **[670]** plaintiff was bound to pay the amount of the mortgage admitted by him, the mortgage-deed being inadmissible in evidence on account of the refusal of the defendant to pay the penalty and additional stamp duty.

There was no appearance of parties in the High Court, either in person or by pleader.

JUDGMENT.

Per Curiam.—The defendant having admitted that he is in possession of the property as a mortgagee under the plaintiff, the latter is entitled to redeem it, on paying what is found due from her on the mortgage, together with the costs of this suit. In taking the account it lies upon the mortgagee to prove what is due from the plaintiff in respect of principal and

* Civil Reference No. 25 of 1882.

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interest. If, therefore, he refuses to pay the penalty and put the mortgage-deed in evidence, he can only be credited in the account with the sum of Rs. 49, which the plaintiff admits was the amount of the principal. On the other hand, he would have to be debited with the income derived from the property since he has been in possession, for which he must account. If the latter exceeds the Rs. 49 and costs of this suit, possession should at once be given to the plaintiff. If, on the other hand, it falls short of the Rs. 49 and costs of the suit, then she must be put in possession, in case she pays the balance within six months after the said balance has been ascertained, and in default she must stand foreclosed.

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6 B. 670.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

NILKANTHAPA MALKAPA (*Original Plaintiff*), *Appellant v.* THE MAGISTRATE (FIRST CLASS) IN CHARGE OF THE SHOLAPUR TALUKA (*Original Defendant*), *Respondent.** [13th April, 1880.]

Civil Procedure Code (Act X of 1877), s. 416—Bombay Act V of 1879, s. 37—Practice—Procedure—Amendment of plaint—Substitution of parties—Criminal Procedure Code, Act X of 1872, s. 521—Order by Magistrate for removal of obstruction from a public thoroughfare—Suit against Magistrate to establish right.

Under s. 521 of the Criminal Procedure Code, Act X of 1872, a First Class Magistrate in charge of a taluka made an order, declaring certain land to be part **[671]** of a public thoroughfare, and directing the plaintiff to remove the obstruction caused by him to it. The plaintiff sued the Magistrate to establish his right to the land, alleging that it was his private property, and that the Magistrate's order was wrong. The Assistant Judge, who tried the suit, dismissed it, holding that it did not lie against the Magistrate. On appeal to the High Court.

Held, that the Assistant Judge might have properly permitted the plaintiff to amend his suit by striking out the name of the First Class Magistrate as defendant, and substituting in that capacity the Secretary of State for India in Council.

The High Court, accordingly, reversed the decree of the Assistant Judge, and remanded the suit for retrial on the merits, after making the amendment directed.

[F., 6 B. 672 (673); **R.**, 15 C. 460 (**F.B.**); 4 O. C. 133.]

THIS was an appeal against the decision of J. W. Walker, Senior Assistant Judge at Sholapur, in the district of Poona.

The plaintiff sued to establish his right to two plots of land, alleging that they belonged to him, and were wrongly held by the defendant, as a Magistrate in charge of Sholapur Taluka, to be part of a public thoroughfare, under s. 521 of the Criminal Procedure Code, Act X of 1872. The defendant answered (*inter alia*) that he was not the proper person to be sued, and that the land did not belong to the plaintiff.

The Assistant Judge raised the issue, whether the suit was maintainable; and, deciding it in the negative, dismissed the plaintiff's claim.

The plaintiff appealed to the High Court.

Ghanasham Nilkanth Nadkarni, for the appellant.—The lower Court was wrong in dismissing the suit. The plaintiff asserts a right to the

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* Appeal No. 8 of 1880 from original decree.

ground which has been declared by the defendant not to belong to him. If the suit is wrongly brought against the Magistrate, I ask that it may be allowed to be amended by substituting the Secretary of State for India as defendant, under s. 416 of the Civil Procedure Code, Act X of 1877.

Nanabhai Haridas, Government Pleader, for the respondent.

The following is the judgment of the Court :—

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JUDGMENT.

WESTROPP, C.J.—This Court being of opinion that the Senior Assistant Judge might properly have permitted the plaintiff to amend his suit by striking out the name of the First Class Magistrate in charge of Sholapur Taluka as defendant, and substituting in that capacity the Secretary of State for India in [672] Council (see Civil Procedure Code, Act X of 1877, s. 416, and Bombay Act V of 1879, s. 37), reverses the decree of the Senior Assistant Judge, and remands the suit for retrial on the merits, after making such an amendment as aforesaid, which this Court hereby permits, and due service of process on the local Government Pleader on behalf of the said Secretary of State pursuant to s. 419 of Act X of 1877, and such other proceedings as may be necessary. The plaintiff must pay all costs of the suit and appeal up to the present time.

Decree reversed and case remanded.

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6 B. 672.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice West.

BALARAM CHATRUKALAL (*Original Plaintiff*), *Appellant v.* THE FIRST CLASS MAGISTRATE IN CHARGE OF TALUKA IGATPURI (*Original Defendant*), *Respondent.** [20th June, 1882.]

Civil Procedure Code (Act X of 1877), s. 416—Practice—Procedure—Amendment of plaint—Substitution of parties—Act X of 1872, ss. 523 and 526—Order by Magistrate for removal of obstruction from public thoroughfare—Suit to establish right.

On the 11th August, 1879, the defendant, as a Magistrate in charge of a taluka, made an order under ss. 523 and 526 of the Criminal Procedure Code (Act X of 1872), directing the plaintiff to remove a certain "*ota*," on the ground that it had been built upon a public thoroughfare. The plaintiff thereupon sued the Magistrate for a declaration that the "*ota*" and site belonged to him, and prayed for a reversal of the Magistrate's order. The Assistant Judge, who tried the suit, dismissed it, holding that it did not lie against the defendant.

On appeal, the High Court, following the decision in *Nilkanthapa Malkapa* v. *The Magistrate (First Class) in charge of Sholapur Taluka* (1), reversed the decree of the Assistant Judge, and remanded the case, in order that the plaintiff might amend his suit by striking out the name of the First Class Magistrate as defendant and substituting in that capacity the Secretary of State for India in Council, and directing the lower Court to determine the suit upon its merits after the above amendment and due service of process.

[R., 15 C. 460; 4 O.C. 133.]

THIS was an appeal against the decision of H. F. Aston, Assistant Judge at Nasik, in the district of Thana.

[673] The plaintiff sued for a declaration of his right to a certain "*ota*" and site, alleging that they belonged to him; that the "*ota*" had

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* Appeal No. 56 of 1881 from original decree.

(1) 6 B. 670.

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been built on the site of an old "*ota*" belonging to the house of one Dhondi, who had sold the house and open ground to the plaintiff for Rs. 100 on the 13th October, 1878. The plaintiff prayed for reversal of the order made by the defendant on the 11th August, 1879, for the removal of the "*ota*," on the ground that it had been built upon a public thoroughfare.

The defendant answered (*inter alia*) that he ordered the "*ota*" to be removed under ss. 523 and 526 of Act X of 1872, on decision of *panch* (jury) that it caused obstruction to a public road; that plaintiff had no cause of action against defendant; that the site of the "*ota*" did not belong to the plaintiff.

One of the issues raised by the Assistant Judge was, whether the suit could be maintained against the defendant. He found this issue in the negative, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Daji Abaji Khare, for the appellant, referred to *Nilkanthapa Malkapa* v. *The Magistrate (First Class) in charge of Sholapur Taluka* (1), and prayed that the plaintiff might be allowed to amend his suit, as in that case.

Nanabhai Haridas, Government Pleader, for the respondent.

JUDGMENT.

MELVILL, J.—Following the course adopted by this Court in *Nilkanthapa Malkapa* v. *The Magistrate (First Class) in charge of Sholapur Taluka* (1), the Court reverses the decree of the Assistant Judge, and remands this case, in order that the plaintiff may amend his suit by striking out the name of the First Class Magistrate in charge of the Igatpuri Taluka as defendant, and may substitute in that capacity the Secretary of State for India in Council. Upon this amendment being made, and after due service of process on the local Government Pleader on behalf of the said Secretary of State, the Court below should proceed to determine the suit upon its merits. The plaintiff must bear the costs of this appeal. The question of other costs will be disposed of in the final decision of the Court below.

Decree reversed and case remanded.

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6 B. 674=7 Ind. Jur. 96.

[674] APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

GOPAL SITARAM GUNE AND TWO OTHERS (*Original Defendants Nos.* 5, 6 *and* 7), *Appellants v.* DESAI AND SEVEN OTHERS (*Original Plaintiffs*), *Respondents.** [19th July, 1882.]

Mortgage—Subsequent agreement conveying to mortgagee for a term of years—Effect of such agreement—"Once a mortgage always a mortgage"—Suit by heirs of mortgagor to recover the property—Limitation—Usufructuary mortgage.

Where, after the expiration of the period prescribed for redemption, the mortgagor and mortgagee agreed that the mortgagee should continue in absolute possession for a fixed term, and then restore the property free from the mortgage lien.

* Second Appeal No. 338 of 1880.

(1) 6 B. 670.

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6 B. 674 = 7 Ind. Jur. 96.

Held, that the agreement was distinct from the original mortgage, and was not intended to be a mortgage, but a conveyance for a term of years, and a suit to recover the property must be brought within twelve years from the expiration of the term stipulated in the agreement.

[D., 12 C.P.L.R. 96.]

THIS was a second appeal from the decision of J. L. Johnston, Assistant Judge of Ratnagiri, confirming the decree of Rao Saheb A. K. Kothare, Subordinate Judge of Rajapur.

The facts of the case, in so far as they are material, are as follows :—

In the year 1814 the plaintiff's ancestor, Hari Narayan, mortgaged to one Limaye his moiety of the village of Gavane with possession for Rs. 1,275 for a term of years. Of this money a part was advanced by Vithal Pitre, the father of defendant No. 1 (Bhaskar), and in 1824 or 1825 Vithal Pitre obtained from Limaye an assignment of the whole mortgage. In 1826, Pitre mortgaged the same moiety to Phadke, the father of defendant No. 3, who continued in possession of it till 1873. On the 1st of November, 1829, Pitre passed to Hari Narayan the following document :—

"Formerly I paid to you * * * in all Rs. 1,725. I obtained from you a mortgage-deed dated 19th November, 1814, in the name of G. B. Limaye. By that deed I took in mortgage from you a moiety of the village of Gavane on an agreement of three years. On its expiry you offered to pay my money through B. L. Joshi. You said that Joshi had agreed to advance money **[675]** up to twenty-two hundred rupees on the said moiety of the village, to get his money paid off in forty years, and to set his village free from encumbrance. I dissuaded you from adopting this course. Just as agreed to by Joshi, I undertake to have my mortgage money paid in forty years, and to set free from mortgage and deliver the said moiety of this village to you. In respect of the said mortgage the sum due to me in all is Rs. 2,126, made up of Rs. 1,725 original sum and Rs. 471 interest. I agree to carry on the management of the moiety of the said village which is mortgaged, to take the gross income of the moiety, to have my said amount liquidated in forty years, and to make the moiety free from mortgage in the forty-first year. Accordingly, a deed has been taken in writing from you, and the deed, which is in the name of the said Limaye, ought to be returned to you. But as the deed in Limaye's name is deposited by me elsewhere, and as the same cannot be obtained to be returned to you, instead of taking from you another document in writing, according to the above agreement, I give you an agreement as follows :—With reference to the said mortgage an agreement was made in November, 1817, to have the sum of Rs. 2,196 paid within forty years together with interest. Out of the forty years agreed upon, twelve years have elapsed up to now. After deducting the said forty years there remain twenty-eight years from the current year. Within these twenty-eight years I will get my money paid with interest as mentioned above, and in the 29th year I will hand over to you the said moiety and your deed in Limaye's name."* * * *

The present suit to recover the moiety of Gavane was brought by the heirs of Hari Narayan within sixty years from the original mortgage, but after twelve years from the expiration of the period prescribed in the deed of 1829. The defendants denied the agreement, which, however, the Subordinate Judge found proved; and on a consideration of the merits of

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the case decreed that the plaintiffs should recover possession of one-half of the estate mentioned in the plaint. No point of limitation was raised or considered in the Court of first instance; it was raised for the first time in appeal. The Assistant Judge considered that the whole case depended upon the genuineness and construction to be put on the agreement of 1829. He agreed with the Subordinate [676] Judge in holding that agreement to be proved, and he also held this claim not to be time-barred, and upheld the decree of the Subordinate Judge. The original defendants 5, 6 and 7 appealed to the High Court.

Kashinath Trimbak Telang with *Yashvant Vasudev Athlye*, for the appellants.—The agreement of 1829 is not a mortgage, but a conveyance for a term of years. It is in supersession of the original mortgage. There is no right to an account in the present case: *Bapuji Apaji* v. *Senavaraji*(1). And there is no trust: Coote on Mortgages, 175 (3rd ed.). The principle laid down in *Goodman* v. *Grierson* (2) was adopted by this Court in *Subabhat* v. *Vasudevbhat* (3), in which the tests of a mortgage transaction are given. Plaintiffs are not the owners during the term. Hence the only remedy is ejectment after the expiration of the term against the trespassers, *Yates* v. *Hambly* (4). This transaction is not analogous to *gahan tahan*, as the agreement is not contemporaneous with the original mortgage. The doctrine "once a mortgage always a mortgage" does not, therefore, apply, nor the limitation of sixty years. The limitation of twelve years applies, and it begins from the close of the term of forty years,—that is from 1857. This suit brought in 1873 is, therefore, barred.

Rao Saheb *Vasudev Jagannath*, for the respondents.—The transaction evidenced by the agreement of 1829 is a mortgage, the intention of the parties being to create a charge; the form of the expression used is immaterial: *Rajkumar R. G. N. Singh* v. *Ram Dutt Chowdhry* (5). The agreement clearly and expressly recites that, in consideration of our refraining from mortgaging our moiety of the village to Joshi, as we had intended to do, Pitre offered us the same terms, and in lieu of the debt due from us the present mortgage was effected for a fixed period, during which Pitre says he would hold it as mortgagee, and after which period he would restore our moiety "free from the mortgage." This amounts to a usufructuary mortgage: *Ruttonsing* v. *Gridharilal* (6); *Keval Sahu* v. *Rash Narain Singh* (7); *Puriag Dutt Roy* v. [677] *Felloo Roy* (8). Even a lease for term of years is a mortgage when it is executed by a debtor to his creditor in consideration of or as security for the debt: *Ishan Chandra* v. *Sujan Bibi* (9); *Ex-parte Hill* (10); *Mashosk Ameen Suzzada* v. *Marew Reddy*(11). *Zuri Pesghi* leases are so construed: Macpherson on Mortgage, p. 8, (6th ed). To every holding on the footing of a mortgage the limitation of sixty years applies. In a case falling under the Limitation Act XIV of 1859 the Privy Council held that "the rule of limitation was enacted in the most general terms, and in language sufficiently large to embrace every kind of mortgage: *Luchmee Buksh Roy* v. *Runjeet Rain Panday* (12). The case of *Subabhat* v. *Vasudevbhat* does not apply. The relation of mortgagor and mortgagee admittedly subsisted, at least till the expiration of the stipulated period; and at the expiration of it nothing took

(1) 2 B. 231. (2) 2 B. & B. 279. (3) 2 B. 113.
(4) 2 Atk. 362 = Sp. Eq. 219. (5) 5 B. L. R. 264. F.B.
(6) 1 W. R. 7; 8 *Ibid.* 310. (7) 13 *Ibid.* 445.
(8) 19 W.R. 160. (9) 7 B.L.R. 14. (10) 8 C. 254.
(11) 8 M.H.C.R. 31. (12) 13 B.L.R. 177, P.C.

place by which the relation was altered. The rule "once a mortgage always a mortgage" therefore applies: *Ramji* v. *Chinto* (1); *Krishnaji Keshav* v. *Ravji Sadashiv* (2); Story's Equity, s. 1004. The present is a case of a mortgagee holding over. Where a mortgage is satisfied, and the suit is for the recovery of the mortgaged property, as the present one is, the rule of sixty years applies: *Lall Doss* v. *Jamal Ali* (3).

JUDGMENT.

KEMBALL, J.—This is a suit to recover possession of the moiety of a village, belonging to a family surnamed Desai, which was mortgaged by one of the members of the family, Hari Narayan, an ancestor of the plaintiffs, on the 19th November, 1814, to secure an advance of Rs. 1,725, which sum was paid off in 1857.

Plaintiffs' case was, that the mortgage of 1814 (Ex. 28) was for three years; that the property remained in the possession of the mortgagee till 1829, when a document (Ex. 82) was executed by Vithal Bhaskar Pitre, the father of the deceased defendant No. 1, whereby the said Pitre agreed, in consideration of his being allowed to remain in possession of the said moiety of the village for twenty-eight years more, that he would satisfy his claim of Rs. 1,725 principal *plus* Rs. 471 interest, and would **[678]** in the twenty-ninth year, *i.e.*, in 1857, hand over the said moiety to the mortgagor, and would have "no interest in any way in the mortgage of the moiety."

This suit to be put back into possession under the aforesaid agreement, was brought in 1873, and the first question which we have to determine is—was it in time? The answer to this question depends upon the construction to be put on this agreement (Ex. 82) on which, as the Assistant Judge rightly observed, the whole case rests. Exception has been taken to the findings of the Courts below as to the genuineness of this document, which is, on the face of it, a copy—(findings to which both the Courts came not without some hesitation), in consequence of a remark in the Assistant Judge's judgment which was obviously not well founded, but we do not think that the error adverted to, would justify our interfering with a finding of fact based as it is on other and independent grounds.

In the Court of first instance the question of limitation appears to have been neither raised nor considered, though the Subordinate Judge laid down the issue, whether the agreement (Ex. 82) was part of the original mortgage, and found it was distinct. In the appellate Court, however, an objection was taken to the Subordinate Judge's decree on the ground of the suit being barred by the Limitation Law; but the Assistant Judge while noting this objection confined himself to the issues framed by the lower Court, though he found that the agreement "must modify the original mortgage contract between Hari Narayan and the father of defendant No. 1, and must, therefore, be taken to form part of the mortgage deed, contract and transaction."

If the view of the Assistant Judge was right, the suit, which was brought within sixty years of 1814, was doubtless not barred. But it is contended for the appellant that the arrangement under the agreement of 1829 was purely a conveyance for a term of years intended to supersede the original mortgage, and in no sense of the term a mortgage; and that the suit being simply to get back the estate, (to the possession of

(1) 1 B.H.C.R. 199. (2) 9 *Ibid.* 79. (3) 9 W.R. 187. F.B.

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which the plaintiffs were entitled in 1857) not having been brought within twelve years from that time, was barred.

[679] The original mortgage of 1814 was, it appears from Ex. 27, executed to one Gangadhar Bhikaji Limaye; and although the Assistant Judge considered that Pitre was virtually the mortgagee, it is apparent from a statement in Ex. 82 that Limaye alone for some time after 1814 dealt with the mortgagor. However that may be, a formal assignment of his rights (Ex. 29) was, it is found, executed by Limaye to Pitre in 1824, so that we may take it that, some few years before 1829, Hari Narayan was aware of Pitre's interest. The agreement of 1829 is not very intelligible; but this much, we think, is clear, that on the expiration of the term of the original mortgage of 1814, *i.e.*, in 1817. Hari Narayan had been desirous of redeeming his moiety of the village from Limaye, and that, in consideration of his consenting not to do this, and of his allowing the said moiety to be retained absolutely for a fixed term of years, it was agreed first by Limaye and subsequently by Pitre to restore possession at the end of that term free from all claim: and, regard being had to these conditions, we think the Subordinate Judge was right in holding the agreement to be distinct from the original mortgage, and we are unable to discover any circumstance tending to show that the transaction was by way of security.

It is contended by Rao Saheb Vasudev Jagannath, who has argued the whole case for the respondents very ably, that, as the original conveyance was intended as a security for the money advanced, it must ever after be considered as a mortgage, and further that the subsequent transaction was of the nature of a *zuri-pesghi* lease or usufructuary mortgage common on the other side of India. But with regard to the first point, it is clearly necessary to distinguish between what passed at the time of the original conveyance and the after arrangement. This arrangement, further, was plainly to the advantage of Hari Narayan, so much so that the appellant's counsel argued from it that the original of it could never have been executed by Pitre, and it is not disputed, in fact it is part of the plaintiff's case, that Pitre received the entire rents and profits without accounting or being expected to account to Hari Narayan for them, so that, having a due regard to the nature of the agreement of 1829 **[680]** and the extraneous facts, we are of opinion that a mortgage was not intended.

Turning, then, to the second point that this is a *zur-i-peshgi* lease, the obvious remark suggests itself, that the advance of the money and the grant of the lease were not contemporaneous, and, so far as we understand the several decisions to which we have been referred, *zur-i-peshgi* leases are placed on the footing of usufructuary mortgages only when there is a power of redemption reserved to the lessor expressly or by implication. Such power was clearly non-existent here, and, moreover, as we have already observed, Hari Narayan could not admittedly have sued Pitre for an account at the expiration of the term. We are unable, therefore, to hold that the grant to Pitre was a usufructuary mortgage or in the nature of one. This is clearly not a suit for redemption; the plaint sets forth that the forty years expired on the 23rd October, 1857, and that on that date the cause of action for obtaining back the village accrued. Why the plaintiffs have remained quiet all these years it is difficult to understand; but we think that, as they have allowed more than twelve years to elapse, their suit has become barred. Without, therefore, going into the other questions that have been argued before us

we must reverse the decrees of the Courts below, and reject the claim with costs.

PINHEY, J.—I also am of opinion that the claim is barred. You cannot call the agreement of 1829 a mortgage bond, for under it none of the relations of mortgagor and mortgagee accrues; there can be no suit for recovery of the property on payment of money advanced, and interest. Under that document the property was assigned for a term of forty years (that is for twenty-eight years from its date) in lieu of the principal sum ascertained to be due on the date of the agreement and the interest accruing thereon. The forty years expired in 1857, and the owner of the land was at once entitled to assume possession of the land. Instead of taking possession of the land, he allowed the holder under the agreement to hold on, or over; and his heirs (the plaintiffs in this suit) have filed this suit on 30th September, 1873, for the recovery of the property—sixteen years after 1857. Therefore, I consider **[681]** the claim barred, and that, without considering any other point in the case, the decrees of the Courts below should be reversed and the claim rejected with costs.

Decree reversed.

NOTE.—This ruling was followed in *Abbesing Dosabhai* v. *Maharana Jasvatsingh*, Reg. Ap. 31 of 1880, decided on 4th October, 1882 by MELVILL and PINHEY, JJ.

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6 B. 681.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

PIRJADE (*Original Plaintiff*), *Appellant v.* PIRJADE (*Original Defendant*), *Respondent.** [5th September, 1882.]

Limitation—Decree—Execution—Act XV of 1877, *s.* 14, *sch. II, art.* 179, *cl.* 4—*The Code of Civil Procedure, Act X of* 1877, *ss.* 374 *and* 647.

The rule laid down in s. 374 of the Code of Civil Procedure, Act X of 1877, that, where a suit is withdrawn with leave to bring a fresh suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought, applies to applications for execution; and, therefore, in counting the time of three years prescribed by the Limitation Act XV of 1877, sch. II, art. 179, cl. 4, an application allowed to be withdrawn must be discarded as if it had never been presented. The bar created by s. 374 of the Code of Civil Procedure is, in such a case, not removed by s. 14 of the Limitation Act as causes for which the withdrawal of a suit or application may be permitted are not causes "of a like nature" with defect of jurisdiction.

[Diss., 10 B. 62 (65); N.F., 18 C. 462; F., 7 A. 359=5 A.W.N. 51; R., 8 A. 475=6 A.W.N. 233; 10 A. 71; 26 B. 76=3 Bom. L.R. 431; 29 B. 219=7 Bom. L.R. 90; 23 C. 217; 13 C. L.J. 532=11 Ind. Cas. 385; 22 P.R. 1905=57 P.L.R. 1905 D., 11 B. 467 (469).]

THIS was an appeal from the order of W.H. Newnham, Judge of Poona, confirming an order of the First Class Subordinate Judge of Poona, who rejected the application of the applicant for execution of his decree.

The facts sufficiently appear from the judgment of the High Court.

Manekshah Jehangirshah, for the appellant.

Ghanasham Nilkanth, for the respondent.

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* Second Appeal No. 693 of 1881.

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6 B. 681.

JUDGMENT.

MELVILL, J.—The decree which the plaintiff seeks to execute was passed on the 14th July, 1862.

An application for execution was presented on the 15th June, 1876; another on the 17th April, 1878; and a third, which is that with which we have to deal, on the 15th April, 1881.

[682] The application of the 17th April, 1878, was withdrawn, with permission to present a fresh application.

The Courts below have held that an application so withdrawn is not such an application as will keep the decree alive. The District Judge says: "This *darkhast* of 1878 was incorrect by reason of misdescription, and the plaintiff was allowed to withdraw it 'with leave to present another;' while the next one was presented in 1881. I do not think that an application which has to be withdrawn from incorrectness can be held to be one which can keep the decree alive."

Unfortunately, the application of 1878 and the proceedings thereon have not been sent up: but, if the description of it given by the District Judge be correct, it may well be doubted whether the application was made "in accordance with law," within the meaning of cl. 4, art. 179 of the Limitation Act XV of 1877.

It is not, however, necessary to send for the proceedings in order to decide this point, because we are able to dispose of the question before us on another ground.

Section 374 of the Civil Procedure Code (Act X of 1877) says: "In any fresh suit instituted on permission granted under the last preceding section, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought."

As rules of limitation are rules of procedure, it must be held that the above provision, relating to suits, is extended to applications by s. 647, which says, "the procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings, in any Court of civil jurisdiction other than suits and appeals."

It was contended for the plaintiff that the meaning and effect of s. 374 is simply this, that a party who has withdrawn from a suit cannot in a fresh suit claim the benefit of s. 14 of Act XV of 1877, which enables a plaintiff to deduct the period during which he may have been prosecuting a former suit in a Court "which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

[683] We do not, however, think that the above section of the Limitation Act was present to the mind of the Legislature when framing s. 374 of Act X of 1877. The causes for which the withdrawal of a suit may be permitted are not causes "of a like nature" with defect of jurisdiction—*Chunder Madhub Chuckerbutty* v. *Bissessuree Debea* (1). Section 374 seems to have been framed with the intention of laying down in the most general terms a rule which, in regard to suits, was perhaps unnecessary, *viz.*, that in the fresh suit any question of limitation should be decided in the same manner as if the former suit had not been brought at all.

The same rule must, we think, be applied to applications. Clause 4, art. 179, of Act XV of 1877 must be read subject to the rules contained in ss. 374 and 647 of the Code of Civil Procedure; and, therefore, notwithstanding that the present application has been presented within three years

(1) 6 W.R. 184.

from the date of the application of 1878, yet the question of limitation must be determined as if the application of 1878 had never been presented at all.

The result is that the decrees of the lower Courts must be confirmed with costs.

Decree confirmed.

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6 B. 681.

6 B. 683.

APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

RAMJI (*Original Defendants*), *Appellant v.* DHARMA (*Original Plaintiff*), *Respondent.** [4th September, 1882.]

Limitation—Acknowledgment — Account stated—Adjusted account — Adjustment of accounts, effect of—"Ruza"*—Act XV of* 1877, *s.* 19*—Act IX of* 1872, *s.* 25, *cl.* 3.

The "*ruzu*" or adjustment of an account can operate either as a revival of an original promise or as evidence of a new contract. If it is to be used as an acknowledgment giving a fresh starting point for computing s new period of limitation it must be made in writing and signed before the expiration of the period of limitation prescribed. If it is to be used as evidence of a new contract furnishing **[684]** a basis for a new cause of action, it must contain a promise in writing duly signed as required by the Contract Act IX of 1872, s. 25, cl. 3, a bare statement of an account not being such a promise.

[R., 22 B. 513 (517) ; 11 C.P.L.R. 65 ; 23 P.L.R. 17.**]**

THIS was a second appeal from the decision of E. Cordeaux, Judge of Khandesh, confirming the decree of the Subordinate Judge of Yaval.

The plaintiff sued to recover Rs. 1,820 due on an account adjusted on the 26th of February, 1879. The original account (not produced in the case) contains an item of Rs. 100 advanced nine years before the date of the account, various small items, and finally, an item of Rs. 1,600 dated the same day as the account. At the foot of the account appears the signature of the defendant. The suit was brought on the 29th of March, 1879, that is to say, a month after the "*ruzu*" or adjustment of the account.

The defendant contended that the "*ruzu*" was a forgery, and that he owed nothing, and that the claim was barred.

Both the Courts found the "*ruzu*" proved, and awarded the claim.

The defendant appealed to the High Court.

Shantaram Narayan.—We contend that, of the sum awarded Rs. 201-10 is barred on two grounds : first that the "*ruzu*" was made after expiry of the limitation prescribed, and, secondly, that it does not contain a promise to pay. For purposes of limitation an account stated is a mere acknowledgment. "*Ruzu*" is nothing more than a statement of a sum of money. Under the Limitation Act XIV of 1859 a suit to recover the balance of an account adjusted and signed by the defendant might be brought within six years : *Humedchand Hukamchand* v. *Shah Bulakidas Lalchand* (1). But that was on the idea that an adjusted account was an

* Second Appeal No. 442 of 1880.

(1) 5 B.H.C.R.O.C.J. 16.

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implied contract. Under the Act of 1859 the signature of the defendant was not necessary to make an account a stated account: *Mulchand Gulabchand* v. *Girdhar Madhav* (1); *Hargopal Premsookhdas* v. *Abdul Khan* (2). Under the Limitation Act IX of 1871 an entry of an account stated was held to be not a contract in writing. To constitute a contract the promise was required to be stated in writing: *Amritlal Mansuk* v. *Maneklal Jetha* (3); **[685]** *Hammantlal Motichand* v. *Ramabai* (4). So that there must be a distinct written promise. As to implied contract we deny that there is any implied contract under the Contract Act. There is either a contract, or there is none. The term implied contract does not occur, and Chapter V is headed "Of certain relations resembling those created by contract." Sections 68 to 72, which compose the chapter, omit to make any mention of an account stated. As a contract in respect of a debt barred, s. 25 of the Contract Act (IX of 1872) requires that it must be in respect of a debt not barred. The law is well settled in that respect.

Hon. *V. N. Mandlik.*—The Contract Act does not do away with implied contracts. As adjustment of account or "*ruzu*" is a promise to pay the balance settled. To constitute a promise it is not necessary that the defendant should in so many words say that he promises to pay the balance. A promise to pay is contained in the idea of a "*ruzu.*"

JUDGMENT.

KEMBALL, J.—The main contention in this appeal is that so much of the claim as respects the balance of Rs. 201-10 was time-barred, and we think the objection is good. The "*ruzu,*" on which this suit was brought, must be used either as a revival of an original promise or as evidence of a new contract. As an acknowledgment it would obviously have no effect—see s. 19, Act XV of 1877—if not made before the expiration of the period of limitation prescribed; and if it is relied on as furnishing a new cause of action, the bare statement of an account is not a contract there being no promise in writing such as is required by s. 25, cl. 3, of the Contract Act—*vide Amritlal Mansuk* v. *Maneklal Jetha and another* (3) and *Hanmantmal Motichand* v. *Ramabai* (4). To the extent of the claim, therefore, in respect of the balance the suit is beyond time. With regard to the other objections, we think the appellant has made out no sufficient case for interference. We accordingly amend the decrees of the Court below by deducting the sum of Rs. 201-10 from the amount awarded. Each party to bear his own costs of this appeal.

Decree amended.

(1) 8 B.H.C.R.A.C.J. 6.
(2) 9 B.H.C.R. 429.
(3) 10 B.H.C.R. 375.
(4) 3 B. 198.

[686] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

KALIDAS (*Original Plaintiff*), *Appellant v.* THE MUNICIPALITY OF DHANDHUKA (*Original Defendant*), *Respondent.** [23rd August, 1882.]

Bombay District Municipal Act VI of 1873, *ss.* 3 *and* 17—*Street—Court—Mehela—Khadki—Ota.*

The plaintiff was the owner of two houses and mortgagee of a third house out of a set of six which surrounded an open Court in the town of Dhandhuka, and which, including the Court, originally belonged to a single individual. The plaintiff built an "*ota*" or verandah and put up a wooden bench in front of his house, which the Municipality of the town ordered to be removed. In a suit by the plaintiff to have this order set aside the District Court found that the occupant of each house had the right of way across the Court, which was used as a means of access to the houses which surrounded it by persons having business with the householders.

Held that such limited access by the public was not sufficient to show that the Court ceased to be private property, and was converted into a "street" vesting in the Municipality within the meaning of ss. 3 and 17 of Bombay District Municipality Act VI of 1873: and that the Municipality had not any right to interfere with the plaintiff's erection, whatever liability he might have incurred to an action by any of the other householders who occupied the Court.

[**R.**, 20 B. 83; 20 B. 146; 27 B. 221 (233); **D.**, 24 B. 600 (605); 30 B. 558=8 Bom. L.R 457=4 Cr. L.J. 23; 8 A.W.N. 255.]

THIS was a second appeal from the decision of M. B. Baker, District Judge of Ahmedabad, confirming the decree of A. H. Unwin, Assistant Judge of Ahmedabad.

In the town of Dhandhuka of the Ahmedabad district there is what is locally known as a "*khadki*,"—that is, a range of buildings round an open Court locally called "*chok*." This Court formerly belonged to a single individual, but at the date of suit the plaintiff was the owner of two and mortgagee in possession of third out of a set of six houses. The plaintiff in front of his houses put up a wooden bench, and erected a mud *ota* or verandah which he wished to convert into a substantial verandah of chunam. The town of Dhandhuka is one to which the Municipal Act VI of 1873 applies, and the Municipality at first by their managing committee admitted the plaintiff's right to the *ota* and the bench, but afterwards under the presidency of the chairman made an order directing the plaintiff to remove them as encroachments on the public street. The Municipality, amongst [687] other things, contended that the claim made in this suit was barred by Bombay Act VI of 1873; that the public had free access to the Court; and that the Court was, therefore, a public street which had vested in the Municipality.

The Assistant Judge in disposing of the case said: "The real questions involved are, (1st) whether the "*mehela*" or "*khadki*," or (as I translate either word) *court* is a street as defined in s. 3 of Bombay Act VI of 1873; and (2nd) "if so, whether the plaintiff has proved his title to the "*parthas*" or "*ota*" in the first instance, and secondly to the Court or user of the Court upon which the plaintiff claims to keep the bench. As to whether the Court is a 'street' it is admitted that there is no thoroughfare through it, but that it is rendered *cul de sac* by the position of the six

* Second Appeal No. 644 of 1881.

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houses and the line of back walls opposed by neighbouring houses. It appears highly probable from the evidence of the plaintiff's witness, Manor, corroborated by Tribhovan, for the defendant, that all the six houses in the Court once belonged to a single Hindu family, of whom Manor is a representative, and that consequently the Court was once private property. * * * * The question arises, how and when the Court ceased to be a private property? In the opinion of the municipal secretary it became public property or street as soon as ever Manor or any member of the proprietary family had alienated one of the six houses and admitted a single separate householder. The defendant's pleader has not wholly adopted this argument, but he has urged that because any one of the outside public might have access, if he chose, to the doors of the separate householders within the Court, and because the owners of the houses whose back walls bound the Court on the north, must have access at times in order to repair their back walls, therefore the 'public' have access; *ergo* the Court is a street. It appears to me that these arguments are fallacious; that the houses of the Court and the back walls in question might have five hundred owners or more, and that individuals to any extent from outside might have access to the doors, and yet the Court might be private property. The *onus* lies, I think, on the plaintiff to show that, at some time during the past twenty years, access to the Court has been barred against the public in the exercise of his right of private ownership. As neither the testimony of [688] Manor the plaintiff's maternal uncle, nor of any other witness goes so far as to establish this, I must hold that the Court has become a 'street' as defined in s. 3 of the Act."

The Assistant Judge then discussed the evidence adduced on either side, and held that the plaintiff succeeded in proving his claim as regards the "*ota*," and failed in establishing that as regards the bench.

The plaintiff appealed to the District Judge as regards the latter part of his claim. The District Judge confirmed the decree of the Assistant Judge. He said: "Had the whole of the *mehela* remained the property of a single individual, I do not think that the Municipality could have interfered; but when the *mehela* became the property of several owners, the case would be different. For, naturally, each person inhabiting a house would be entitled to a right of way, and would also have a right to enjoy the open space in front of the houses. * * * The *mehela* certainly is not a thoroughfare; but considering that others have a right of way there. I think that the Court is an open space, such as would vest in the Municipality under s. 17 of the Municipal Act."

The plaintiff appealed to the High Court.

Nagindas Tulsidas, for the appellant, was not called on to support the appeal.

Nanabhai Haridas, for the defendant in support of the judgments of the lower Courts, contended that the parties should have asked for an issue as to the ownership of the Court in question.

JUDGMENT.

MELVILL, J.—The piece of ground, to which this suit relates, is an open square surrounded by houses, and with a narrow entrance, to which it is stated that there was originally a door. The houses formerly belonged to a single owner, and there can be no doubt that the square Court was then the property of that owner. The houses are now held by different proprietors, and the District Judge has found that, because the occupant of each house has a right of way across the Court, therefore the Court

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vests in the Municipality as a public street or space. To this reasoning we are unable to assent. The Assistant Judge has based his judgment on different grounds. He says: "The question [689] arises, how and when the Court ceased to be private property? In the opinion of the municipal secretary (No.10) it became public property or street as soon as ever Manor or any member of the proprietary family had alienated one of the six houses, and admitted a single separate householder. The defendant's pleader has not wholly adopted this argument, but he has urged that because any one of the outside public might have access, if he chose, to the doors of the separate householders within the Court, and because the owners of houses whose back walls bound the Court on the north must have access at times in order to repair their back walls, therefore the 'public' have access: *ergo*, the Court is a street. It appears to me that these arguments are fallacious; that the houses of the Court and the back walls in question might have five hundred owners or more; and that individuals to any extent from outside might have access to the doors, and yet the Court be private property." In this opinion we agree. But the Assistant Judge then goes on to say: "The *onus*, I think, lies on the plaintiff to show that, at some time during the past twenty years, access to the Court has been barred against the public in the exercise of the right of private ownership. As neither the testimony of Manor, plaintiff's maternal uncle, nor of any other witness goes so far as to establish this, I must hold that the Court has become a street, as defined in s. 3 of the Act." It appears to us, however, that this final conclusion and the reason on which it is based are erroneous. It is proved that the property was originally private property; it is not shown that it ever ceased to be so; and the Court in question is evidently not used as a thoroughfare, but only as a means of access to the houses which surround it by persons who have business with the householders. No one's rights of property would be safe if the Municipality could take advantage of such limited access by members of the public in order to make out a claim to hold the land in question as public property. We think that the plaintiff, if the *onus* of proof is upon him, has made out a case which, even as it is stated by the Court below, is sufficient to entitle him to relief against the interference of the Municipality, whatever liability he may have incurred to an action by any of the other householders who occupy the square.

[690] The decrees of the Courts below are accordingly amended, and the claim allowed in full, with costs on defendant throughout.

Decree amended.

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6 B. 690=7 Ind. Jur. 101.

APPELLATE CRIMINAL.

Before Mr. Justice Melvill and Justice Pinhey.

EMPRESS v. MAHADU.* [7th September, 1882.]

Indian Penal Code (Act XLV of 1860), s. 75—Enhanced punishment—Transportation for life—Imprisonment.

The accused having been previously convicted of offences punishable, under Chapter XII or Chapter XVII of the Indian Penal Code, with imprisonment for

* Criminal Appeal No. 120 of 1882.

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6 B. 690 = 7 Ind. Jur. 101.

a term of three years or upward was subsequently convicted of an offence under one of these chapters punishable with imprisonment which may extend to three years, and sentenced to imprisonment for seven years.

Held that a sentence of imprisonment for seven years was illegal. Under s. 75 of the Indian Penal Code the accused might be transported for life, but he could not be imprisoned for a longer period than six years.

THIS was an appeal against the sentence of imprisonment for seven years passed by C. E. G. Crawford, Assistant Judge, Ratnagiri, on a conviction of theft.

The accused pleaded guilty to a charge of theft and to a number of previous convictions of offences falling under Chap. XII or Chap. XVII of the Indian Penal Code punishable with imprisonment of either description for a term of three years or upwards.

No one appeared on behalf of the accused or the Crown.

JUDGMENT.

The judgment of the Court was delivered by

MELVILL, J.— The sentence is illegal. Under s. 75, Indian Penal Code, the prisoner might have been sentenced to transportation for life, but not to imprisonment for more than six years. The prisoner has not yet been sentenced to any long term of imprisonment, and the Court considers a sentence of three years' imprisonment to be sufficient. See *Reg.* v *Gopala Santu*, Criminal Rulings, 21st November, 1871.

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6 B. 691 (F.B.) = 7 Ind. Jur. 90.

[691] APPELLATE CIVIL.—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Melvill and Mr. Justice Kemball.

In re BHAVAN BADHAR.* [10th July, 1882.]

Stamp Act I of 1879, *sch. II, art.* 13, *cl.* (*b*)—*Lease by a cultivator—Definite term—Annual rent.*

Clause (*b*), art. 13 of sch. II of Act I of 1879, exempts all leases executed in the case of a cultivator without the payment or delivery of any fine or premium, whatever the reserved or annual rent may be, provided it be for a definite term not exceeding one year, and also whatever the term may be, provided the annual rent reserved does not exceed Rs. 100.

THIS was a reference under s. 46 of the Indian Stamp Act, 1879, by G. F. Sheppard, Commissioner, N.D., for the decision of the High Court.

In making the reference the Commissioner said :—

"The question is as to the interpretation of the exemption, cl. (*b*) of art. 13, sch. II of Act I of 1879. * * * * *

* * The Advocate-General and Legal Remembrancer to Government differ in opinion as to the meaning of the clause referred to.

"The instrument under consideration is a lease executed by a cultivator for one year, and reserves a rental of Rs. 131 over the Government assessment. It is on plain paper, and I am of opinion that it is exempt from stamp duty under art. 13 of the second schedule, as I understand the object of the Act to be to exempt, not *small*, but *short* leases."

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* Civil Reference No. 93 of 1882.

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The instrument is dated 7th of January, 1882, and is passed to Krishn Vallabh Pran Vallabh by Bhavan Badhar. The material part of it is as follows:—

"I have rented the above-mentioned land from you for the purpose of cultivation for the season of 1881-82, and Rs. 131 has been fixed as the rent thereof. I am to pay the whole of the said amount in the month of March, 1882. The Government **[692]** assessment in respect of the said land is to be paid by me; you are to be paid Rs. 131 clear on account of the said rent. I am to clear the said land and make it over to you on the 19th of April, 1882, without your asking for it and without objection."

Nanabhai Haridas, Government Pleader, for the Commissioner, N. D.
There was no appearance by any of the executing parties.

OPINION.

Per Curiam.—We think that the language of cl. (*b*), art. 13 of sch. II of Act I of 1879, exempts all leases executed in the case of a cultivator without the payment or delivery of any fine or premium, whatever the reserved or annual rent may be, provided it be for a definite term not exceeding one year, and also whatever the term may be, provided the annual rent reserved does not exceed Rs. 100.

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6 B. 692.

ORIGINAL CIVIL.

Before Mr. Justice Latham.

RUTTONSEY MORARJI AND OTHERS (*Plaintiffs*) *v.* JAMNADAS PITAMBERDAS (*Defendant*).*

[4th, 5th and 6th May and 13th June, 1882.]

Contract—Suit for damages for non-acceptance—Dispute as to quality of goods tendered—Right to examine goods—Survey—Reasonable time for examination of goods by purchaser—Contract Act (IX of 1872), s. 38.

The defendant agreed to purchase from the plaintiffs one hundred full-pressed bales "fully good fair Kishli cotton" at Rs. 208-8 per candy, to be delivered from March 15th to April 1. On March 21 the plaintiffs sent the defendant a letter reminding him of the contract and requesting him to take delivery. On receipt of this letter the defendant put the matter into the hands of V. The plaintiff had then no cotton of the specific kind to deliver, nor did the letter refer to any particular bales. At 11-30 o'clock A. M. on March 30th the plaintiffs sent the defendant a letter enclosing a sampling order directed to an employ of Messrs. H. and S., on whose premises the bales referred to in the order were lying. V., on behalf of the defendant, got samples taken of the cotton and examined them, but without reference on that day to any standard. He then, however, conceived doubt as to the quality of the cotton and expressed his doubts to the plaintiff in the evening of that day. On March 31 the plaintiffs sent the defendant a delivery order enclosed in a letter from their solicitors calling on the defendant to attend with his surveyor at 1 P. M. on that day to survey the cotton, as otherwise an *ex-parte* **[693]** survey would be held. This letter reached the defendant at 11-30 o'clock A.M, and was given by him to V. at noon of the same day. V. applied to M. to attend as surveyor, but M. was unable to do so. The plaintiffs had an *ex-parte* survey held by Messrs. C. & B. at 1 P. M. and they pronounced the cotton, samples of which were submitted to them, to be "fully good fair Kishli cotton." While this survey was going on, the defendant was on the Cotton Green, but declined to attend, saying that V. and his surveyor were coming.

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Shortly afterwards V. did come, and subsequently wrote a letter to plaintiffs in the defendant's name, stating that the cotton was not of the description contracted to be sold by them, and asking for a survey. This letter reached the plaintiffs at 2-19 o'clock P.M. After this there was a discussion between plaintiffs and defendant and V. On that afternoon (the 31st March) the plaintiffs' solicitors sent a leter to ethe defendant stating the result of the survey and requiring him to take delivery. This was answered by a letter of next day (April 1) from the defendant's solicitors denying that the cotton was of proper quality or that proper notice of the survey had been given, alleging that the defendant had that morning attended with his surveyor and asked leave to survey the cotton which had been refused, and stating that the contract must be treated as cancelled. The cotton was sold by auction on April 5th. The plaintiff brought this suit to recover Rs. 1,631-1-11 as damages for non-acceptance of the cotton. The defendants contended that there had been no reasonable time allowed by the plaintiffs for the examination of the cotton and that a joint survey should have been held.

Held, that a joint survey was not necessary under the terms of s. 38 of the Indian Contract Act (IX of 1872), and that the defendant having had a period of twenty-four hours for inspection, had had a reasonable opportunity of seeing whether the cotton offered by the plaintiffs was such cotton as the plaintiffs were bound by their contract to deliver.

A purchaser of goods is not entitled to continue inspecting and examining the goods offered by the vendor until the expiration of the period for delivery. A reasonable opportunity for such inspection and examination is all that he is entitled to.

SUIT to recover Rs. 1,631-1-11 as damages for non-acceptance of goods purchased.

The plaint alleged that by a written agreement in Gujarati language, dated the 28th January, 1881, the defendant agreed to purchase from plaintiff "one hundred full pressed bales fully good fair Kishli cotton at the rate of Rs. 208-8 per candy" through a broker named Callianji Ludha. Delivery was to be taken from 15th March, 1881, to 1st April, 1881. On 21st March, 1881, plaintiffs sent a letter of that date to defendant, requesting him to take delivery of the cotton. On 30th March, 1881, the plaintiffs sent a sampling order to the defendant; and on 31st March, 1881, the plaintiffs through their solicitors tendered a delivery order to the defendant, who, however, refused to accept it.

[694] On the 5th April, 1881, the plaintiffs sold the cotton by public auction on account of the defendant, and realized by the sale Rs. 8,460-12-1. The plaintiffs claimed the sum of Rs. 1,631-11-1 as damages sustained by reason of the defendant's breach of contract.

The defendant admitted the agreement, but alleged that the cotton offered to him by the plaintiffs was not of the quality stipulated for in the agreement. He also pleaded that the plaintiffs did not allow him a reasonable time for holding a survey on the cotton offered to him by the plaintiffs. He alleged that he was always ready and willing to perform his part of the contract of 28th January, 1881.

At the hearing the following issues were raised:—

(1) Whether the plaintiffs were ready and willing to perform their part of the contract of 28th January, 1881?

(2) Whether plaintiffs tendered to the defendant cotton of the quality in the said contract agreed to be delivered?

(3) If such tender was made, whether the defendant was allowed by the plaintiffs a reasonable time for the examination of such cotton?

(4) Whether defendant was justified in not accepting the said cotton?

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Starling and *Lang*, for the plaintiffs.
Jardine and *Telang*, for the defendant.
The material facts as proved in evidence are stated in the judgment.

JUDGMENT.

June 13. LATHAM, J.—This is a suit to recover damages for the breach, by the defendant, of a contract to purchase cotton from plaintiffs. The contract is dated the 28th of January, 1881, and is for the sale of 100 pressed bales of the new Kishli "fully good fair" cotton at Rs. 208½ per candy; the time of delivery to be from March 15th to April 31st, 1881. On March 21, the plaintiffs sent the defendant a letter, reminding him of the contract, and requesting him to take delivery. The plaintiffs had then no cotton of the specific kind to deliver, nor does the letter refer to any particular bales, and I look on it merely as a reminder. On the receipt of this letter the defendant appears **[695]** to have put the matter into the hands of his friend Vizbhookandas Atmaram, partner in the firm of Narrondas Rajaram, cotton merchants, and broker to and at present in charge of the business of the firm of Messrs. Bushby & Co. On March 30th the plaintiffs sent the defendant a letter enclosing a sampling order directed to one Jairam, apparently an employee of Messrs. Harvey and Sabapathy, on whose premises the bales referred to in the order were lying. This letter was received by Vizbhookandas Atmaram at 11-30 A.M. that day, as appears by his own endorsement. Vizbhookandas Atmaram got samples taken of the cotton in question by his mukadam Ludha Mohanji, and examined them, but without reference on that day to any standard. He, however, conceived doubts as to the quality and classification of the cotton, and expressed these doubts to the plaintiff Ruttonsey Morarji in the evening. Ruttonsey attributes this expression of opinion to the defendant, but is, no doubt, mistaken; indeed, he is a very inaccurate witness, and on his evidence I place little reliance.

On the next morning (March 31) the plaintiffs sent to the defendant a delivery order for the 100 bales enclosed in a letter from their solicitors, Messrs. Jefferson, Bhaishankar and Dinsha, calling on the defendant to attend with his surveyor at 1 P.M. to survey the cotton, as otherwise an *ex parte* survey would be held. This letter at first sight appears peculiar, but is no doubt to be accounted for by Vizbhookandas Atmaram's intimation on the previous evening. It reached the defendant's hands at 11-30 A.M., and was given by him to Vizbhookandas Atmaram at noon. Vizbhookandas Atmaram applied to Mr. Marsball to attend as surveyor, but that gentleman did not do so, it being mail day. The plaintiffs had an *ex parte* survey held by Messrs. Cheetham & Booth at 1 P.M. and they pronounced the cotton, samples of which were submitted to them, to be "fully good fair Kishli cotton," as appears by their certificate. While this survey was going on, the defendant was on the Cotton Green, but declined to attend, saying that Vizbhookandas Atmaram and his surveyor were coming. Shortly afterwards Vizbhookandas Atmaram did come, and he subsequently wrote a letter to plaintiffs in defendant's name (Ex. D), stating that the cotton was not of the description and quality *ordered* by them (apparently meaning **[696]** *contracted to be sold*), and asking for a survey. This letter reached the plaintiffs at 2-19 P.M.

After this there was a discussion between the plaintiff Ruttonsey and the defendant Vizbhookandas Atmaram to which I need not at present refer in detail. The plaintiffs' solicitors on that afternoon sent a further letter to defendant (Ex. E.) stating the re sult of the survey at which they

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erroneously alleged the defendant to have been present, and requiring him to take delivery. This was answered by a letter of the next day (April 1st) from the defendant's solicitors, Messrs. Smith & Frere (Ex. G), denying that the cotton was of proper quality or proper notice of the survey given, alleging that the defendant had that morning attended with his surveyor and asked leave to survey the cotton, which had been refused, and stating that the contract must be treated as cancelled. After that the parties were at arm's length. The cotton was advertised for sale and in part sold by Messrs. Crawford & Co., on April 5, and no objection has been taken to the conduct of that sale or to Messrs. Crawford & Co.'s account thereof. On the morning of April 5, however, a letter was sent by Messrs. Smith & Frere to the plaintiffs, offering to take the cotton if the plaintiffs could satisfy the defendant and his surveyor that it was fully good Kishli cotton; but no tender of the price was made, nor did any surveyor attend.

On this state of facts the three material issues raised are

(1) Whether the plaintiffs were ready and willing to perform their part of the contract?

(2) Whether plaintiffs tendered to defendant cotton of the quality agreed? and, if so,

(3) Whether the defendant was allowed by plaintiffs a reasonable time for examination of such cotton?

Before considering these issues I may mention that the price of Kishli cotton fell from Rs. 20 to 30 in the interval between the contract and date of delivery. Mr. Telang very properly admitted that this circumstance raised a presumption that his client would wish to get out of the contract. Still it is far from conclusive. However the plaintiffs might desire to perform their part of the contract, they might be unable to do so if no **[697]** cotton of the quality contracted to be sold was then in the market. At the same time the presumption should be attended to in estimating the conduct of the parties.

The first issue, literally interpreted, is very wide in its scope, so much so as to comprise the second; but I take the intention of counsel to have been that the point raised by the second issue should be considered as distinct from the first, the question to be decided under which is whether the plaintiffs, were in a position to deliver to the defendants the 100 bales in question. It is true that the contract for these bales (Ex. I), which were bought by the plaintiffs from Harvey and Sabapathy, bears date March 31st; but the plaintiff Ruttonsey and the broker Ludha Pithraj depose to the arrangements having been made on the previous day, and the whole evidence in the case shows that the plaintiffs had then the bales under their control so as to be able to deliver them to the defendant. This is all that was requisite, and it is a matter of indifference whether the plaintiffs' legal title was complete at the time of their letters calling on defendant to sample and take delivery. I have no hesitation in finding the first issue in favour of the plaintiffs.

The second issue is of vital importance; and the plaintiffs have by attempting to snatch an advantage over defendant by holding a survey in his absence, placed themselves in a serious difficulty. They have reduced the effect of that survey from being, as it might have been, a *quasi* arbitration almost if not altogether binding on the parties as to the quality and description of the cotton, to the opinion of two experts on the quality and description of certain samples of cotton submitted to them. We must,

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therefore, trace the history of this cotton. [His Lordship reviewed the evidence and found the second issue in favour of the plaintiffs.]

The third issue raises the nicest question in the case. Mr. Telang relies on the 38th section of the Contract Act, and he contends that the reasonable opportunity there mentioned includes a joint survey. No doubt a joint survey would be a reasonable opportunity ; but I should be introducing a new clause into the Contract Act if I were to hold a joint survey necessary to constitute the reasonable opportunity.; There seems to be something like **[698]** a mercantile custom about surveys springing up in connection with what are called the Association Rules, but it is admitted that these rules do not apply to the present case; and the varying opinions given as to what is reasonable notice of a survey show that no defined custom is yet in existence.

The rule in the 38th section of the Contract Act agrees with the rule of English law laid down in Benjamin on Sales (2nd ed., pp. 573 and 576) ; but there is little authority as to what is a reasonable opportunity of inspection. The point was considered at considerable detail in *Startup* v. *Macdonald* (1), where the Exchequer Chambers (*diss.* Lord Denman) reversing the Court of Common Pleas held that the tender of 10 tons of linseed oil at 8-30 P.M. on the last day fixed for delivery was a good tender ; a decision which the Court appears to have felt bound to come to on the finding of the jury, though contrary to their own view of the facts. The rule of law is laid down by Williams, J., at p. 619 of the report, and Parke, B., at p. 623. In the present case the sampling order was delivered to the defendant by 11-30 A.M. on the 30th March, and he had till 1 P.M. on the 31st March before any refusal by the plaintiffs to allow a further examination is alleged. Now, Vizbhookandas Atmaram seems to have been certainly dilatory in his examination, he not having compared the samples with the standards till past noon on the 31st ; and it seems to me that a period of over twenty-four hours gave a reasonable opportunity to see whether the cotton offered was the cotton which the plaintiffs were bound by their contract to deliver.

Then are we to go further, and to say that the purchaser is entitled to continue inspecting and examining until the expiration of the period for delivery ? I find no authority for this, and in many cases it would be unreasonable to place no limit on the inspection. Is a purchaser at liberty to open and taste every bottle of wine in a lot sold ; or, in the present case, to pass every pound of cotton through an expert's hands ? There must be some limit ; and I think that a reasonable opportunity is the limit alike for **[699]** vendor and purchaser, and that such a reasonable opportunity had been had by 1 P.M. on the 31st March.

Further, I may say that I am not satisfied that there was an application on the 31st March for further inspection. The letter (Ex. D) states positively that the cotton is not of the proper description and quality ; and asks for a joint survey, not for further inspection, a survey which, according to defendant's contention, would not be due till the next day, *i.e.*, till after the time *for delivery* had expired. Letter G of April 1, alleges no application before that day. The oral testimony is, as usual, conflicting ; but the highest to which Vizbhookandas Atmaram carries it is that " asked to be allowed to draw *fresh samples for his satisfaction.*" In the face of the letters and the plaintiff Ruttonsey's denial I cannot think any application for a further inspection proved. For the

(1) 6 M. & G. 593.

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reasons above given, I should hold that the plaintiffs were not then bound to comply with such an application, unless the defendant had given some reason for regarding the inspection already offered as insufficient. This is not done even here; and I may observe that I can see no reason why Vizbhookandas Atmaram should not have submitted the samples already in his possession to Mr. Marshall or some other expert: his not having done so is of importance both on this and on the preceding issue. I may observe that a great deal of the difficulty on this point arises from the ambiguous sense of the word "reasonable," which may either denote a legal limit, though one to be fixed on consideration of the circumstances of the case, in which sense it is used in s. 38 of the Contract Act; or may be used in contradistinction to "legal," as when we say "it is not reasonable for a man to exist on his strict legal rights." In my opinion Mr. Booth used the word in the latter sense when he said "it would not be reasonable to refuse a buyer a survey up to the last moment for taking delivery," by which expression I think he meant the same as Mr. Marshall meant when he said "if either party turned up within the time fixed by the contract, we should re-open the matter as a matter of courtesy."

I find issues 1, 2, 3 and 4 for the plaintiffs. As to issue 5, concerning the amount of damages, I of course disallow the **[700]** Rs. 20 for surveyor's fee and the Rs. 16-8 for solicitors' notices mentioned in the particulars of demand. I also disallow Rs. 39-1-3 for interest claimed in these particulars, and do not give interest since the filing of the plaint, as I think that the plaintiffs' hasty conduct has greatly conduced to this litigation, and I, therefore, am not disposed to give them interest by way of damages. Deducting Rs. 73-9-3, the total of these disallowed items, from the Rs. 1,631-11-1 claimed in the plaint, I pass a decree for the plaintiffs for Rs. 1,558-1-10 and costs.

Attorney for plaintiffs.—Mr. *R. M. Sayani.*
Attorneys for defendant.—Messrs. *Shapurji* and *Thakurdas.*

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6 B. 700.

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Before Mr. Justice Latham.

LUKMIDAS KHIMJI AND OTHERS (*Plaintiffs*) *v.* PURSHOTAM HARIDAS, OODHOWJI WALLJI AND GOCULDAS JEWRAZ (*Defendants*).*
[27th September, 1882].

Partnership—Parties—Practice—Contract Act (IX of 1872), s. 43.

In a suit brought upon a contract made by a firm the plaintiff may select as defendants those partners of the firm against whom he wishes to proceed, allowing his right of suit against those whom he does not make defendants to be barred.

[F., 25 P.L.R. 1902; Rel., 17 C.L.J. 201=16 Ind. Cas. 852; R., 22 A. 307=20 A. W.N. 73; 17 B. 6; 25 B. 378; 21 M. 256; 15 C.P.L.R.51.]

IN this suit the plaintiffs sued to recover from the defendants the sum of Rs. 16,424, the price of goods sold and delivered.

Written statements were filed by the first and third defendants. The first defendant denied that he was a partner with the second and third

* Suit No. 216 of 1880.

defendants. The third defendant also denied that the first defendant had ever been a partner in his firm, which consisted of three partners, *viz.*, himself, the second defendant and one Hemraj Haridas. He submitted that the said Hemraj Haridas ought to be made a party to this suit.

Upon the issues being framed at the hearing, counsel for the defendants raised the point as to whether the alleged partner Hemraj Haridas was not a necessary party to the suit.

Starling (with the Hon. *B. Lang*, Acting Advocate-General) contended that, under s. 43 of the Indian Contract Act (IX of 1872), a plaintiff might sue as he pleased any or all of the partners **[701]** in a firm. He referred to ss. 42, 249, 262, and *Hemendra Coomar Mullick* v. *Rajandrolall* (1); Pollock's County Courts Act, p. 66; Act IX of 1850, s. 36; *King* v. *Hoare* (2).

Farran (*Kirkpatrick* with him), for the first and third defendants *contra*.

JUDGMENT.

LATHAM, J.—The preliminary issue now to be decided is whether Hemraj Haridas is a necessary party to this suit, it being assumed for the purposes of this issue that Hemraj was a partner in the defendant's firm. Plaintiffs rely on the first clause of s. 43 of the Contract Act: "When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one of such joint promisors to perform the whole of the promise." Section 43 is one of the series of sections materially altering the rules of English Common Law as to the devolution of the benefit of and liability on joint contracts, the English rule corresponding to s. 43 being that "all joint contractors must be sued jointly for a breach of contract:" Dicey on Parties to an Action, p. 11. With s. 42 compare Dicey, p. 237; with s. 45, Dicey, p. 108; and with s. 45, Dicey, p. 128.

Section 43 is in itself perfectly clear, and the defendants do not dispute that, in cases where it applies, the promisee may at his option sue any one or more of the joint promisors; but they say that the section does not apply to the case of the members of a partnership firm being sued on a contract of the firm. Now, by s. 226, "contracts entered into through an agent, and obligations arising from acts done by an agent may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person." According to English law the responsibility of partners on a contract entered into by a co-partner depends on the doctrine of agency; and, unless that law has been altered here, I see no reason to suppose that co-partners who by English law are joint promisors when the promise is that of the firm are outside s. 43. Mr. Farran relies on the definition of the word *firm* in s. 239 and its use in Chap. XI headed "Of Partnership," as constituting the firm a species of legal *persona*, the **[702]** members of which cannot be separately sued. I cannot accede to this argument, as to me such definition and use of the word *firm*,—a use not always consistent with itself (s. 251, cls. *a*, *b* and *c*)—seems to be simply a compendious expression for the several persons who are members of the firm. I find that Mr. Pollock is of the same opinion, as in his Digest of Partnership, art. 9, he adopts the definition of *firm* contained in s. 239 of the Contract Act as appropriate in England, while in art. 11 he points out

(1) 3 C. 353.

(2) 13 M. & W. 494.

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that "the law of England knows nothing of the firm as a body or artificial person distinct from the members composing it." The Judicature Act (Order XV, Rule 10,) has enabled partners to sue and be sued in the names of their firms. a provision going further than anything in the Indian law of Partnership. Still, according to Mr. Pollock (art. 63), this rule does not introduce "anything that amounts to the recognition of the firm as an artificial person distinct from its members."

Then I am pressed with the argument *ab inconvenienti*. Now it is impossible to see how any inconvenience can arise from the application to partners of the first clause of s. 43. The promisee can select those partners against whom he wishes to proceed, allowing his right of suit against such as he does not make defendants to be barred: *Hemendro Coomar Mullick* v. *Rajendrololi Mooshee* (1), *Kendall* v. *Hamilton* (2); and the rights of the partners the joint promisors *inter se* are saved by the latter clause of s. 43. But it is said that if s. 43 applies to partners, so must s. 45, and that from such application of the latter section great inconvenience will result. The words of the two sections are not identical: and I think that it would be an unsound principle of construction to interpret s. 43 by the light of the possible inconvenience which might result from a similar construction being placed on s. 45. I am sensible that if s. 45 does apply to partners who are joint promisees, the resulting inconvenience may sometimes be very great; especially having regard to the decision in *Ramsebuk v. Ramlall* (3) that if a suit is barred by limitation as to some joint promisees added as [703] co-plaintiffs by amendment, it is barred as to the original plaintiffs also. But the inconvenience will be the same in kind, if greater in degree, as must result from the application of the section to any joint promisees; and to my mind it must be dealt with, if at all, by the Legislature altering the expressions of its intention, and not by a Judge putting a forced construction on the words in which that intention is at present embodied.

I therefore find that Hemraj Haridas is not a necessary party to the suit.

Attorneys for the plaintiffs.—Messrs. *Payne and Gilbert.*
Attorney for the defendants.—Mr. *Khunderao Morojee.*

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6 B. 703.

ORIGINAL CIVIL.

Before Mr. Justice Latham.

AHMEDBHOY HUBIBHOY (*Plaintiff*) *v.* VULLEEBHOY CASSUMBHOY, SATBAI AND FAZULBHOY CASSUMBHAI (*Defendants*).*

[29th and 30th September, 1882.]

Decree—Fraud—Decree when binding—Effect of fraud—Parties and privies to suit—Strangers to suit—Collusive fraud between parties in obtaining decree—Civil Procedure Code (Act X of 1877), s. 13—Res judicata—Evidence Act (I of 1872), s. 44—Khoja Mahomedan administrator with the will annexed.

The powers of a Khoja Mahomedan executor or administrator, like those of a Cutchi Mahomedan executor or administrator, seem to be generally limited to recovering debts and securing debtors paying such debts.

Where a will gave the executor full powers with regard to the payment of the testator's debts. *Held* that an administrator with the will annexed who was a

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* Suit No. 486 of 1881.

(1) 3 C. 353. (2) 3 C.P.D. 403. (3) 6 C. 815.

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Khoja Mahomedan succeeded to those powers, and in a suit brought against him as such administrator by an alleged creditor of the testator's estate represented all the persons interested in the estate.

Where a decree in a suit has been honestly obtained without fraud it cannot be subsequently disputed by the parties thereto or their privies or by persons who were represented by such parties. Strangers to the suit (*i.e.*, persons neither privies to nor represented by the parties thereto) are not bound by such a decree if it be a decree *inter partes* ; but if it be a decree *in rem* and passed by a competent Court, they are bound by it and cannot controvert it.

Where a decree has been obtained by means of the fraud of one party against the other, it is binding on parties and privies and on persons represented by the parties so long as it remains in force, but it may be impeached for fraud and may be set [704] aside if the fraud is proved. In the case of judgments *in rem* the same rule holds good with regard to persons who are strangers to the suit.

Where a decree has been obtained by the fraud and collusion of both the parties to the suit, it is binding upon the parties. It is also binding upon the privies of the parties; except, probably, where the collusive fraud has been on a provision of the law enacted for the benefit of such privies. But persons represented by but not claiming through the parties to the suit may, in any subsequent proceeding, whether as plaintiff or defendant, treat the previous judgment so obtained by fraud and collusion as a mere nullity, provided the fraud and collusion be clearly established. The same rule applies with regard to strangers where the previous judgment is a judgment *in rem*.

Section 13 of the Civil Procedure Code (Act X of 1877) is not exhaustive as to the effect of *res judicata*. It does not deal with the case of judgments *in rem*, nor with that of parties represented by though not claiming under the parties to a former suit.

Quære—As to the proper construction of s. 44 of the Indian Evidence Act.

[**F.**, 11 B. 708 ; **Appr.**, 27 C. 11=3 C.W.N. 660 ; **R.**, 26 A. 272=24 A.W.N. 25 ; 19 B. 680 (691) ; 19 B. 821 (827) ; 21 B. 205 (216) ; 10 M. 17 ; 18 M. 378 ; 20 M. 326 ; 29 M. 390=16 M.L.J. 307=1 M.L.T. 183 ; 5 Bom. L.R. 885 ; 3 Bur. L.T. 41=8 Ind. Cas. 614 ; 14 Ind. Cas. 486=14 P.R. 1912=157 P.L.R. 1912=96 P.W.R. 1912.]

THE plaintiff sued to establish his right to attach a certain house in Bombay in execution of a decree obtained by him on the 29th August, 1876, in suit No. 401 of 1876.

In that suit the plaintiff sued Fazulbhoy Cassumbhai (the third defendant in the present suit) as administrator with the will annexed of the estate of his father Cassumbhai Nathubhai, and obtained a decree for Rs. 17,243-9-7 against the said estate.

The first defendant was the son and one of the residuary legatees of the said Cassumbhai Nathubhai. The second defendant was the widow of Cassumbhai Nathubhai, and was entitled under his will to a provision out of his estate.

In 1880 the plaintiff attached the house in question in execution of his decree in suit No. 401 of 1876, whereupon the first and second defendants took out a summons for the removal of the attachment upon the grounds (among others) that the said house had been made over and distributed among the persons interested in the residuary estate of the said Cassumbhai Nathubhai, and that the first defendant Vulleebhoy Cassumbhoy was then solely entitled to the said house subject to the life-interest in a portion thereof of the third defendant Satbai, and that the defendants were then in possession of the said house. It was thereupon ordered that the plaintiff might, if so advised, bring a suit to establish his right to attach the said house in execution. The plaintiff then filed the present suit.

[705] The first and second defendants filed written statements, in which (*inter alia*) they alleged that the debt in respect of which the

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plaintiff had obtained his decree in suit No. 401 of 1876 was not a debt due from the estate of Cassumbhai Nathubhai, but was a private debt due to the plaintiff by the administrator Fazulbhoy (the third defendant) and that the said decree had been obtained by the plaintiff against the estate by fraud and in collusion with the said Fazulbhoy.

The defendants subsequently sought to obtain discovery and inspection of the plaintiff's books. The plaintiff objected to give the inspection sought for, and insisted that, even admitting that the decree in suit No. 401 of 1876 had been (as alleged by the defendants) obtained by the fraud of the plaintiff and in collusion with the said Fazulbhoy, nevertheless it was now a binding and valid decree against the estate of Cassumbhai Nathubhai and all persons interested therein.

The plaintiff took out a summons under s. 135 of the Civil Procedure Code (Act X of 1877) calling on defendants to show cause why an issue upon the above point should not be framed and determined before the plaintiff should be ordered to make the discovery or give the inspection demanded by the defendants.

By an order dated the 5th September, 1882 (1), the said summons was made absolute, and it was ordered "that this suit be set down for hearing for the determination of the following issue, *viz.*, whether assuming the allegations in the fourth paragraph of the written statement of the defendant Vulleebhoy Cassumbhoy and the defendant Satbai, respectively, contained to be true, and assuming that the decree in suit No. 401 of 1876 was obtained by fraud of the plaintiff and in collusion with the defendant Fazulbhoy Cassumbhai as in the said fourth paragraph alleged, the said decree is not, for the purposes of this suit, a binding and valid decree against the estate of Cassumbhai Nathubhai and all persons interested therein; and whether the said decree is not in this suit binding upon the defendants and each of them; and **[706]** whether the defendants, or any or either of them can in this suit in any way object or dispute the said decree."

The suit now came on for the determination of the above issue.

Hon. *B Lang* (Acting Advocate-General) and *Starling*, for the plaintiff.

Farran and *Inverarity* for defendant No. 1.

Kirkpatrick and *Telang* for defendant No. 2.

The third defendant did not appear.

Farran applies to be heard first in support of the defendants' plea.

LATHAM, J.—This is in effect a demurrer to the plea of the defendants, and the party demurring has the right to begin.

Starling, for the plaintiff.—Under ss. 13 and 14 of the Civil Procedure Code (Act X of 1877), a defendant in a suit on a foreign judgment is permitted to plead fraud. No similar provision is made for suits on other judgments, and a defendant cannot, therefore, be allowed to plead as to a judgment obtained here that it was obtained by fraud.

If a defendant is allowed to plead fraud, a plaintiff must be allowed to reply fraud. Under the system of pleading in India there is no replication, and a plaintiff would, therefore, surprise the defendant at the hearing by alleging fraud for the first time,—an allegation which the defendant might be unprepared to meet.

[LATHAM, J.—That is an impeachment of our system of pleading. The argument would apply where a defendant pleads a deed as well as

(1) See 6 B. 572.

a judgment. The plaintiff's answer might be that the deed was fraudulent.]

Here the parties admit the decree in suit No. 401 of 1876, but they desire to re-open the whole question decided by that decree. They were represented in the suit by the defendant who was administrator of the estate, and they are, therefore, bound. They have not sued to set the decree aside : *Huffer* v. *Allen* (1) ; **[707]** *Flower* v. *Lloyd* (2) ; *Flower* v. *Lloyd* (3) ; *Patch* v. *Ward* (4) ; *Allen* v. *Macpherson* (5) ; Daniel's Chancery Practice (5th ed.), Vol. I, p. 1428.

There is no case which decides the position of a Khoja Mahomedan administrator. The will in this case gives the person named as executor large powers : *Narayan Gop Habbu* v. *Pandurang* (6) ; *Brammoye Dassee* v. *Kristo Mohun Mookerjee* (7) ; *Mufti Jalaiuddeen Mahomed* v. *Shohorullah* (8).

Farran, for the first defendant.—The defendants' plea is this—that the plaintiff had no claim against the estate. The defendant knew this also, but did not appear at the hearing to contest the plaintiff's suit, and in collusion with the plaintiff allowed a decree to be passed against the estate. The essence of the plea is that there was no debt due by the estate, but that it was fraudulently made liable.

Fraud in a decree may be either unilateral, *i.e.*, the fraud of either plaintiff or defendant; or it may be bilateral, *i.e.*, it may be a fraud, common to both of them, directed against some third person. All the cases which have been cited are cases of unilateral fraud, and in such cases no doubt a decree is binding until set aside. But cases in which there has been fraud of both plaintiff and defendant to the injury of a third person, stand on a different footing. We contend that such a decree is not valid until set aside ; it is void altogether. It is as if non-existent : *Price* v. *Dewhurst* (9) : *Meddowcroft* v. *Huguenin* (10) ; *Perry* v. *Meddowcroft* (11) ; *Earl of Bandon* v. *Becher* (12) ; *Philipson* v. *Egremont* (13) ; *Bradley* v. *Eyre* (14) ; *Ochsenbein* v. *Papellier* (15) ; *Turnor's case* (16).

The person injured must be permitted to plead the fraud when the decree is about to be enforced against him. Why should he **[708]** move in the matter until then ? It may never be enforced against him at all.

The first and second defendants were in no sense privies to the administration, and they are not bound by his acts : *Whittingham's case* (17). They claim not under him, but from the testator. If they are privies, and as such precluded from pleading the fraud of the administrator against the decree, they must be also precluded from suing to set the decree aside.

As to the position of a Khoja Mahomedan administrator, counsel referred to *In re Haji Esmail Abdula* (18) ; *Lalchand* v. *Gumtibai* (19) : *Srimati Jaykali Debi* v. *Shibnath Chattirja* (20) ; Mayne's Hindu Law, para. 304.

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(1) L.R. 2 Ex. 15. (2) 6 Ch. Div. 277. (3) 10 Ch. Div. 327.
(4) L R. 3 Ch. Ap. 203. (5) 1 H L. Cases 191. (6) 5 B. 685.
(7) 2 C. 222. (8) 15 B L R. Appx. I. (9) 8 Sim. 279 (305).
(10) 4 Moore's P.C. 398 *per* Lord Brougham. (11) 10 Bea. 122.
(12) 3 Cl. & F. 510. (13) 6 Q.B. 587. (14) 11 M. & W. 432.
(15) L.R. 8 Ch. Ap. 695.
(16) Coke's Rep. Part VIII, 132*a* (Vol. IV, p. 403, ed. by Thomas and Fraser).
(17) Coke's Rep. Prt VIII, 42*b* (Vol. IV, p. 224, ed. by Thomas and Fraser).
(18) 6 B. 452. (19) 8 B.H.C.R. O.C.J. 140. (20) 2 B.L.R.O.C.J. 1.

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Kirkpatrick, for the second defendant.—He cited *Prudham* v. *Phillips*(1); Williams on Executors (8th ed.), pp. 1971-2; *In re Place*(2); *Shattock* v. *Carden* (3); *De Medina* v. *Grove* (4); *Gopi Wasudev Bhat* v. *Markande Narayan Bhat* (5).

JUDGMENT.

LATHAM, J.—The question argued before me is that raised by the preliminary issue, "whether, assuming the allegations in the fourth paragraph of the written statements of the first and second defendants respectively to be true, and assuming that the decree in suit No. 401 of 1876 was obtained by fraud of the plaintiff and in collusion with the third defendant as in the said fourth paragraph alleged, the said decree is not for the purposes of this suit a binding and valid decree against the estate of Cassumbhai Nathubhai and all persons interested therein; and whether the said decree is not in this "suit binding upon the defendants and each of them; and whether the defendants or any or either of them can in this suit in any way object to or dispute the said decree." This issue was set down for determination under s. 135 of the Civil Procedure Code (Act X of 1877) before disposing of a summons taken out by the first and second defendants to obtain discovery from the plaintiff with reference to the alleged fraud. That fraud is that the plaintiff **[709]** and the third defendant Fazulbhoy Cassumbhai, the administrator with the will annexed of Cassumbhai Nathubhai, father of the first and third defendants and husband of the second defendant, by collusion procured a decree to be passed in suit No. 401 of 1876, wherein they were respectively plaintiff and defendant, against Fazulbhoy as such administrator for a debt which was due, not by the estate of the testator, but by Fazulbhoy in his personal capacity to the plaintiff. The matter is tried as it were on demurrer; and the question shortly is, whether admitting the truth of the allegations of fraud and collusion made by the first and second defendants, they are entitled to set up such fraud and collusion in their defence in this suit, while the decree in suit No. 401 of 1876 still stands unreversed.

I think that persons other than parties to a suit in which a decree or judgment, to use the more general term, has been obtained, may be divided into three classes with reference to their position as affected by such judgment. These classes are:—

(*a*) Persons who in the language of the Civil Procedure Code (Act X of 1877), s. 13, claim under the parties to the former suit or, in the language of English law, *privies* to those parties. Privies are, according to Lord Coke [*Whittingham's Case* (6)] of three kinds—Privies in blood, Privies in estate, Privies in law. In Wharton's Law Lexicon, p. 764, I find a six-fold division: (1) Privies in blood; (2) Privies in representation, as the executor or administrator to his testator or intestate; (3) Privies in estate; (4) Privies in respect of contract; (5) Privies in respect of estate and contract; (6) Privies in law. But I have been unable to discover the original authority for this division;

(*b*) Persons who though not claiming under the parties to the former suit were represented by them therein. Such are persons interested in the estate of a testator or intestate in relation to the executor or administrator; shareholders in a company under 7 Wm. IV and

(1) 2 Amb. 763. (2) 8 Exch. 704. (3) 6 Exch. 724.
(4) 10 Q.B. 152. (5) 3 B. 30.
(6) Coke's Rep., Part VIII, 42 *b* (Vol. IV, p. 224, ed. by Thomas and Fraser).

1, Vic., c. 75, in relation to the registered officer of that company, and in India members of a joint and undivided family in such cases as those referred to in *Jogendro* v. **[710]** *Funindro* (1), "where the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interests being taken to have been sufficiently represented by the party in the original suit;"

(*c*) Strangers, neither privies to nor represented by the parties to the former suit.

In the present case, I think that the first and second defendants fall within class (*b*). No doubt the powers of the executor or administrator of a Cutchi Memon according to *Re Ismail H. Abdula* (2) are generally limited to recovering debts, and securing debtors paying the same; and the same rule would seem to apply to the executor or administrator of a Khoja. But the will of Fazulbhoy gave his executor full powers with regard to the payment of debts; and the administrator with the will annexed succeeded to these powers, and so occupied in suit No. 401 of 1876 nearly the same position as an English executor, or still more closely the position of the manager of a joint family in the case described in the passage above quoted from *Jogendro* v. *Funindro*.

I next consider the effect of a previous judgment on these three classes respectively, with reference to their capacity to dispute it. In the first place the judgment may be an honest one, obtained in a suit conducted with good faith on the part of both plaintiff and defendant. In such a case the previous judgment is clearly binding both on class (*a*) and class (*b*). Class (*c*) (strangers to the former suit) will be in no way affected by the judgment if it be *inter partes*, but if it be one *in rem* passed by a competent Court, they will be bound by and cannot controvert it.

In the second place the judgment may be passed in a suit really contested by the parties thereto, but may be obtained by the fraud of one of them as against the other. There has been a real battle, but a victory unfairly won. In this case again I think that class (*a*) and class (*b*), and, as regards judgments *in rem*, class (*c*) are in one and the same position, which is that **[711]** of the parties themselves, to whom indeed the authorities mostly relate. The judgment is binding on them so long as it remains in force, but it may be impeached for fraud and set aside if the fraud be proved.

It is not easy to reconcile all the opinions expressed in the various cases, but the general principles above laid down seem to me borne out by the authorities. See Mitford on Equity Pleadings (5th ed.), 113, original p. 93; 1 Daniel Chancery Practice (5th ed.), 837, and *Flower* v. *Lloyd* (3), where James, L.J., said: "In the case of a decree being obtained by fraud, there always was power and there still is power in the Courts of Law in this country to give adequate relief." I cannot think that the opinions expressed by James and Thesiger, L.JJ., in the later case of *Flower* v. *Lloyd* (4) were intended to question the general rule, although they do tend to restrict its application in the particular class of fraud there alleged. See also *Hufter* v. *Allen* (5); *Patch* v. *Ward* (6); *Brooke* v. *Lord Mostyn* (7) and *Tommey* v. *White* (8), where the

(1) 14 M.I.A. 367 (376).
(2) 6 B. 452.
(3) 6 Ch. Div. 297.
(4) 10 Ch. Div. 327.
(5) 2 L. R. Ex. 15.
(6) 3 L. R. Ch. 203.
(7) 2 De G.J. & S. 373.
(8) 4 H.L. Ca. 313.

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House of Lords discharged its own order as having been obtained by suppression and misrepresentation. "Although," said the Lord Chancellor at p. 334, "in any question decided by this House upon appeal the matter is finally settled between the litigant parties * * * all the commonest principles of justice compel this house, as they must compel any other tribunal, to interfere to prevent its own decisions from being made the machinery for effecting a fraud."

In the third place, the previous judgment may have been obtained by the fraud and collusion of both the parties to the former suit; as, for the purposes of the present issue must be assumed to have been the case here. In this case there has been no battle, but a sham fight. "*Fabula, non jurdicium, hoc est; in scena, non in foro, res agitur*," to cite from the celebrated argument of Mr. Solicitor Wedderburn in the *Duchess of Kingston's Case* (1). As between the parties to such a judgment I apprehend that it is binding; and that, as Willes, C. J., said in *Prudham* v. **[712]** *Phillips* (2), "if both parties colluded it was never known that one of them could vacate it." The same rule will, I think, though I can find no express authority on the point, apply as between the privies of these parties; except probably where the collusive fraud has been on a provision of the law enacted for the benefit of such privies. For instance, I think that the heir would be allowed to show that a decree was obtained by his ancestor collusively in fraud of the Mortmain Act; indeed the effect of the provision of law is that the heir as regards it is made the antagonist of his executor, and *cessante ratione legis cessat ipsa lex*. But, as regards class (*b*), persons represented by but not claiming through the parties to the former suit, and (where a judgment *in rem* is in question) class (*c*) strangers, I think that any member of either class may in any subsequent proceeding whether as plaintiff or defendant treat a previous judgment so obtained by fraud and collusion as a mere nullity, provided of course that he clearly establish the fact of the fraud and collusion. The point has been frequently decided with respect to judgments *in rem*. See *Meddowcroft* v. *Huguenin* (3), where Lord Brougham said (p. 398), "a collusive suit is not a real judgment, but something obtained by fraud from the Court which is not binding"—*Perry* v. *Meddowcroft* (4), where Lord Langdale, M. R., said—"a sentence may be refused the respect which would otherwise be due to it, if it can be shown, as it may be shown, that the sentence was obtained by fraud and collusion," and *Harrison* v. *Mayor of Southampton* (5), in which case the Court of Appeal in Chancery held the appellant to be the lawful issue of a marriage which had been declared to be null and void by the Consistory Court of the Bishop of Winchester,—Turner, L J., saying (p. 151) "that this sentence, if obtained without fraud and collusion, would bind the question and establish the invalidity if the marriage was not disputed on the part of the appellants; but it was contended on their part that the sentence was obtained by fraud and collusion, and that the sentence so obtained could have no valid or binding effect. To this latter proposition I have no difficulty in assenting."

[713] The point has also been decided in cases in which the parties belonged to class (*b*), *i.e.*, though not privies to, yet were represented by the parties to the former suit. In *The Earl of Bandon* v. *Becher* (6), a case in which the Court of Chancery in Ireland had at the instance of the then tenant in tail set aside a decree of the Exchequer

(1) 20 Howell's State Trials, 478.
(2) 2 Ambler 763.
(3) 4 M. P. C. 386.
(4) 10 Beav. 122 (137).
(5) 4 De G.M. & G. 137.
(6) 3 Cl. & F. 497.

made against a former tenant in tail who was treated throughout the argument as sufficiently representing his successor for the purposes of the suit. Lord Brougham, after saying that it was undeniably true that the Court of Chancery had no right to review a decree of the Court of Exchequer, added (p. 510), "but it is equally true, that if the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim or to the defence of a right." And a little further on he said: "It is not an irregularity, it is not an error which is here complained of; but it is that the whole proceeding is collusive and fraudulent; that it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up." And in *Philipson* v. *Earl of Egremont* (1) on a *scire facias* against the defendant a shareholder in a company under 7 Wm. IV and 1 Vic., c. 75, on a judgment obtained by the plaintiff in a previous action against the registered officer of the company, the Court held good a plea that "the registered officer fraudulently and deceitfully and by connivance with the plaintiff suffered the judgment in order to charge the defendant." In this case the Court of Queen's Bench relied on the opinion expressed in *Fowler* v. *Rickerby* (2) by Tindal, C.J., that such a plea would be good; and differed from dicta of Parke, B., in *Bradley* v. *Eyre* (3) and *Bradley* v. *Urquhart* (4) so far as they were to the effect that such a plea would be bad, though agreeing with the opinion therein expressed that relief from the fraud might also be had by motion to the Court. The technical ground on which the Queen's Bench proceeded was, that there had been no previous opportunity to plead the fraud and collusion alleged. The cases of *The Earl of Bandon* v. *Becher* and *Philipson* v. *Lord Egremont* **[714]** were referred to with approval by Willes, J., in *The Queen* v. *Saddler's Company* (5), where he said: "a judgment or decree obtained by fraud upon a Court binds not such Court nor any other; and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding."

With regard to the case of executors allowing the judgment to be passed against them by collusion with the plaintiff I may refer to 2 William on Executors (8th ed.), p. 1971, where it is said that "where an executor pleads that he has *no assets ultra* a judgment which, in truth, was recovered against him upon an unjust or fictitious debt, the plaintiff (creditor) may reply that the judgment was had and obtained by fraud and covin between the executor and the creditor (the plaintiff in the former suit); but he cannot traverse the averment that the debt for which the judgment was had, was a just and true debt: and also to note (3) to *Williams* v. *Fowler* (6) and 2 Williams Saunders, p. 50, on which that passage is based.

As regards Indian decisions, I may quote a passage from the judgment of West, J., in *Gope Wasudev* v. *Markande* (7), where a collusive mortgage had been supported by a collusive decree, "if the ostensible sale or mortgage was really a mere colourable transaction, the vendee from the mortgagor may claim to have it disregarded, even though the fraud has been carried a stage further, so as to give to the sham mortgage the corroboration of a decree, which is then allowed to lie by unexecuted for several years."

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(1) 6 Q.B. 587.
(2) 2 M. & G. 776.
(3) 11 M. & W. 450.
(4) 11 M. & W. 460.
(5) 10 H.B. Ca. 431.
(6) 1 Strange 410.
(7) 3 B. 30 (33).

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And I may refer also to *Narayan* v. *Pandurang* (1), where the frame of a suit brought by members of a joint Hindu family to recover from the defendant their shares in land of which he had got permission under a decree against the manager of the family, alleged to have been obtained by collusion, was not objected to by the Court consisting of Westropp, C.J., and West, J., though they held that the allegation of collusion failed altogether of proof.

So far I have dealt with the question on general grounds of English law. I now proceed to consider how far it is affected by special Indian enactments. Section 13 of the Civil Procedure [715] Code (Act X of 1877), slightly altered in Act XIV of 1882, enacts that "no Court shall try any suit or issue, in which the matter directly and substantially in issue, having been directly and substantially in issue in a former suit in a Court of competent jurisdiction between the same parties, or between parties under whom they or any of them claim, litigating under the same title, has been heard and finally decided by such Court." In my opinion this section cannot apply to the present case, as the parties here do not claim under the parties to the previous suit. And, again, reading explanations I and II to the section with the remarks in *Philipson* v. *Lord Egremont* (2), it seems that the charge of collusion in the former suit was not and could not have been a matter directly and substantially in issue in that suit. But I must say that I do not think that s. 13 of the Civil Procedure Code is exhaustive as to the effect of a *res judicata*. It does not deal at all with the case of judgments *in rem*, nor with that of parties represented by, though not claiming under the parties to the former suit, although the effect in this case of the previous judgment was recognized by the Privy Council in the passage in *Jogendro* v. *Funindro*(3) above cited.

Very different in the wideness of its terms is the 44th section of the Evidence Act, which enacts that "any party to a suit or other proceeding may show that any judgment, order, or decree, which is relevant under ss. 40, 41 and 42 (which comprise all cases of judgments relevant *qua* judgments) and which has been proved by the adverse party * * * was obtained by fraud or collusion." This section clearly covers the present case; the difficulty is to say what it does not cover. Its language is wide enough to allow a party to the suit in which the judgment was obtained to aver that it was obtained by the fraud of his antagonist, though the judgment stands unreversed. This, indeed, has sometimes been thought to be the English rule (see 2 Taylor on Evidence, para. 1522); but I do not think that the contention can be successfully maintained, having regard to the recent authorities, especially [716] to *Hufler* v. *Allen* (4) above quoted. It it also wide enough to allow a party to set up his own fraud or collusion in procuring the former judgment in order to defeat it, certainly a startling proposition. No doubt the section refers to the admissibility, not the weight of the evidence allowed thereby to be given; still it is hard to suppose that the Legislature contemplated that evidence should be admitted from which no result could follow. Possibly the Courts may hereafter read "fraud or collusion" as equivalent to "fraud and collusion," as denoting what Mr. Farran happily termed bilateral, as distinct from unilateral, fraud; and no doubt in many of the English decisions the term "fraud" is

(1) 5 B. 686.
(2) 6 Q.B. 605.
(3) 14 M.I.A. 367 (376).
(4) 2 L.R. Ex. 15.

used where collusion is plainly meant, which ambiguity indeed has been the principal cause of doubt last mentioned. Still the construction would be a somewhat forced one. But whatever we may conjecture, I do not feel it incumbent on or proper for me in this case to attempt to interpret the section. It suffices to say that, whatever its construction may be, the present case falls within it.

I, therefore, find the preliminary issue for the first and second defendants. The summons, the decision in which has been pending the decision on this issue, may now be brought on in chambers. Costs to be costs in cause.

Attorneys for the plaintiff: Messrs. *Jefferson, Bhaishanker and Dinsha.*
Attorneys for the first defendant: Messrs. *Payne and Gilbert.*
Attorneys for the second defendant: Messrs. *Ardesir and Hormasjee.*

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6 B. 717.

[717] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

NAGINBHAI AND ANOTHER (*Original Defendants*), *Appellants v.* ABDULLA (*Original Plaintiff*), *Respondent.** [18th September, 1882.]

Benami transaction by Hindu or Mussalman—Property bought by a father in his son's name—Advancement—Presumption—Evidence—Nature of evidence to rebut—Onus of proof.

When a purchase is made by a Hindu or a Mahomedan in the name of his son, the presumption is in favour of its being a *benami* purchase: and it lies on the party in whose name it was purchased to prove that he is solely entitled to the legal and beneficial interest in the estate. When the rights of creditors are in issue in such a transaction very strict proof of the nature of the transaction should be required from the objector to such rights. and the burden of proof lies with more than ordinary weight on the person alleging that the purchase was intended for the benefit of the son.

THIS was a first appeal from the decree of Rao Bahadur Mangeshrao Balvant, First Class Subordinate Judge of Surat.

The defendants sued the plaintiff's father, Nasar, in the High Court of Bombay (original jurisdiction side) and obtained a decree against him on the 3rd of May, 1876. In execution of this decree they attached three pieces of land and a house in Surat as the property of their judgment-debtor, Nasar. The plaintiff in a miscellaneous petition applied to the Subordinate Judge of Surat to have the attachment raised, but it was rejected on the 31st of October, 1879. The plaintiff now sued for a declaration of his own right to the property and to prevent the defendants from attaching and selling it as the property of his father, Nasar. The defendants contended that the property had been purchased with Nasar's money and belonged to him and was liable to attachment and sale in execution of their decree against Nasar.

The Subordinate Judge held the purchase not to be *benami*. He said: "It is clear that when the disputed properties were purchased, the defendants had not obtained their decree against Nasar, the said decree having been obtained in May, 1876. There is, therefore, no ground to suppose

* Regular Appeal No. 67 of 1881.

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that the transactions in question were fraudulently made to evade the execution of the defendants' decree. Bearing in mind this point, as also the [718] evidence of Nandial, which shows that the plaintiff alone managed the property and received the income, I come to the conclusion that the plaintiff holds the property, sued for, beneficially and for his own interest, and that the money paid by his father as purchase money was an advancement in his favour, and Nasar has no title over the said property. I, therefore, hold that the plaintiff is entitled to a decree."

The defendants appealed to the High Court.

Nanabhai Haridas, Government Pleader, for the appellants.—The properties which the defendants seek to attach were purchased by a Mahomedan in the name of his minor son, and the presumption is that the purchase is *benami* : *Gopee Krist Gosain* v. *Gunpersaud Gosain* (1) ; *Sayyud Uzhur Ali* v. *Bebee Ultaf Fatima* (2) ; *Nawab Azimat Alikhan* v. *Hurdwaree Mull* (3). Very strict proof is required to rebut this presumption.

Shantaram Narayan, for the respondent.—Assuming that such a presumption arises, we submit it is rebutted by the evidence adduced.

JUDGMENT.

MELVILL, J.—This is a suit to raise an attachment placed upon a house and three pieces of land by the creditors of plaintiff's father, Nasar. The property was purchased by Nasar, about ten years before the suit, in the name of his son, and the Subordinate Judge has found that the purchase was an advancement in favour of the son. It has been repeatedly laid down by the Judicial Committee that when a purchase is made by a Hindu or Mahomedan in the name of his son, the presumption is in favour of its being a *benami* purchase, and it lies on the party in whose name it was purchased to prove that he is solely entitled to the legal and beneficial interest in the estate. It has been also said [*Ahmed Ali Khan* v. *Hardwari Mall* (4)] that when the rights of creditors are in issue, very strict proof of the nature of the transaction should be required from the objector to such rights ; for that it would be easy, if such vigilance and jealousy were not exercised, for a family to place the family property out of the reach of creditors. In the present case the property was [719] undoubtedly purchased by the father during his son's minority. It is in evidence, that, after the purchase, the father and son lived together in the purchased house. As regards the land, it would seem that rent notes were taken in the son's name, and that rent was paid to the banker of the father and son, and credited in the son's name, and the account thereof was rendered by the banker to the son ; but it appears from the banker's evidence that the account was originally a mere transfer of the father's balance to the name of the son ; and it would, of course, be perfectly easy for the father and son to arrange the matter between themselves, so that the son should account for the rents to the father. It is possible that the transaction was a real one, and that the purchase was intended for the benefit of the son ; but the burden of proof lies with more than ordinary weight on the person alleging the *bona fides* of such a transaction and the evidence in this case is too slender to enable us to say that the plaintiff has discharged himself of that burden.

The decree of the lower Court is reversed, and the claim rejected with costs.

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(1) 6 M.I.A. 53.
(2) 13 W. R. P.C. 1=13 M.I.A. 232.
(3) 13 M.I.A. 395.
(4) 5 B.L.R. 578.

6 B. 719 (F.B.)

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APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Melvill and Mr. Justice Kemball.

LALLUBHAI (*Plaintiff*) *v.* NARAN (*Defendant*).*

[18th September, 1882.]

Limitation Act XV of 1877, *sch.* II, *art.* 132—*Mortgage—Suit by mortgagee to recover debt from the mortgagor personally—Money decree.*

Art. 132 of Act XV of 1877, sch. II, is applicable to a suit by a mortgagee to obtain a mere money decree, to which suit, therefore, the limitation of twelve years from the time the money sued for becomes due applies.

Pestanji Bezanji v. *Abdool Rahiman* (1) overruled.

[**Diss.**, 5 A. 461=3 A.W.N. 114; **N.F.**, 14 B. 377; **Appl.**, 6 M. 417; **R.**, 6 A. 551=4 A. W.N. 188 (**F.B.**); 7 A. 120=4 A.W N 283; 13 A. 28=10 A.W.N. 216; 10 B. 519; 14 B. 269; 15 B. 299; 20 B. 408; 9 M. 218; 10 M. 509; 26 M. 686; L.B. R. 1872—1892, 555; 79 P.R. 1904=133 P.L.R. 1904.]

UNDER s. 617 of the Code of Civil Procedure Rao Saheb Dolatrai Sampatrai, Subordinate Judge of Kheda, stated the following case for the orders of the High Court :—

"The plaintiff in the case presented a plaint on the 10th of January, 1882, in this Court to recover money due on a *sankhat* **[720]** (mortgage without possession) from the p rson and general property of the defendant according to the contract in the said *sankhat*, but relinquishes his right over the *san* immoveable property. This *sankhat* is dated 6th November, 1876, and as there is no time fixed for repayment, there is no dispute that this suit is brought after the lapse of three years from the date of the *sankhat*. In this *sankhat* the covenant, mentioned in clear words at the foot, runs thus :—'I bind myself jointly and severally to repay the amount of the *sankhat* with interest from the *san* property as well as my other properties, my person and heirs.'

"This *sankhat* is proved by evidence. I am of opinion that, since the time the Limitation Act IX of 1871 came into operation, the limitation of twelve and not three years applies to suits against *san* property as well as the defendant's person and other properties, if the debt be secured by such a *sankhat* of immoveable property as involves a two-fold contract; and such has been the practice of this Court.

"Before Act IX of 1871 came into force, the statute of limitation was Act XIV of 1859, and s. 1, cl. 12 of that Act was applicable to suits to recover any interest in immoveable property; and I see no reason to write at length regarding the wording of Act IX, which in this respect is quite different, because on a reference from the First Class Subordinate Judge of Kheda, Westropp, C.J., and Melvill, J., decided in Regular Appeal No. 6 of 1877 on the 16th of July, 1877, as follows :—

"The Court varies the decree of the Subordinate Judge by allowing interest at 9 per cent. per annum on the first instalment of Rs. 900 due upon the bond in the plaint mentioned from the 13th February, 1869, and by declaring that the defendant is personally liable for the said first instalment and the said interest thereon, inasmuch as the Court

* Civil Reference No. 6 of 1882.

(1) 5 B. 463.

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is of opinion that the period of twelve years allowed by art. 132 of the second schedule of Act IX of 1871 in the case of money charged upon immoveable estate is applicable as well to the personal liability of the debtor (when he has personally contracted) as to his liability of the immoveable property charged.'

[721] "Lately Sir Charles Sargent has passed a decision in *Pestanji Bezanji* v. *Abdool Rahiman* (1), which is contrary to this. Hence I make this reference * * *."

The case was heard by Kemball and Nanabhai Haridas, JJ., on the 14th of March, 1882, who referred it to the Full Bench.

The case was then reheard by Sir Charles Sargent, C.J .. and Melvill and Kemball, JJ.

The parties did not appear.

Manekshah Jehangirshah as *amicus curiæ* for the plaintiff —Article 132 of the Limitation Act XV of 1877, sch. II, is conversant with the nature of the debt which is sought to be recovered, and not with the remedy by which it is sought to be recovered. For instance, a suit on a registered bond may be brought within six years, though a suit on a bond not registered must be brought within three years. To hold that art. 132 does not apply to a claim to recover money only, would be to add words to it, and to read it as if it said "to enforce payment from the immoveable property." As the article stands it is quite wide enough to include a claim to recover money only, which has been charged upon immoveable property. The explanation to the article shows that it would include *malikana* and *haks*.

Ghanasham Nilkanth as *amicus curiæ* for the defendant.—Article 132 is not applicable to a suit brought on a mortgage bond to obtain a money decree only. Where the mortgage security is abandoned, the suit must be regarded as brought as it were on a money bond, and the limitation applicable is three years. Under Act XIV of 1859 the limitation for such a suit was three years. It cannot be supposed that by passing Act IX of 1871 or XV of 1877 the Legislature intended to alter the law which was in force without an express provision to that effect. A 'charge' is money charged, and, therefore, to enforce payment of money charged upon immoveable property, is to enforce the charge upon immoveable property. How can a suit for a personal decree be called a suit to enforce a charge upon immoveable property under art. 132? The word 'charge' is defined in the Transfer of Property Act IV of 1882, s. 100, as follows:—

[722] "Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property." This shows that the expressions used in art. 132 do not cover a suit on a mortgage bond. The absence of the word 'enforce' in arts. 57 to 64 and 65 to 80, which relate to suits for mere money, indicates that the art. 132 in which that word occurs, is intended to apply to a suit for obtaining a decree against immoveable property only. A suit may be brought for a mere money decree, treating the mortgage bond as a simple money bond, and again another suit may be brought to enforce the mortgage lien. There is no reason, therefore, why a different period of limitation should apply to a suit on mortgage bond treated by the plaintiff himself as a money bond from that applicable to a suit on a mere money bond. Again, there are distinct provisions

(1) 5 B. 463.

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of limitation, arts. 147 and 148, for suits based upon mortgage. The Legislature could not, therefore, have intended art. 132 to apply to a suit on a mortgage bond. The decision in *Pestanji Bezanji* v. *Abdool Rahiman* (1) is, therefore, correct.

In the course of the argument the following cases were also referred to:—*Junesmar Dass* v. *Mahabeer Singh* (2); *Surwan Hossein* v. *Shahazadah Golam Mahomed* (3); *Mannu Lal* v. *Pegue* (4); noted *in the matter of the petitions of S. J. Leslie* (5); and *Bappoo bin Ganoji* v. *Kalu bin Khandoba* at page 81 of the printed judgments for 1874.

JUDGMENT.

MELVILL, J.—The question referred for our decision is, whether art. 132, sch. II, of Act XV of 1877 is applicable to a suit brought by a mortgagee to recover his debt, not from the mortgaged property, but personally from the mortgagor.

Under Act XIV of 1859 the Courts held that such a suit was a suit "for money lent," and, therefore, subject to the three years, or the six years' rule, according as the bond was not, or was registered. A suit for foreclosure or sale was held to be a suit "for the recovery of immoveable property or of an interest in **[723]** immoveable property," and, therefore, governed by the twelve years' rule.

Act IX of 1871 contained provisions similar to those of Act XIV of 1859 regarding suits "for money lent," and "for possession of immoveable property or any interest therein not otherwise specially provided for," and our Courts would, no doubt, have adhered to their decision passed under the previous Act, if it had not been for the introduction of a new rule in art. 132, sch. II, of Act IX of 1871. That article prescribed a period of twelve years for suits "for money charged upon immoveable property," and in the case referred to by the Subordinate Judge it was held by a Division Bench of this Court that art. 132 was applicable as well to the personal liability of the debtor as to the liability of the immoveable property charged. Having regard to the wording of the article, and to its undoubted applicability to the case of money lent upon mortgage, we do not see how the decision could well have been otherwise.

The other decision to which the Subordinate Judge refers, *Pestanji Bezanji* v. *Abdul Rahiman bin Shaik Budoo*(1), was passedwith reference to the provisions of a later Act, and, consequently, the two decisions are not necessarily in conflict. For the words "for money charged upon immoveable property" art. 132, sch. II, of Act XV of 1877 has substituted the words "to enforce payment of money charged upon immoveable property," and it is difficult to suppose that the change was made without intention. In the case in question the use of the word "enforce" induced the Court to the conclusion that the article was intended to apply only to suits to enforce the claim of the mortgagee, against the mortgaged property. It was indeed pointed out during the argument that it might well be doubted whether art. 132 was intended to apply to mortgages at all, inasmuch as art. 147 had introduced a special provision, not contained in previous Acts, for a suit by a mortgagee for foreclosure and sale.

It must be admitted that these changes in the law have introduced difficulties with which this Court had not to contend **[724]**

(1) 5 B. 463. (2) 1 C. 163. (3) 9 W.R. 170.
(4) 9 B.L.R. 175, note. (5) 9 B.L.R. 171.

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when considering this question with reference to the provisions of the Act of 1871. But upon a careful consideration of the whole subject, and bearing in mind that, in cases of doubt, an Act of Limitation ought to be construed in the manner most favourable to the person whose right is the subject of the limitation, we have come to the conclusion that art. 132 of the last Act ought to be held applicable to a suit by a mortgagee to obtain a mere money decree. The explanation to the article provides that "the allowances and fees respectively called *malikana* and *haks* shall, for the purpose of this clause, be deemed to be money charged upon immoveable property." Now suits for *malikana* or *haks* are ordinary suits for mere money decrees, and, therefore, the explanation is opposed to the supposition that the article was intended to apply exclusively to suits to enforce payment out of immoveable property. And although the introduction of a special provision for the enforcement of a mortgage by foreclosure or sale (art. 147) may point to the conclusion that the Legislature intended the word "charge" in art. 132 to bear the same meaning as in s. 100 of the Transfer of Property Act (which says that "where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, *and the transaction does not amount to a mortgage*, the latter person is said to have a *charge* on the property"), yet it cannot be denied that money lent on mortgage is, in ordinary legal phraseology, money charged upon immoveable property, and that, therefore, a suit by a mortgagee for a money decree is strictly within the words, though possibly not within the intention of the article in question.

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6 B. 725.

[725] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Kemball.

MURARI (*Original Plaintiff*), *Appellant v.* SUBA AND OTHERS (*Original Defendants*), *Respondents.** [11th September, 1882.]

Jurisdiction – Caste question – Regulation II of 1827, *s.* 21—*Suit for fees appurtenant to the office of* Guru—*Jurisdiction of Civil Courts.*

A claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy privileges and honours at the hands of the members of the caste in virtue of that office is a caste question, and not cognizable by a Civil Court. The same rule applies where there are fees appurtenant to the office.

The plaintiff belonged to the Mahar caste, and sued to recover from the defendants certain fees which, he alleged, were appurtenant to the office of *guru* to the members of the Mahar caste living in a certain village. The defendants denied that the plaintiff was their *guru*. Both the lower Courts dismissed the suit on the ground that it involved a caste question.

The High Court, on second appeal, confirmed the decrees of the Courts below.

[**Appl.** 34 B. 455 = 12 Bom. L.R. 358 = 6 Ind. Cas. 519; **Appr.**, 1 Bom. L.R. 711; 12 Bom. L.R. 358 (362); **R.**, 11 B. 534; 19 B. 507 (522); 23 B. 122; 34 B. 467 = 11 Bom L.R. 1014 = 4 Ind. Cas. 108; 17 M. 222 = 4 M.L.J. 101; 14 Bom. L.R. 573 = 16 Ind. Cas. 338; **D.**, 12 C.L.J. 74 = 14 C.W.N. 1057 = 6 Ind. Cas. 864.]

THIS was a second appeal from the decision of S. Tagore, Judge of the District Court of Kanara, affirming the decree of V. W. Phade, Second Class Subordinate Judge of Sirsi.

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* Second Appeal, No. 596 of 1881.

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The plaintiff Murari instituted this suit to establish his right as *guru* to certain annual fees from the defendants as his *sishayas* (disciples), and to recover one year's arrears of such fees from them. The defendants denied that the plaintiff was their *guru*.

The Subordinate Judge rejected the plaintiff's claim on the ground that it involved a caste question, and that, therefore, the suit was excluded from the jurisdiction of the Civil Courts by Reg. I of 1827, s. 21. In appeal, the District Court upheld the decree of the first Court.

The plaintiff appealed to the High Court.

N. G. Chandavarkar, for the appellant.

G. N. Nadkarni, for the respondents, relied upon *Murar Daya* v. *Nagria Ganeshia* (1) and the cases referred to therein; also *Shankara* v. *Hanma* (2).

JUDGMENT.

[726] SARGENT, C.J.—The plaintiff belongs to the Mahar caste, and seeks to recover from defendants certain fees which, he alleges, are as of right appurtenant to the office of guru to the members of the Mahar caste, living in the village of Indur, Taluka Yellapur, the duty of which office he states is to supervise the religious ceremonies in the families of his disciples. The defendants denied that the plaintiff was their guru. The District Judge dismissed the plaint without taking evidence, holding on the authority of *Murar Daya* v, *Nagaia Ganeshia* (1) that it was a caste question. In that case the plaintiffs sued to recover, from another member of the caste, fees alleged to be due to them as mehtars or chief men of the caste on the marriage of the defendant's daughter. The defendant said the plaintiffs were not his mehtars, and that he had never engaged them as such. The Court held, following the view taken in Special Appeal No. 39 of 1862, that the question at issue between the parties was a caste question, and excluded from the cognizance of the Civil Courts by Reg. II of 1827, s. 21. In Special Appeal No. 39 of 1862 the question was as to the right to be recognized as the head of the caste, and to be entitled to receive from the defendants (other members of the caste) certain privileges and precedence, and the Court held that the question at issue was a caste question, and to hold otherwise would be to interfere with the autonomy of the caste. It was a decree, therefore, that the right to an office of dignity in a caste is a caste question, and that a suit will not lie against members of the caste who refuse plaintiff the privileges belonging to that dignity.

In the case of *Shankara* v. *Hanma* (2) the plaintiff claimed to be the hereditary holder of the office of chalvadi in the Lingayat caste of Bagalkot to which (it was found by the Court below) no fees as of right were appurtenant, and he sued defendants for damages for having dispossessed him of the office, and it was held that the claim was a caste question within the meaning of so much of 21st section of Reg. II of 1827 as remains unrepealed by Act X of 1861. The Chief Justice delivering judgment says: "The alleged duty of the chalvadi being to carry the insignia of the caste at public ceremonials without any **[727]** right to levy fees or receive salary for the purpose of that duty, is essentially a

(1) 6 B.H.C.R.A.C. J. 17.

(2) 2 B. 470.

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matter which concerns the caste exclusively, and, therefore, one which we think the Bombay Legislature intended to leave to the caste."

Upon these authorities it must be taken as well established that a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy privileges and honours at the hands of the members of the caste in virtue of such office is a caste question and not cognizable by a Civil Court; and, indeed, we think the same rule ought to apply when there are fees appurtenant to the office.

We do not understand the Chief Justice as intending to express an opinion either way in such a case in *Shankara* v. *Hanma*, although doubtless he relied on the fact of there being no fees appurtenant to the office as a circumstance which assisted the conclusion that the question was a caste one. The principle laid down by the Court in Special Appeal No. 39 of 1862 appears to us to be the sound one, *viz.*, would the taking cognizance of the matter in dispute be an interference with the autonomy of the caste? And applying that principle, we think it would be equally so, whether the question turns upon the obligation of the members of the caste to accord to the holder of the office certain privileges and honours or to pay him fees in virtue of his office. In either case it is one which, if a caste is to be considered in any sense a self-governing body as is contemplated by the Regulation of 1827, should, we think, be left to be decided and dealt with by the caste according to its customary mode of procedure. Of course, if the office be one which enables the holder to render services to individual members of the caste, and the holder is actually employed to render those services, he may be entitled to recover in the Civil Courts remuneration for them; and in determining the amount, the fees customarily paid in the caste would, in the absence of special agreement, be properly taken as the basis for assessing it. That is, however, not the plaintiff's case. We must, therefore, confirm the decree with costs.

Decree confirmed.

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6 B. 728.

[728] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

BAI BAIBA, (*Applicant*) *v.* BAI DAGUBA, (*Opponent*).*
[25th September, 1882.]

Certificate of heirship—Minor—Reg. VIII of 1827.

Under the provision of Reg. VIII of 1827 a certificate of heirship cannot be granted to a minor.

[R., 7 B. 341.]

THIS was an application for the exercise of the High Court's extraordinary jurisdiction.

One Dipsangji Amarsangji of Rojka in the Ahmedabad District died, leaving two widows Baiba and Daguba, and a minor son Gagubha by the younger widow Daguba. Disputes arose between the widows. Baiba denied the legitimacy of her rival's son, and adopted a boy Nanubha. Daguba contested both the fact and the validity of this adoption. Both parties went up

* Extraordinary Application, No. 150 of 1880.

to the District Court with various applications, which resulted in the appointment of the Collector of Ahmedabad to take charge of the property of the deceased, the appointment of Baiba as guardian of Nanubha, the appointment of Dagubha, as guardian of Gagubha, and the issue of a certificate to Gaguba declaring him to be the heir of the deceased. The present application was to obtain a cancelment of the certificate of heirship.

Phirozshah M. Mehta and *Shantaram Narayan*, for the applicant.—A certificate of heirship cannot be granted to a minor under Reg. VIII of 1827: *In re Sambhajirav* decided by Saussee, C.J., and Hebbert and Newton, JJ., on the 16th of February, 1863.

Branson and *Gokaldas Kahandas*, for the opponent.—The Regulation nowhere prohibits the grant of a certificate to a minor. On the contrary the wording does not support the ruling cited. The applicant is himself a minor, and has applied for a similar certificate. The certificate granted prejudices no one.

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JUDGMENT.

MELVILL, J.—We think, having regard to all the provisions of Reg. VIII of 1827, that a certificate of heirship cannot be granted under that Regulation to a minor. This was so decided by a Full Bench of this Court, *In re Sambhajirav*, on the 16th of [729] February, 1863. We accordingly annul the certificate of heirship granted by the District Judge on the 21st of October, 1880, to the minor Gagubha Dipsangji. The parties to bear their own costs in this application.

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6 B. 729.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

KANJI LADHA, (*Plaintiff*) *v.* DHONDE, (*Defendant.*)*

[17th January, 1882.]

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 56—Signed balance of account—Evidence.

A balance of account signed by an agriculturist is an instrument which purports to evidence an obligation for the payment of money, and cannot, therefore, be admitted in evidence, unless written by or under the superintendence of, and attested by, a village registrar, as required by s. 56 of Act XVII of 1879.

[Appr., 13 B. 215.]

THIS case was submitted for the decision of the High Court by Rao Saheb G. A. Mankar, Second Class Subordinate Judge of Khed, under s. 617 of Act X of 1877. He stated the facts of the case as follows:—

"The plaintiff sues to recover the sum of Rs. 41-8 from the defendant, who is an agriculturist, according to s. 2, cl. 2 of Act XVII of 1879, upon a *khata*, being an acknowledgment under his signature of a balance of account by the latter in the former's account book. The *khata* is dated 9th October, 1880, that is, six months after a village registrar under Act XVII of 1879 was appointed for Chincholi in this taluka, where the defendant resides. The main question in this case is whether the *khata*, being an acknowledgment of debt by an agriculturist

* Civil Reference, No. 39 of 1881.

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under his signature, is admissible in evidence when it is not registered according to s. 56 of Act XVII of 1879. That section runs as follows :—

"No instrument which purports to create, modify, transfer, evidence or extinguish an obligation for the payment of money or a charge upon any property or to be a conveyance or lease, and which is executed after this Act comes into force by an agriculturist residing in any local area for which a village [730] registrar has been appointed, shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon by any such person or by any public officer, unless such instrument is written by or under the superintendence of, and is attested by a village registrar, provided that nothing herein contained shall prevent the admission of any instrument in evidence in any criminal proceeding.'

"The Amendment Act XXIII of 1881 adds the following words to this section :—'or apply to any instrument which is executed by an agriculturist merely as a surety.'

"If the *khata* in question be an instrument, then it is certainly not admissible in evidence, owing to its being not registered according to the provisions of s. 56, as it creates an obligation for the payment of money by an agriculturist residing in a village for which a village registrar has been appointed. The word 'instrument' is not defined in Act XVII of 1879 or in any other Act so far as I am aware. According to Wharton's Lexicon (1867), an 'instrument' is a formal legal writing, *e. g.*, 'a record, charter, deed, or written agreement.'

"The *khata* is then, in my humble opinion, an instrument, and, consequently, not admissible in evidence, owing to its non-registration.

"It may, however, be well doubted whether the Legislature meant that creditors should take their account books to the village registrars in order that the latter might write the intended acknowledgments of debt by their debtors therein, or cause them to be written under their superintendence.

"It may also be observed that a difficulty will arise if such entries be held registrable under s. 56. For the entries in account books will have to be attested by the village registrar and also by two respectable witnesses, if the executants are unable to read them, under ss. 56 and 57 of Act XVII of 1879. If they be so attested they will become bonds, according to s. 3, cl. (4) (*b*) of Act I of 1879, and will not, therefore, be admissible in evidence if not written upon stamp paper. If s. 56, then, requires that entries under the signatures of [731] agriculturists should be registered, it virtually prohibits, in my opinion, such entries being made at all. I doubt, however, whether this was the intention of the Legislature. It therefore appears necessary to submit this case to the Honourable the Chief Justice and Judges of the High Court for the decision of the point raised above."

There was no appearance of parties in the High Court.

PER CURIAM.

The signed account is an instrument which purports to evidence an obligation for the payment of money, and cannot, therefore, be admitted in evidence, unless written by or under the superintendence of and attested by a village registrar as required by s. 56 of Act XVII of 1879.

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Before Mr. Justice Melvill and Mr. Justice Pinhey.

EMPRESS *v.* MALHARI * [11th October, 1882.]

Evidence—Possession of stolen goods—Presumption—Dishonest receipt of stolen property—Dacoity—Jury.

In considering whether the possession of stolen goods raises a presumption of dishonest receipt of stolen property, the attention of the jury should be drawn to the necessity of satisfying themselves that the possession is clearly traced to the accused.

The fact of stolem property being found concealed in a man's house would be sufficient to raise a presumption that he knew the property to be stolen property, but it would not be sufficient to show that it had been acquired by dacoity.

[**Rel.**, 15 C.L.J. 517=16 C.W.N. 1 105 (1143)=13 Cr. L.J. 609=16 Ind. Cas. 257; **R.**, 12 Cr. L.J. 48=9 Ind. Cas. 288=9 M.L.T. 291; **Cons.**, 6 Bom. L.R. 887.]

THE appellant along with others was tried by Sir William Wedderburn, Session Judge of Poona, and a jury, for the offence of dishonestly retaining stolen property the possession of which he knew had been transferred by the commission of dacoity under s. 412 of the Indian Penal Code, and was sentenced to suffer rigorous imprisonment for four years.

The Session Judge in his charge to the jury with respect to the appellant Malhari summed up thus :—

"There remains the evidence as to the ornaments, articles found in the house of No. 17, Malhari. It is not denied that [732] these ornaments formed part of the property stolen in the dacoity, but No. 17 maintains that he does not know how they came into his house. It appears that the ornaments were found concealed in a large earthen pot containing tobacco, stored in a sort of loft ; and if the jury are satisfied that no fraud has been committed, there will arise a strong presumption against accused No. 17. At the same time there are circumstances which are deserving of consideration in favour of accused. The dacoity was committed on 6th April, and his house, which is in Bibi, was not searched till 8th June. During the whole interval stringent inquiries were going on, and many arrests made. It seems, therefore, somewhat unaccountable that accused, who had served as a police patel, should have kept silver ornaments all that time in a place where they would certainly be found if his house was searched. It would have been very easy in this long interval either to melt them down or hide them in the jungle. Also there seems to be some suspicion that the searchers knew what they were going to find. For they seem to have stopped their search as soon as the bundle containing the ornaments was discovered. Ladhuji complainant's total loss is stated at Rs. 2,692-8-0, and we might have naturally expected that the discovery of a small portion would have led to a more vigorous search. Instead of this the police seem to have been quite satisfied with what they found, and proceeded to search another house, leaving unexamined some large grain baskets in which grain was stored. From the evidence of complainant it appears that the dacoits in searching for his valuables broke open such grain stores and further broke up the

* Criminal Appeal, No. 145 of 1882.

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walls and flooring. The kulkarni states that the loft in which the ornaments were found can be got at through a window opening to the outside, but his evidence is weakened by the fact that in the memorandum of the search it is stated that there is no entrance except by a ladder inside the house."

The jury brought in a verdict of guilty against Malhari, and the Session Judge concurring with that verdict convicted him, under s. 412, Indian Penal Code, of dishonestly receiving stolen property, knowing that the possession thereof had been transferred by dacoity, and sentenced him to four years' rigorous imprisonment.

[733] *Branson* with him *Mahadev Chimnaji Apte*, for the appellant.—From the recent possession of the appellant of property stolen in *dacoity* the Session Judge has presumed that he knew that the property had been stolen in *dacoity*. In this he has committed an error in law, for the presumption can go no further than imputing to him a knowledge of the property being stolen. For this offence, which falls under s. 411, Indian Penal Code, the maximum punishment is three years. The sentence of four years is, therefore, illegal. But in this case the possession of the stolen property was not clearly traced to the appellant; and the Session Judge committed an error in law in not drawing the attention of the jury to this fact.

Nanabhai Haridas, Government Pleader, for the Crown.

JUDGMENT.

MELVILL, J.—It is admitted that there is no evidence against the appellant Malhari except the circumstance that stolen property was found concealed in a loft in his house. This would be sufficient to raise a presumption that he knew the property to be stolen property, but not to support the finding of the jury that he knew that it had been acquired by dacoity. But, apart from this defect in the verdict, it is to be observed that the attention of the jury was not directed to the necessity of their being satisfied that the possession of the stolen property was clearly traced to the accused, and that it could not have been placed where it was found by any other member of the accused's household. The following observations by Mr. Best in his work on Evidence, section 212, page 292 (5th edition) are worthy of consideration:—" But in order to raise this presumption legitimately, the possession of the stolen property should be *exclusive* as well as recent. The finding it on the person of the accused, for instance, or in a locked-up house or room, or in a box of which he kept the key, would be a fair ground for calling on him for his defence; but if the articles stolen were only found lying in a house or room in which he lived jointly with others equally capable with himself of having committed the theft, or in an open box to which others had access, no definite presumption of his guilt could be made. An exception has been said to exist where the accused is the occupier of the house in which the stolen property is found, who, it is argued, must be presumed to [734] have such control over it as to prevent anything coming in or being taken out without his sanction. As a foundation for *civil* responsibility this reasoning may be correct; but to conclude the master of a house guilty of *felony*, on the double presumption, first, that the stolen goods found in the house were placed there by him or with his connivance; and, secondly, supposing they even were, that he was the thief who stole them, there being no corroborating circumstances, is certainly treading on the very verge of artificial conviction."

In the present case the appellant appears to have had a grown-up brother living in his house during his absence, besides several other relatives; and the presumption that the appellant and not one of these relatives placed the stolen property where it was found, is under the circumstances so weak that the attention of the jury might well have been directed to the point. We do not think that the conviction as it stands, nor even a minor conviction under the Indian Penal Code, s. 411, is under the circumstances sustainable in law, and we, therefore, reverse the conviction, and order Malhari to be discharged.

Conviction reversed.

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6 B. 734.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Kemball.

BABAJI AND ANOTHER (*Plaintiffs*) *v.* VITHU AND OTHERS (*Defendants*).

AND

PATLUJI (*Plaintiff*) *v.* TULSIRAM (*Defendant*).* [5th September, 1882.]

The Dekkhan Agriculturists' Relief Act XVII *of* 1879—*Mortgage—Agriculturist mortgagor—Suit for account and redemption before the time fixed for payment.*

Under the Dekkhan Agriculturists' Relief Act XVII of 1879 an agriculturist mortgagor may sue for account and possession of mortgaged property before the time fixed in the mortgage deed for the payment of the mortgage debt, on the ground that the debt has been satisfied.

The rule of law that the right to redeem is co-extensive with the right to foreclosure, and is consequently postponed until the time fixed for the payment of the mortgage debt, does not apply to cases falling under that Act.

[R., 15 Bom. L.R. 266.]

UNDER s. 617 of the Civil Procedure Code, Act X of 1877, these cases were submitted for the decision of the High Court by Rao Saheb V. V. Paranjpe, Second Class Subordinate Judge of Dahivadi.

[735] The plaintiffs in both the cases sued for an account and possession of the mortgaged lands, alleging that the mortgage debts had been fully satisfied out of the profits of the said lands. The defendants in both the cases answered (*inter alia*) that the plaintiffs had no cause of action under the terms of the mortgage deeds, both of which are fully set out in the judgment of the High Court. The mortgage deed in the first case was dated the 24th April, 1871, while that in the second case bore date the 31st March, 1876.

The Subordinate Judge, therefore, submitted to the High Court the question whether the suits were maintainable. He was of opinion that as the mortgage deeds, had fixed the time for the payment of the mortgage debts, they were agreements which determined the manner of taking the account between the parties within the meaning of s. 13 of Act XVII of 1879. He was, however, of opinion that the suits would be maintainable if, after taking account, the mortgage debts should be found to have been satisfied.

There was no appearance of parties in the High Court.

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* Civil References Nos. 41 and 42 of 1882.

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JUDGMENT.

SARGENT, C.J.—Both these suits are suits for redemption by an agriculturist under the Dekkhan Agriculturists' Relief Act of 1879. The mortgage bond in the first suit is as follows:—"I owe you certain debts, account of which is made up to this day. The balance is fixed to be Rs. 85, for which I give my land, Survey Nos. 63 and 68, for twenty years, and you are to enjoy its produce in satisfaction of the debt." In the second suit the mortgage bond was in the following terms:—"I have received from you principal Rs. 50 of the Surat currency. As for the interest thereof, I have given you my *miras* land. Therefore, you should enjoy the said land by cultivating it at home or letting the same to any one. The time fixed for payment of the said amount is ten years from the date of the bond, *i.e.*, you are to carry on the management down to the Fasli year 1295 (A.D. 1886). After the expiration of the ten years, I will pay off your debts Rs. 50 and receive back the land. Therefore, after enjoying the land for the full period of ten years, you should give it up. I will pay the *chavdi* (assessment). If the assessment be recovered from you, I will not deduct that year, because you will have held the land on payment of the *chavdi* This is the agreement. Should the money be not paid at the time **[736]** fixed, you are to carry on the management of the land until the amount is paid."

The question referred to us in both cases is, whether the plaintiff can redeem the mortgaged lands before the periods fixed for payment of the mortgage debt. The general principle is that the right to redeem is co-extensive with that of foreclosure, and that, consequently, the right to redeem, under such mortgage agreements as the above, is postponed until the time fixed for payment. The question is whether that rule can still prevail in cases falling under the Dekkhan Relief Act, and we think it must be answered in the negative. The object of the Dekkhan Relief Act, as stated in the preamble, is to relieve the agricultural classes in the Deccan from indebtedness, and, therefore, any agreement between the parties by which the mortgagor is compelled to remain in the mortgagee's debt for a definite period *pro tanto* frustrates the object which the Legislature had in view, and such would be the effect of the mortgage bonds in question, if construed and acted upon according to the general rule. It must be admitted that there is no express provision in the Act which prevents the application of the rule; for it would, we think, be straining the language of the Act too much to hold, as suggested by the Subordinate Judge, that the time fixed for payment is an agreement "determining the manner of taking the account" between the parties, although that expression in s. 13 undoubtedly appears to be used in an elastic sense and not strictly according to its technical meaning. The Dekkhan Act, however, is a remedial Act presumably enacted for the public good. Bearing this in mind, and having regard to the anomalous powers which by ss. 12 and 13 of the Act the Court is required to exercise in disregard of the contractual relations between the parties, we think that a beneficial construction of the Act to effect its object requires us to hold that when the Act says in s. 12—"In any suit for redemption the Court *shall* proceed to enquire into the past history of the case *ab initio*, and take the account in the manner directed by s. 13," it impliedly excludes any objection based on the agreement between the parties that the suit is premature. The questions referred to us in both cases must be answered in the affirmative.

6 B. 737.

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[737] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, BY THE COLLECTOR OF KHEDA (*Original Defendant No.* 1), *Appellant v.* JAMNADAS AND OTHERS (*Original Plaintiffs*), *Respondents.**

[18th September, 1882.]

Pensions Act XXIII of 1871, *ss.* 1 *and* 4—*Grant of land revenue—Former suit for money.*

The plaintiffs formerly sued for a sum of money, and obtaining a decree attached, in 1861, two villages, the land revenue of which had been granted in *inam*. The attachment continued down to 1875, when the last holder of the villages died, and, the Government having resumed the villages, the attachment was raised. The plaintiffs now sued to have their right declared to satisfy their decree from the revenues of the villages.

Held that the former suit was not a suit in respect of a pension or grant of money or land revenue, and that an attachment placed in pursuance of an ordinary money decree before the date of the Pensions Act (XXIII of 1871) could not be treated as a suit in respect of a pension, grant of money, or land revenue instituted before such date, so as to exclude the operation of the Act under s. 1.

THIS was an appeal from the decision of S. H. Phillpotts, Judge of Ahmedabad.

The facts of the case, in so far as they are material, are as follows :—

The plaintiffs sued the Secretary of State for India in Council represented by the Collector of Kheda and one Karunashankar to establish their right to have the proceeds of two villages Kansari and Jesarva attached in execution of a decree obtained by their ancestor Dayaram in 1856 in the Court of the Principal Sadar Amin of Surat against Karunashankar's adoptive father Pranshankar. That decree had been transferred for execution to the Subordinate Judge of Borsad, who by an order dated 13th February, 1861, attached the villages and continued to execute the decree till 31st of July, 1875, through the Collector of Kheda.

The village of Kansari was granted by the Peishwa in 1803 and the village of Jesarva by the British Government in 1820 to a Brahman of the name of Hareshvar, who died on the 4th of October, 1821. On the death of the grantee his son Umyashankar succeeded, and he was succeeded by his son Pranshankar, the [738] judgment-debtor of the plaintiffs. Pranshankar died on the 18th of November, 1852. Hareshvar's lineal descendants accordingly enjoyed the villages as owners for a period of more than thirty years, and as such had, at the date of Pranshankar's death, acquired a prescriptive title under Reg. V of 1827, independently of the *sanads*. The grant by the Peishwa was to Hareshvar, his sons, grandsons, &c., but the grant by the British Government was to Hareshvar alone. Hareshvar petitioned the Government to remedy this defect; and a resolution was passed by Government ordering the issue of a *sanad* accordingly. It did not appear whether an amended *sanad* was in fact issued; but Pranshankar, the great-grandson of the original grantee, continued to enjoy both the villages up to his death in 1852.

Pranshankar died childless, and was succeeded by his widow, on whose petition the Government passed a resolution declaring that she should enjoy the villages during her lifetime, but at her death they should

* Regular Appeal No. 37 of 1881.

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lapse to Government. The widow Suraj declined to accede to this order or to accept the terms of the summary settlement. About the year 1874 she adopted the second defendant Karunashankar as the son of her deceased husband, and she died in June, 1875, when the villages were declared by the Collector of Kheda as *khalsa* and not liable to further execution of the plaintiff's decree. The Subordinate Judge of Borsad accordingly on the 3rd of December, 1878, referred the plaintiffs to a regular suit, and raised the attachment. The present suit was accordingly brought in 1880.

Both the defendants urged a number of objections, but it is not material to take any notice of them. Their main contention was that the cognizance of the suit was barred by the Pensions Act XXIII of 1871.

Upon a construction of the *sanads* the District Judge arrived at the conclusion that the grant as regards both the villages was one of revenue only, and that this suit was prohibited by s. 3 of the Pensions Act. But he thought the prohibition was removed by s. 1, the attachment on the villages having been placed prior to the Act. He said; "The Act was not intended to be retrospective, and s. 1 provides that it shall not affect **[739]** any suit in respect of a pension or grant of money or land revenue which may have been instituted before the date on which it came into force. Now the plaintiffs' decree did not bind the *inam* or in any way encumber it; but on the 13th of February, 1861, or a few days afterwards, at any rate years before the Pension Act came into force, an order was passed declaring this *inam* liable for the plaintiffs' decree, and any subsequent legislation cannot deprive the plaintiffs of this right. This attachment was raised on application by the defendant No. 1 or rather on the Collector of Kheda using the power he had as manager to obstruct the decree. The plaintiffs have now sued under s. 283 of Act X of 1877. This was the only means open to them of giving effect to the decree. To say that they should not bring this suit without the consent of the Revenue Authorities would deprive them of the benefit of the former suit, and put an insuperable objection in the way of their obtaining the benefit thereof. Had the Collector been, as he ought to have been, referred to a regular suit, he must undoubtedly have lost it on the merits, and it would be unfair to give him the advantage he might have gained by his decidedly irregular procedure." The District Judge, therefore, awarded the plaintiffs' claim. The Secretary of State for India in Council appealed to the High Court.

Nanabhai Haridas, Government Pleader, for the appellant.—The suit is barred by s. 1 of the Pensions Act. The plaintiffs' decree, under which the attachment was placed on the villages, was not in respect of a pension or grant of money or land revenue. It was a simple money decree in execution of which the attachment was placed. On failure of heirs the Government was at liberty to resume the villages, the land revenue only of which and not the soil was alienated. In the case of *Parbhudas v. Motiram* (1) the mortgagee of the *toda giras haks* had, before the date on which the Pension Act came into operation, obtained a decree for the recovery of the mortgage *haks*.

Shantaram Narayan, for the respondent.—The decree obtained by the plaintiffs followed by the attachment on the villages **[740]** vested in the plaintiffs the right to recover the proceeds of the villages until full satisfaction of their decree. The right thus vested before the Pension Act could not be taken away from the plaintiffs by that Act, which has been

(1) 1 B. 203.

held not to have retrospective effect: *Jamnadas* v. *Lalitaram* (1). The villages have been undoubtedly enjoyed by the grantee and his descendants for more than thirty years, and they have acquired the prescription of them by Reg. V of 1827. The Government, therefore, had no right to resume them. Had the Collector been referred to a suit by the executing Court, he would, as remarked by the District Judge, have lost on the merits. It would, therefore, be inequitable to construe the Pension Act as urged by the appellant. But the Pension Act does not apply, as the grant of the village of Kansari especially was a grant of the soil and not merely of the land revenue. The terms of the *sanad* in respect of the Kansari village are as follows:—

"You hold the village of Kansari in the pargana Petlad as a *jat tainat* (personal holding). As you serve the Government faithfully, so from the year Shak 1726 this village with the exception of the rights of the *hakdars* and *inamdars* has been given you as a newly-created *inam* for the maintenance of yourself and your family by the Government: so do you and your sons, grandsons, &c., hereditarily enjoy the *inam* and be prosperous."

JUDGMENT.

MELVILL, J.—We think that the District Judge was right in holding that the property which the plaintiffs wish to attach is in the nature of a grant of land revenue, and the present suit is, consequently, barred by s. 4 of the Pensions Act, No. XXIII of 1871, unless they can have the benefit of the reservation contained in s. 1 of the Act. The District Judge, evidently relying on the decision in *Parbhudas* v. *Motiram* (2), has given them the benefit of this reservation; but we do not think that either that case or *Jamnadas* v. *Lalitaram* (1) can help the plaintiffs. In both those cases there had been a previous suit by a mortgagee to enforce his claim against the pension or grant of land revenue, and a decree had been obtained directing payment out of such pension or grant. A refusal to execute such decree [741] would directly have affected "a suit in respect of a pension or grant of land revenue" within the meaning of s. 1 of the Act. But in the present case the plaintiffs never brought any suit in respect of any such grant. They are simply the holders of a money decree, and the mere attachment of property under that decree before the date of the Pensions Act cannot be treated as a suit in respect of such property instituted before such date.

The decree of the District Court is reversed, and the claim rejected with costs on the plaintiffs throughout.

Decree reversed.

(1) 2 B. 294.

(2) 1 B. 203.

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APPEL-
LATE
CIVIL.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Kemball.

HARI (*Original Plaintiff*) *v.* MARUTI (*Original Defendant*), *Respondent.** [29th August, 1882.]

Limitation Act XV of 1877, *art.* 127—*Partition—Exclusion from share.*

Where in a suit for partition a District Judge held the plaintiff's claim barred, on the ground that the defendant had been in possession of the property in dispute for more than fifteen years without any claim having been made by the plaintiff.

Held that under the Limitation Act XV of 1877, art. 127, time would not run against the plaintiff until his exclusion (if he was excluded) from the property had become known to him.

[R., 14 B. 70; 22 B. 259; 5 Bom. L.R. 355 (360); 8 Ind Cas, 512=21 M.L.J. 21 (28) =9 M.L.T. 3.]

THIS was a second appeal from the decision of R. F. Mactier, Judge of the District Court of Satara, affirming the decree of the First Class Subordinate Judge at the same place.

The plaintiff Joti and his brother brought this suit to recover possession of certain immoveable property, alleging that their father and the defendant's father were brothers; that the property in dispute was their joint ancestral property; and that, therefore, they (plaintiffs) were entitled to a half share in it. The plaint was filed on the 23rd November, 1880.

The Subordinate Judge dismissed the suit, holding that it was barred.

In appeal, the District Judge raised the issue whether the property in dispute was in possession of any person from whom [742] the plaintiffs could legally claim it within twelve years previous to the date of the suit. He found this issue in the negative, and held the claim barred by limitation. He observed: "The defendant seems to have been at least fifteen years in the property which the plaintiffs claim to share in, and no attempt has been made to claim a share till lately."

The plaintiff Joti alone appealed to the High Court.

S. V. Bhandarkar, for the appellant.—The District Judge was wrong in holding the suit barred by limitation, merely because the defendant was in possession of the property in dispute for fifteen years before the institution of the suit. He ought to have determined when the plaintiffs demanded a share of it and were refused, or when their exclusion from it became known to them, as required by art. 127 of Act XV of 1877.

There was no appearance for the respondent.

JUDGMENT.

SARGENT, C.J.—The District Judge has apparently found that the plaintiff's claim was barred, on the ground that the defendant had been in possession of the property in dispute for more than fifteen years, without any claim having been made by the plaintiff. Time, however, under art. 127 of Act XV of 1877 would not run against plaintiff until his exclusion

* Second Appeal, No. 143 of 1882.

(if he was excluded) from the property had become known to him. The decree must, therefore, be reversed, and the case sent down for re-trial with reference to the above remarks. Costs of appeal to follow the result.

Decree reversed and case remanded.

1882 AUG. 29. APPELLATE CIVIL. 6 B. 741.

6 B. 742.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Kemball.

PANDURANG ANPAI (*Original Plaintiff*), *Appellant v.* KESHAVJI JADHAVJI AND OTHERS (*Original Defendants*), *Respondents.**

[29th August, 1882.]

Practice—Application for subpœnas to witnesses.

On the 12th October, 1879, the plaintiff applied to the Court for subpœnas to his witnesses. The Court refused to grant them, on the ground that the plaintiff had himself originally undertaken to bring his witnesses. (The Court had fixed the 28th October, 1879, for the final hearing of the plaintiff's case.)

[743] *Held* that the plaintiff's failure to bring his witnesses was no sufficient reason for depriving him (the plaintiff) of his right to have subpœnas issued, if he found himself unable to bring his witnesses or to detain them till they could be examined, although it might possibly be, under certain circumstances, a reason for not waiting for them, if the plaintiff's case had been in other respects finished before they could be examined.

THIS was an appeal from the decision of Rao Bahadur Ramrav Subaji, Subordinate Judge (First Class) of Karwar, in Original Suit No. 680 of 1874.

This suit was instituted by the plaintiff Pandurang to recover Rs. 61,321-14-7 from the defendants. The Subordinate Judge first rejected the plaintiff's claim on the 27th July, 1877. On appeal (No. 60 of 1877) the High Court reversed the decree and remanded the case for re-trial on the merits. The lower Court fixed the 28th October, 1879, for the hearing. On the 12th October the plaintiff applied to that Court for subpœnas to his witnesses. The Court refused to grant them on the ground that the plaintiff had undertaken to bring his witnesses himself. On the re-trial the Court again dismissed the plaintiff's claim.

The plaintiff then appealed to the High Court a second time. One of the grounds in the appeal was that the Subordinate Judge did not receive the whole of the plaintiff's evidence.

F. R. Vicaji (with him *G. N. Nadkarni*), for the appellant.

K. T. Telang (with him *Pandurang Balibhadra*), for respondent No. 1.

Shamrav Vithal, for respondent No. 3.

The Court made the following interlocutory order :—

ORDER.

SARGENT, C.J.—The Subordinate Judge was wrong in refusing to issue subpœnas to plaintiff's nine witnesses, as asked for on the 12th October, 1879, by Ex. 273. The circumstance of plaintiff's having originally undertaken to bring them himself was no sufficient

* Appeal No. 32 of 1881.

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reason for depriving him of his right to have subpœnas issued, if he found himself unable to do so or to detain them till they could be examined, although it might possibly, under certain circumstances, be a reason for not waiting for them, if the plaintiff's case had been in other respects finished before they could appear. However, it cannot be said that [744] such was the case here, as the final hearing of plaintiff's case, as fixed by the Judge himself, was not till 28th October. The Subordinate Judge must, therefore, issue the subpœnas, as asked for by the plaintiff in his application of 12th October, 1879 (excepting the two in respect of whom plaintiff failed to pay batta), and having taken the evidence of such witnesses, return it to this Court within two months. We also think advisable that a subpœna should also issue on plaintiff's application to the third defendant Ganpaya bin Bab Shanbhog to give evidence, which should be taken and returned at the same time.

GENERAL INDEX.

Abatement.

(1) See DIVORCE, 6 B. 126.

(2) See PENAL CODE (ACT XLV OF 1860), 6 B. 126.

Account.

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Account stated.

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(1) See LIMITATION, 6 B. 683.

(2) See LIMITATION ACT (XIV OF 1859), 5 B. 88.

(3) See LIMITATION ACT (IX OF 1871), 5 B. 688.

(4) See LIMITATION ACT (XV OF 1877), 5 B. 89.

(5) See REGISTRATION ACT (III OF 1877), 5 B. 232.

I.—Imperial Acts.

Act IX of 1837 (Succession to Parsis' Immoveable Property).

See PARSIS, 6 B. 151.

Act XX of 1841 (Collection of Debts on Succession).

See PROBATE, 6 B. 452.

Act I of 1846 (The Legal Practitioners).

S. 7—See VAKIL AND CLIENT, 5 B. 258.

Act IX of 1850 (Small Cause Courts Presidency Towns).

Ss. 91, 98, 25—See SMALL CAUSE COURT, 5 B. 295.

Act XXVII of 1860 (Collection of Debts on Succession).

S. 18—See PROBATE, 6 B. 452.

Act XX of 1864 (Minors, Bombay).

(1) See ACT III OF 1874 (HEREDITARY OFFICERS, BOMBAY), 6 B. 463.

(2) See EXECUTION OF DECREE, 5 B. 2.

(3) See MINOR, 5 B. 310; 6 B. 593.

(4) See MORTGAGE (FORECLOSURE), 5 B. 14.

(5) S. 2—See MINOR, 5 B. 306.

Act XI of 1865 (Mufassal Small Cause Courts).

S. 6—Jurisdiction—Suit by Vatandar Mahars to recover "aya"—Immoveable property, what is—See IMMOVEABLE PROPERTY, 6 B. 512.

Act XXVII of 1866 (Trustees).

Ss. 3, 35, 53—*Equitable jurisdiction of High Court—Trusts—Appointment of new trustee—Letters Patent*, 1823, *cls.* 29, 33, 41.—The High Court may exercise the summary powers conferred upon it by the Indian Trustee Act (XXVII of 1866) in the Hindu trusts.

S. 3 of the Indian Trustee Act, which provides that the power and authority given by the Act to the High Court shall be exercised only "in cases to which English Law is applicable," cannot be intended to limit the operation of the Act only to cases to which, in their whole extent, the law prevailing in England, applies without qualification or reserve, as this would virtually exclude the Act in any case on which an Act of the Indian Legislature has any bearing. The cases referred to in the section must be cases to which English law is *in some measure* applicable, but in what measure is not indicated in the Act. English law must be regarded as applicable in the sense intended if the principles recognized by the English Equity Courts are applicable.

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Act XXVII of 1866 (Trustees)—(*Concluded*):

At the date of the grant of the charter to the Supreme Court of Bombay in the year 1823, English equity had become a system which would deal with a body of *quasi* common law in a scientific manner and in obedience to known and uniform rules. When it applied its method to the determination or the constitution of a right, even based on the Hindu or Mahomedan law, it administered English law. In this sense "English law was applicable" at the date of the passing of the Indian Trustee Act of 1866, to all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants of Bombay. Those doctrines could not be employed to subvert the native substantive laws, but they afforded a means of ameliorating them by a system of rules borrowed from the English Court of Equity.

Trusts are recognized in the Hindu as well as in the English system of law. But while the substantive Hindu law insists strongly on the suppression of fraud and the fulfilment of promises, it fails to furnish the detailed rules by which effect is to be given to its principles in cases of trust. If the Court is called on to give effect to a trust in any given case, it looks to the Hindu law of property to determine the estate of the trustee, but with reference to the duties of trustee and the rights of beneficiaries it is governed by the rules of English equity. There are no others that it can apply. In meeting an exigency, or in taking cognizance of a form of right not directly provided for in the Shastras, the Court in exercising its jurisdiction under s. 41 of the Charter of 1823 may apply Hindu law. But, taking Hindu law as one of its *data*, it applies "English law" also in the form of equity to all or nearly all the questions that arise. *In re* KAHANDAS NARRANDAS, 5 B. 154=5 Ind. Jur. 589 ... 103

Act XIV of 1869 (Civil Courts, Bombay).

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Act XXI of 1870 (Hindu Wills).

S. 2—See PROBATE, 6 B. 452.

Act XV of 1871 (Broach Talukdars).

S. 23—*Civil Courts' jurisdiction.*—The Broach Talukdars' Relief Act, XV of 1871, does not bar the cognizance, by the Civil Courts, of a suit to recover the amount improperly levied, as rent of rent-free land, and to obtain a declaration that such land is not subject to the payment of rent, albeit that, under S. 23 of the Act, the manager of a Thakor's estate is exempt from personal liability for anything done by him *bona fide* pursuant to the Act, and is not subject to an action for damages on account of the attachment of the plaintiff's property. ASMAL SALEMAN v. THE COLLECTOR OF BROACH, 5 B. 135 ... 91

Act XXIII of 1871 (Pensions).

(1) See SARANJAM, 6 B. 598.

(2) *Ss.* 1 *and* 4—*Grant of land revenue—Former suit for money.*—The plaintiffs formerly sued for a sum of money, and obtaining a decree attached, in 1861, two villages, the land revenue of which had been granted in *inam*. The attachment continued down to 1875, when the last holder of the villages died, and, the Government having resumed the villages, the attachment was raised. The plaintiffs now sued to have their right declared to satisfy their decree from the revenues of the villages.

Held, that the former suit was not a suit in respect of a pension or grant of money or land revenue, and that an attachment placed in pursuance of an ordinary money decree before the date of the Pensions Act XXIII of 1871, could not be treated as a suit in respect of a pension, grant of money, or land revenue instituted before such date, so as to exclude the operation of the Act, under s. 1. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. JAMNADAS, 6 B. 737 ... 947

(3) *Ss.* 3 *and* 4—*Jurisdiction of Civil Courts—Deshmukh.*—A suit in a Civil Court by a hereditary *deshmukh* relating to a grant of land revenue is prohibited by the Pensions Act XXIII of 1871. NARO DAMODAR GHUGRI v. THE COLLECTOR OF POONA, 6 B. 209 ... 597

(4) S. 4—Toda-giras hak—See TODA-GIRAS HAK, 5 B. 408.

Act IX of 1875 (Majority).

See ACT III OF 1874 (HEREDITARY OFFICERS), 6 B. 463. PAGE

Act X of 1876 (Revenue Jurisdiction, Bombay).

(1) See JURISDICTION, 5 B. 578.

(2) *S.* 4, *cl.* (*a*), *para* 2.—*Quære*—Whether the claims excluded by Act X of 1876 as amended by Act XVI of 1877, s. 1, are limited to claims against Government. VASUDEV VITHAL SAMANT v. RAMCHANDRAGOPAL SAMANT, 6 B. 129=6 Ind. Jur. 315

(3) S. 4, cl. (*c*)—See REVENUE, 5 B. 73. ... 544

(4) S. 15—See MINOR, 5 B. 306.

Act IV of 1877 (Presidency Magistrates).

(1) *Ss.* 87, 121, 122—*Malicious prosecution, action for—Reasonable and probable cause—Effect of order of discharge of a person accused of an offence before a Magistrate.*—The discharge of an accused person by a Presidency Magistrate, under s. 87 of the Presidency Magistrate Act IV of 1877, is such a termination of the prosecution as entitles the accused to maintain an action for malicious prosecution. VENU v. COORYA NARAYAN, 6 B. 376 =6 Ind. Jur. 535

(2) *S.* 167—*Plea of guilty—Conviction—Sentence—Appeal.*—Where a person has, on his own plea, been convicted on a trial held by a Presidency Magistrate, an appeal to the High Court, on the ground that the conviction was illegal and therefore also the sentence, does not lie according to the provisions of s. 167 of the Presidency Magistrates' Act No. IV of 1877, albeit that the Magistrate has sentenced the person to imprisonment for a term exceeding six months, or to a fine exceeding two hundred rupees. EMPRESS v. JAFAR M. TALAB, 5 B. 85=5 Ind. Jur. 428 ... 706

Act XIV of 1877 (Broach and Kaira Incumbered Estates).

S. 19—"*Suit*"—*Application for execution—Limitation.*—The term "suit" in the last paragraph of s. 19 of Act XIV of 1877, includes application for execution of decrees. BHUJI BECHAR v. BAWAJI DAJI, 5 B. 448 ... 58

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See ACT VII OF 1873 (SALT, BOMBAY), 6 B. 251. ... 295

Act XII of 1879 (Registration and Limitation Acts Amendment).

(1) See EXECUTION OF DECREE, 5 B. 130.

(2) See MINOR, 5 B. 306.

(3) Ss. 60 and 108—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 26.

(4) S. 258—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 146.

Act XVII of 1879 (Dekkhan Agriculturists' Relief).

(1) Ss. 7, 12, 74—Practice—Procedure—Right of defendant to call witnesses—Act X of 1877, ss. 100, 101—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 184.

(2) *S.* 13—*Mortgage—Agriculturist mortgagor—Suit for account and redemption before the time fixed for payment.*—Under the Dekkhan Agriculturists' Relief Act (XVII of 1879), an agriculturist mortgagor may sue for account and possession of mortgaged property before the time fixed in the mortgage deed for the payment of the mortgage debt, on the ground that the debt has been satisfied.

The rule of law that the right to redeem is co-extensive with the right to foreclosure, and is consequently postponed until the time fixed for the payment of the mortgage debt, does not apply to cases falling under that Act. BABAJI v. VITHU, 6 B. 734 ... 945

(3) *S.* 16—*Mortgage—Suit by a mortgagor for account only—Decree—Execution of a money decree obtained by mortgagee.*—Under the Dekkhan Agriculturists' Relief Act, XVII of 1879, s. 16, an agriculturist mortgagor has no right to sue his mortgagee in a mere action for account.

Ordinarily, a suit for an account upon a mortgage cannot be maintained by a mortgagor, unless he asks for redemption also. Where a mortgagee is entitled to a personal decree against the mortgagor, or his heir, or representative and takes a mere money decree against him upon the mortgage

Act XVII of 1879 (Dekkhan Agriculturists' Relief)—(*Continued*). PAGE

without any direction that the amount of the decree shall be recovered by sale, or otherwise from the mortgaged property, the mortgagee has nevertheless the right to attach and sell that property under the money decree, and such sale transfers to the purchaser the interest both of mortgagor and mortgagee in the same manner as as if the sale had been made under an express direction in the decree. Even though the officer of the Court should mention merely the right, title, and interest of the mortgagor as what is sold, the interest of the mortgagee who has promoted the sale passes by way of estoppel, although the mortgagee executes no conveyance to the purchaser.

The only difference in execution between a money decree upon a mortgage and one not upon a mortgage is that where the mortgaged lands are attached under the former, their sale is deferred until six months or some other reasonable period expires, in order to give the mortgagor an opportunity to redeem, which he would have in a suit for foreclosure or redemption. HARI v. LAKSHMAN, 5 B. 614 ... 405

(4) Ss. 20, 74—*Mortgage decree—Decree in suit in mortgage—Payment by instalments—Civ. Pro. Code (Act X of 1877)*, s 210.—The words "decree passed against an agriculturist" in s. 20 of the Dekkhan Agriculturists' Relief Act, XVII of 1879, mean a decree passed against an agriculturist *personally*, and do not include a decree for the recovery of money by the sale of mortgaged property.

The effect of that section must be taken to be an enlargement of the indulgence granted by s. 210 of the Civ. Pro. Code (Act X of 1879), but only in those cases to which the latter section applies. By s. 210 of the Civ. Pro. Code, the Court may, after the passing of decree in money suits, order the amount to be paid by instalments, provided the decree-holder consents. By s. 20 of Act XVII of 1879, the Court may make the same order in similar suits *without the consent* of the decree-holder.

In the case of a debt secured by a mortgage, the agriculturist's remedy lies in a suit, not for an account, but for redemption; and the only decree which can be made in such a suit, in the absence of any special provision in the Act, is the ordinary decree for payment of the whole amount within six months, or, in default, for foreclosure. SHANKARAPA DARGO PATEL v. DANAPPA VIRANTAPA, 5 B. 604 ... 398

(5) S. 22—*Immoveable property—Standing crops* —Standing crops are immoveable property within the meaning of s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), as well as within the Code of Civil Procedure, and not liable to attachment and sale in execution of money decrees, unless specifically pledged. SADU v. SAMBHU, 6 B. 592 ... 850

(6) S. 36—*Suit for rent—Village Munsif—Jurisdiction.*—A Village Munsif has no jurisdiction to try a suit for rent under the Dekkhan Agriculturists' Relief Act XVII of 1879. VITHAL RAMCHANDRA v. GANGARAM VITHOJI, 5 B. 180 ... 120

(7) S. 44—*Agreement of compromise.*—Under s. 44 of Act XVII of 1879 the plaintiff presented to the Subordinate Court of Talegaon an agreement compromising the amount of a decree obtained by the plaintiff against the defendant in the Small Cause Court at Poona. The agreement stipulated that the plaintiff was to receive, in full satisfaction of the amount of the decree (which was for Rs. 59-15-1), the sum of Rs. 40 to be paid by yearly instalments of Rs. 4 each, and that, in default, the plaintiff was to recover the whole amount of the decree by executing it. The Subordinate Judge refused to file the agreement, being of opinion that it did not finally dispose of the matter. The case being referred to the High Court.

Held that the agreement was one finally disposing of the matter within the meaning of s. 44 of Act XVII of 1879, and that, therefore, the Subordinate Judge of Talegaon was bound to receive it, and to proceed as directed in that section. LAKSHMICHAND v. ARJUNA, 6 B. 77 508

(8) Ss. 47 *and* 48—*Application for execution—Conciliator—Limitation Act* XV *of* 1877, s. 14, *para.* 3, *art.* 179, *sch.* 2—*Court.*—A conciliator appointed under the Dekkhan Agriculturists' Relief Act (XVII of 1879) is not a Court.

Act XVII of 1879 (Dekkhan Agriculturists Relief)—(*Concluded*). PAGE

The presentation, therefore, to a conciliator of an application for execution of a decree within the period of limitation does not save the limitation, if the application to the proper Court be time-barred: Act XV of 1877, s. 14, para. 3, sch. II, art. 179; Act XVII of 1879, ss. 47 and 48.

The presentation, to any Civil Court, of an application for execution of a decree passed before 1st November 1879 (the date on which the Dekkhan Agriculturists' Relief Act came into force), to which any agriculturist residing within any local area for which a conciliator has been appointed is a party, is no legal presentation at all, if the application be not accompanied by the conciliator's certificate. MANOHAR v. GEBIAPA, 6 B. 31 ... 477

(9) S. 56—*Signed balance of account—Evidence.*—A balance of account signed by an agriculturist is an instrument which purports to evidence an obligation for the payment of money, and cannot, therefore, be admitted in evidence, unless written by or under the superintendence of, and attested by, a village registrar, as required by s. 56 of Act XVII of 1879. KANJI LADHA v. DHONDE KONDAJI, 6 B. 729 ... 941

(10) S. 72—Limitation Act XV of 1877, sch. II, art. 59—Non-agriculturist principal—Agriculturist surety—Remedy against principal barred, but surety held liable—The Indian Contract Act IX of 1872, ss. 126 to 147—See LIMITATION ACT (XV OF 1877), 5 B. 647.

Act XXI of 1879 (The Foreign Jurisdiction and Extradition).

S. 9—Act XI of 1872—Offence in foreign territory—Jurisdiction—Native Indian subject—See JURISDICTION, 6 B. 622.

Act XV of 1880 (The Revenue Jurisdiction, Bombay).

S. 3, cl. (*b*)—See MINOR, 5 B. 306.

Act V of 1881 (Probate and Administration).

See SUCCESSION ACT (X OF 1865), 5 B. 638.

II.—Bombay Acts.

Act V of 1862 (Bhagdari and Narwadari Tenures, Bombay).

See LAND TENURE, 5 B. 77.

Act II of 1863 (Exemptions from Land Revenue in Territories subject to Act II of 1852, Bombay).

S. 8, cl. 3—See HINDU LAW (RELIGIOUS ENDOWMENTS), 5 B. 393.

Act VII of 1863 (Summary Settlement, Bombay).

Ss 2, 6, 9—*Jaghirdar—Inamdar—Suit for contribution—The Indian Contract Act* (IX *of* 1872), *ss.* 69 *and* 70.—The plaintiff was the *jaghirdar* of a village in which the defendant held certain land as *inamdar* on the annual payment of a certain quit-rent. The plaintiff's *jaghir* was in point of time, subsequent to the defendant's *inam*. Ever since the time of the *jaghir*, the ancestors of the defendant (and, after them, the defendant himself) paid the quit-rent to the ancestors of the plaintiff, and, after them, to the plaintiff himself. In 1869 the summary settlement was introduced into the village under Bombay Act VII of 1863. Under s. 9 of that Act, a notice was served upon the plaintiff by the Collector in respect of the village, and he accepted the settlement provided in ss. 2 and 6 of the Act. Government, accordingly, granted the village to him at the summary settlement of two annas in the rupee of the full assessment. No notice was served upon the defendant under the Act, nor did the plaintiff inform the defendant of the notice which the plaintiff had received in respect of the village. The certificate issued by the Collector to the plaintiff, previously to the grant of the *sanad* regarding the settlement, contained the following passage:—"Before the villages (Vesu and Sanya) were granted in *jaghir*, lands were held by *peta-inamdars* over which the *jaghirdar* has no right. They are entered in the *sanad* only for the purpose of receiving the settlement and paying it over to the Sarkar." In 1877 the plaintiff sued the defendant for the amount of three years' summary settlement which he (plaintiff) had paid to Government on account of the defendant's land.

Act VII of 1863 (Summary Settlement, Bombay)—(*Concluded*). PAGE

Held that the defendant was not liable to pay, whether regarded as an independent *inamdar* holding directly under Government or as a tenant of the plaintiff.

Held, also, that ss. 69 and 70 of the Indian Contract Act, IX of 1872, did not apply to the case. NAWAB MIR KAMALUDIN v. PARTAP MOTA, 6 B. 244=6 Ind. Jur. 421 ... 620

Act V of 1864 (Mamlatdar's Courts, Bombay).

Limitation Act IX of 1871, sch. II, art. 46—Partition suit—See LIMITATION ACT (IX OF 1871), 5 B. 25.

Act III of 1866 (Gambling, Bombay).

S. 11—See GAMBLING, 6 B. 19.

Act VI of 1873 (Bombay District Municipal).

(1) *Ss.* 3 *and* 17—*Street—Court—Mehela—Khadki—Ota.*—The plaintiff was the owner of two houses and mortgagee of a third house out of a set of six which surrounded an open court in the town of Dhandhuka, and which, including the court, originally belonged to a single individual. The plaintiff built an "*ota*" or verandah, and put up a wooden bench in front of his house, which the Municipality of the town ordered to be removed. In a suit by the plaintiff to have this order set aside the District Court found that the occupant of each house had the right of way across the court, which was used as a means of access to the houses which surrounded it by persons having business with the house holders.

Held, that such limited access by the public was not sufficient to show that the court ceased to be private property, and was converted into a "street" vesting in the Municipality within the meaning of ss. 3 and 17 of Bombay District Municipality Act VI of 1873; and that the Municipality had not any right to interfere with the plaintiff's erection, whatever liability he might have incurred to an action by any of the other householders who occupied the court. KALIDAS v. THE MUNICIPALITY OF DHANDHUKA, 6 B. 686. ... 913

(2) *S.* 86—*Suit against Municipality—Limitation Act* IX *of* 1871, *sch.* II, *arts.* 43, 143.—S. 86 of Bombay Act VI of 1873, is not applicable to suits in the nature of actions of ejectment, but only to suits for damages.

The limitation of three years provided in cl. 43, sch. II of the Limitation Act IX of 1871, applies only to suits for damages on account of trespass, and not to suits to recover immoveable property from a trespasser, for which the period of limitation is twelve years, as provided by cl. 143. JOHARMAL v. THE MUNICIPALITY OF AHMEDNAGAR, 6 B. 580 ... 841

Act VII of 1873 (Salt, Bombay).

Act XVIII *of* 1877—*Duty paid under former Act—Effect of new Act by which duty increased coming into operation before removal of salt—Increased duty paid under protest—Suit to recover excess—Set-off—Excise duty—Customs.*—Prior to the 28th December 1877, the excise duty on salt manufactured in Bombay was Rs. 1-13-0 per maund, and the Act which regulated the importation and transport of salt in the Presidency of Bombay was the Bombay Salt Act VII of 1873. The plaintiffs, who were salt merchants, were desirous of exporting salt from the salt-works at Uran and Panvel, and accordingly, under the provisions of Act VII of 1873, made four several applications in writing to the Assistant Collector of Salt Revenue for the necessary permits on the following dates, *viz.*, 27th November 1877; 17th December 1877; 17th December 1877; and 24th December 1877. Each application stated the amount of salt which it was proposed to export, and at the time of sending in such applications the duty payable in respect of the amount of salt therein mentioned was paid. Receipts for the duty so paid were given to the plaintiffs, and all four applications were duly registered before the 28th December, 1877. The salt comprised in the first three applications amounted, in all, to maunds 20,972; and the whole of this quantity, with the exception of maunds 2,748, had been removed by the plaintiffs before the 28th December 1874; but at that date no part of the salt which was the subject-matter of the last application (24th December 1877) and which

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consisted of maunds 10,483, had yet been removed. On the 28th December 1877, Act XVIII of 1877 came into force, by which Act the excise duty on salt manufactured in Bombay was raised from Re. 1-13-0 to Rs. 2-8 0 per maund, and on that day the sarkarkun refused to allow the plaintiffs to remove the balance of the first three lots (*viz.*, 2,748 maunds) or the last lot of maunds 10 483, unless an additional duty, at the rate of eleven annas per maund, was paid in respect thereof, alleging that the same was leviable under Act XVIII of 1877. The plaintiffs paid under protest the additional duty demanded, amounting to Rs. 9,096-5-0, and exported the salt to British Malabar, having previously obtained certificates from the Collector that excise duty, at the full rate of Rs. 2-8-0 per maund, had been paid upon the said salt. On production of these certificates at the ports of British Malabar, the salt was admitted free of customs duty. The plaintiffs subsequently brought this suit to recover the said sum of Rs. 9,096 5-0 together with a sum of Rs. 1,000 damages alleged to have been sustained by reason of the delay in removing the salt caused by the conduct of the sarkarkun. The plaintiffs contended that having paid the duty in respect of the salt comprised in the four applications, and the said duty having been received by the Collector before Act XVIII came into force, they were not liable to pay any further duty, and that Act XVIII of 1877 did not apply to the said salt. The defendant contended that the additional duty was rightly levied on the salt, and further claimed to set-off against the plaintiffs' claims the sum of Rs. 9,056 5-0 which the plaintiffs would have been obliged to pay in importing the salt into British Malabar if they had not already paid it to the authorities in Bombay, but from payment of which they had been exempted on production of the certificates above mentioned.

Held that on the 28th December 1877, the plaintiffs had acquired the right to remove the salt, whenever they might think proper, by simply complying with the usual forms required by Act VII of 1873, and that Act XVIII of 1877 did not operate retrospectively so as to destroy that right and to impose on the plaintiffs a heavier burden as a condition of their removing the salt.

Held, also, however, that as the salt was allowed to pass free into British Malabar on the strength of its having already paid the duty of Rs. 2-8-0 per maund at Bombay, the sum of Rs. 9,096-5-0 must be deemed to have been appropriated by the plaintiffs to the payment of the customs duty payable on the importation of the salt into the ports of British Malabar, and was, therefore, no longer recoverable from the defendant. The plaintiffs, by applying to the Collector of Customs at Bombay for certificates that the duty had been paid, by presenting them at the Malabar ports, and claiming, in virtue of such certificates, that the salt should be admitted free of customs duty, virtually appropriated the Rs. 9,096-5-0 excess of excise duty (which remained in the hands of the customs authorities as money had and received to the use of the plaintiffs) to the payment of the enhanced customs duties at such ports. BRITO v. THE SECRETARY OF STATE FOR INDIA, 6 B. 251 ... 624

Act III of 1874 (Hereditary Office, Bombay).

(1) Jurisdiction of Civil Courts—See JURISDICTION, 5 B. 578.

(2) See VATAN, 5 B. 435, 437.

(3) Ss. 5, 8, 9 and 10—See VATAN, 5 B. 283.

(4) *S.* 10—*Certificate by Collector—Jurisdiction—Hindu law—Age of majority—Mortgage by a person not owner—Agent—Ratification—Estoppel.*—A certificate under s. 10 of Bombay Act III of 1874, stating that *vatan* has been assigned to an officiator as his remuneration, and granted by the Collector to save a *vatan* from attachment before judgment, does not exclude the jurisdiction of the Civil Court to make a decree, notwithstanding that the decree may be rendered inoperative by the Collector issuing a fresh certificate.

A Hindu to whom Act XX of 1864 (Minors Act) is not applied and who is not governed by the Indian Majority Act, 1875, attains his majority when he attains the age of sixteen years.

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Act III of 1873 (Hereditary Office, Bombay)—(*Concluded*).

The plaintiff sued the defendant on mortgages executed to the plaintiff by the adoptive mothers of the defendant (who were also defendants) subsequently to his adoption. The plaintiff contended that the mortgages had become effectual as against the defendant by reason of his subsequent conduct. Evidence was given that he had promised his adoptive mothers to redeem the mortgages, and that he had stood by and allowed the plaintiff to carry out the provisions of the mortgage deeds to his own detriment by paying maintenance to the defendant's adoptive mothers and by paying off certain mortgages which had been created by them previously to the adoption of the defendant.

Held that the defendant was not liable upon the mortgages. His promise to redeem the mortgages was not made to the plaintiff, but to his adoptive mothers, and there was no consideration for such promise as he made. Nor could the promise have the effect of ratification, for the ratification of the unauthorized contract of an agent can only be effectual when the contract has been made by the agent avowedly for on account of the principal, and not when it has been made on account of the agent himself.

Held, also, that knowledge on the part of the defendant that the plaintiff was carrying out the provisions of the mortgage deeds, and his allowing the plaintiff to do so, did not estop him from disputing them afterwards, for it was no part of his duty to step in and protect the plaintiff against the consequences of his own unauthorized dealings with his property. SHIDDHESHVAR v. RAMCHANDRARAV, 6 B. 463 ... 763

(5) S. 15—Mortgage of vatan property—Mortgagor's life-interest—Reg. XVI of 1827—See VATAN, 6 B. 211.

(6) *Ss.* 24 *and* 25—*Civil Courts.*—Under Bombay Act III of 1874 the Civil Courts cannot entertain a suit which seeks to recover damages against the defendant for wrongly continuing in office as patel, instead of resigning in favour of the plaintiff, in obedience to a family custom which entitled the plaintiff to serve as patel every fourth year, whereby the plaintiff lost the emoluments of office. VASUDEV VITHAL SAMANT v. RAMCHANDRA SAMANT, 6 B. 129=6 Ind. Jur. 315 ... 544

Act III of 1876 (Mamlatdar's Court, Bombay).

(1) See SANCTION, 5 B. 137.

(2) S. 13—See RES JUDICATA, 6 B. 477.

Act V of 1878 (Abkari, Bombay).

Ss. 14, 20, 64, 65, 66 *and* 67—*Tree—Toddy-producing tree.*—The words "any tree" in s. 14 and "every toddy-producing tree" in s. 20 of the Bombay Abkari Act V of 1878 mean all trees in the Bombay Presidency to which the Act applies, from which toddy is drawn or produced, and not merely those in regard to which no special rights of drawing toddy previously existed. ARDESIR JEHANGIR v. THE SECRETARY OF STATE FOR INDIA, 6 B. 398 ... 721

Act V of 1879 (Land Revenue Code, Bombay).

S. 37—See CRIM. PRO. CODE (ACT X OF 1872), 6 B. 670.

Administration.

(1) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 45.

(2) See MINOR, 6 B. 593.

Administrator.

See MINOR, 5 B. 306.

Admission.

(1) Effect of, in pleading—See REGISTRATION ACT (III OF 1877), 5 B. 143.

(2) See EVIDENCE, 6 B. 34.

Advancement.

Benami transaction by Hindu or Mussalman—Property bought by a father in his son's name—Presumption—Evidence—Nature of evidence to rebut—Onus of proof—See BENAMI TRANSACTION, 6 B. 717.

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Adverse Possession.

See VATAN, 5 B. 437.

Agreement.

(1) Construction—Parsis in Mofussil of Bombay, English law how far applicable to—Lex loci—Rule in Shelley's Case—Act IX of 1837—See PARSIS, 6 B. 151.

(2) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 6 B. 77.

(3) See CHARTER PARTY, 6 B. 5.

(4) See RAILWAY COMPANY, 5 B. 371.

Agriculturist Mortgagor.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 6 B. 734.

Amendment.

(1) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 609.

(2) See EVIDENCE, 5 B. 181.

(3) See EXECUTION OF DECREE, 5 B. 496.

Ancestral Property.

(1) Hindu law—Sale of ancestral property by father for debts incurred for immoral purposes—Son's interest in ancestral estate—Evidence—Stamp—Intention to defraud Government of its stamp revenue—Reg. XVIII of 1827, s. 13—Act XXXIV of 1860, s. 13—Act X of 1862, s 15—Admissibility of insufficiently stamped documents—Issues—See HINDU LAW (ALIENATION), 5 B. 621.

(2) See HINDU LAW—ALIENATION, 6 B. 520.

Antastha Sadilwar.

(1) See IMMOVEABLE PROPERTY, 6 B. 546.

(2) See LIMITATION ACT (XIV OF 1859), 5 B. 322.

Appeal.

1.—GENERAL.
2.—SECOND APPEAL.
3.—SPECIAL APPEAL.
4.—TO PRIVY COUNCIL.

——— 1.—General.

(1) Against a co-plaintiff—Practice—See HINDU LAW (INHERITANCE), 5 B. 264.

(2) *Power of the Court of appeal to vary decrees appealed from in consequence of circumstances occurring subsequently to the date of such decrees—Partition suit—Death of a co-parcener* pendente lite—*Decree for partition when a severance.*—When the decree of a Subordinate Court is under appeal to the High Court, it is open to the High Court to vary it either in points in which it is erroneous or in respect of matters occurring subsequently to the date of such decree which are admitted.

The plaintiff obtained a decree in a partition suit in the Subordinate Judge's Court for his share in certain joint family property in the possession of the defendants (his co-parceners). The decree was affirmed on appeal. The defendants filed a second appeal in the High Court; but, before it was decided, one of the defendants died. The plaintiff at the hearing of the second appeal claimed a larger share in the family property than he had been awarded by the decree of the Courts below.

Held that he (plaintiff) was entitled to a share in that of the co-parcener who died *pendente lite*, and that the decree appealed from ought to be varied accordingly.

A decree for partition does not operate as a severance so long as it remains under appeal. SAKHARAM MAHADEV v. HARI KRISHNA, 6 B. 113 ... 533

(3) Practice—Registration Act XX of 1866, s. 53—See EXECUTION OF DECREE, 5 B. 673.

(4) Right of—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 45.

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(5) See ACT IV OF 1877 (PRESIDENCY MAGISTRATES), 5 B. 85.
(6) See CIV. PRO. CODE (ACT X OF 1877), 6 B. 590.
(7) See COURT FEES ACT (VII OF 1870), 6 B. 302.
(8) See DIVORCE, 6 B. 487.
(9) See JUDGE, 6 B. 304.
(10) See PRACTICE, 6 B. 14.
(11) See RES JUDICATA, 6 B. 110.
(12) See SPECIFIC RELIEF ACT (I OF 1877), 5 B. 446.
(13) See STAMP, 6 B. 143.

———2.—Second Appeal.

See HINDU LAW (ADOPTION), 6 B. 524.

———3.—Special Appeal.

(1) See LIMITATION ACT (IX OF 1871), 5 B. 25.
(2) See PRACTICE, 6 B. 107.

———4.—To Privy Council.

Certificate as to value of subject-matter of the suit—Final decree or order, what is a—Interlocutory order—Civ. Pro. Code (Act X of 1877), ss. 595, 600.—An order in a partnership suit for account refusing to allow the plaintiffs to have their accounts taken in a particular manner suggested by themselves, unless they would consent to give certain credits in their accounts to the defendants, is not a final decree within the meaning of cl. (*b*) of s. 595 of the Civ. Pro. Code, although the effect of such order may be to make it impossible for the plaintiffs to proceed further in the case and, consequently, an appeal from such an order of the High Court to the Queen in Council does not lie. ABEN SHA v. CASSIRAO BABA SAHEB, 6 B. 260 ... 631

Arbitration.

(1) *Agreement to refer disputes to a third person—Effect of such agreement on the right to sue—Award of such third person essential to right of action—Surveyor's certificate—Limitation—Covenant—Stranger to consideration—Landlord and tenant—Party wall, liability for costs of—Building leases.*—The plaintiff sued to recover from the defendant half the cost of a party wall.

The plaintiff and defendants were lessees of adjoining pieces of land under agreements made between them respectively and the Secretary of State for India in Council as lessor. The terms and conditions of the two agreements were the same. By these agreements the plaintiff and defendant respectively agreed to build houses upon the said pieces of land in the manner therein specified, and the agreements contained the two following clauses:—(1) "The buildings to be continuous with party walls common to both adjoining houses." (7) "All disputes regarding the cost and maintenance of party walls to be decided by the Government Surveyor, whose decision shall be binding on both parties." In pursuance of the said agreements the plaintiff and defendants respectively erected buildings on the said pieces of land. The plaintiff caused the northern wall of his building to be built as a party wall, and it was used by the defendants as the southern wall of the building erected by them. The defendants paid the builder who was employed by the plaintiff a sum of Rs. 700 on account of the cost of erecting the party wall, but the rest of the cost was defrayed by the plaintiff. The party wall was completed in November 1871; but, in consequence of disputes which arose between the plaintiff and the building contractor, the sum payable to the latter was not ascertained for some years. In March 1879, the plaintiff caused the party wall to be measured by a surveyor, and on the 7th June 1879, demanded from the defendants payment of half the cost. The defendants, however, failing to pay the sum demanded, the plaintiff, after notice to the defendants, caused the cost of the said party wall to be ascertained by the Government surveyor, who by a certificate dated the 25th February 1882, certified that the share of the cost to be borne by the defendants for the said party wall was Rs. 3,226. The plaintiff in

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this action sought to recover this sum from the defendants *minus* the Rs. 700 which, as above stated, the defendants had already paid, and for which the plaintiff gave them credit.

The defendants in their written statement alleged that the party wall had been partly built with materials supplied by them, and that in the year 1870 they had adjusted accounts with the plaintiff in respect of the said materials and the said party wall, and it was then agreed that the sum of Rs. 700 paid by the defendants should be treated as a final settlement. They also alleged that the plaintiff had settled disputes with the building contractors, and had only paid them three annas in the rupee on the amount of their claim in full satisfaction; the defendants pleaded that they ought not to be charged with more than their due proportion of such reduced amount. It was further contended for the defendants that their obligation to pay half the cost of the party wall exists independently of the arrangement between them and the plaintiff to refer the matter to the Government surveyor: that this latter covenant was only collateral, and did not interfere with the plaintiff's right to sue the defendants for their half share of the cost; that the plaintiff's cause of action in this respect arose on the 15th October 1878, when the contractor's claim was finally settled, and that this suit not having been brought for more than three years after that date it was barred by limitation.

Held that the suit was not barred. There was no right of action independently of the valuation and award of the Government surveyor. There was no separate covenant to pay compensation to which the covenant for reference to the Government surveyor could be collateral. The rights of the parties were defined by the contracts, and, under these, each lessee might have the benefit of a party wall on such terms, and no others, as he on his part submitted to. Payment of a share of the cost was not one of those terms, except in so far as each lessee, if a dispute arose, was bound by the decision of a Government surveyor. That decision was not ancillary, serving to give greater explicitness to a right already fully subsisting. It was essential to the right itself, and until it was made, no cause of action for the moiety of the cost arose.

Where, in leases granted by one lessor to several lessees taking sites for buildings intended to be contiguous and to form one block or group in mutual relation, there is a common covenant in favour of the lessor which is an inducement to the lessee to take the lease, and which he must know is equally an inducement to his neighbour to take his lease, neither can be called a stranger to the consideration. Each may be regarded as an equitable assignee of the covenants which the lessor made for his benefit as lessee. Each, consequently, has an equitable right to enforce against the other the obligation stipulated for in his interest, and serving as a part of his inducement (as the other knew) to the contract. COOVERJI LUDHA v. BHIMJI GIRDHAR, 6 B. 528 ... 807

(2) *Award—Oral award—Written award not signed by all the arbitrators—Setting aside award—Practice—Procedure—Civ. Pro. Code (Act X of 1877), ss. 525, 526, 520, cl. (a)—Arbitration without the intervention of Court.*—The term 'to show cause' in ss. 525 and 526 of the Code of Civil Procedure (Act X of 1877) does not mean merely to allege cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court.

Matters in dispute between the parties were referred to seven arbitrators without the intervention of a Court. The arbitrators, or so many of them as could be got together, held sittings extending over some months, and at each sitting they came to a decision, either unanimously or by a majority, on different questions submitted to them. These decisions were entered on the minutes of their proceedings; and at their last sitting the arbitrators all agreed, and informed the parties, that the decisions so arrived at constituted the final award, and gave directions for embodying those decisions in the shape of a formal document, which was drawn up on a subsequent day, but was signed by four only out of the seven arbitrators. The remaining arbitrators not being asked to sign it, they never did sign it.

Held that the actual award was an oral award made by all the arbitrators on the last day of their joint sitting, and the drawing up of the formal

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award was a purely ministerial act to give effect to the previously completed judicial act. The omission to take the signatures of the minority of the arbitrators to the document, which formed the record of the award, was not fatal to the award.

Amongst other matters the arbitrators were asked to make a division of certain fields to which the parties were equally entitled. The arbitrators decided the other matters, but as regards the fields said that it was inconvenient to do so in consequence of the rains, and ordered the parties "to receive the profits half and half and to pay the assessment half and half."

Held that the award left undetermined one of the principal subjects of dispute; and as the Court had no power to remit the award to the arbitrators, the applicant was entitled to a judgment setting aside the order for filing the award. DANDEKAR v. DANDEKARS, 6 B. 663 ... 896

Assessment.

Sale of land for arrears of—Fraudulent purchaser—Trustee for the owner in equity—Act X of 1876, s. 4, cl. (*e*)—Claims to set aside a revenue sale—Forfeiture of tenancy—Jurisdiction—See REVENUE, 5 B. 73.

Assignment.

See MORTGAGE (GENERAL), 6 B. 64.

Attachment.

(1) Execution—Sale—Ancestral estate—Attachment and sale of the interest of one co-parcener—Purchaser at execution sale should sue for partition, not possession—See HINDU LAW (PARTITION), 5 B. 499.

(2) Of debts arising out of claims over which the Courts have no jurisdiction—Decree—Civ. Pro. Code (Act X of 1877), s. 266—Jurisdiction—Execution—Subject of the Gaekwar—Subject of a Kathiawar State—Rajkot—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 249.

(3) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 132, 643.

(4) See DECREE, 5 B. 493; 6 B. 582.

(5) See EJECTMENT, 6 B. 215.

(6) See LAND TENURE, 5 B. 77.

Attempt.

See PENAL CODE (ACT XLV OF 1860), 5 B. 140, 403.

Award.

See ARBITRATION, 6 B. 663.

Balance Order.

See COMPANY, 5 B. 42.

Benami Transaction.

(1) *By Hindu or Mussalman—Property bought by a father in his son's name—Advancement—Presumption—Evidence—Nature of evidence to rebut—Onus of proof.*—When purchase is made by a Hindu or a Mahomedan in the name of his son, the presumption is in favour of its being a *benami* purchase; and it lies on the party in whose name it was purchased to prove that he is solely entitled to the legal and beneficial interest in the estate. When the rights of creditors are in issue in such a transaction very strict proof of the nature of the transaction should be required from the objector to such rights, and the burden of proof lies with more than ordinary weight on the person alleging that the purchase was intended for the benefit of the son. NAGINBHAI v. ABDULLA, 6 B. 717 ... 933

(2) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 575.

Bhag.

Bhagdari—Narva—Alienation previous to Bombay Act V of 1862—Attachment—Dismemberment of bhag—See LAND TENURE, 5 B. 77.

Bhagdhari Lands.

In Broach—Inheritance—Special custom—Priority of nearest male relative to daughter or sister—See HINDU LAW (INHERITANCE), 5 B. 482.

Bill of Exchange.

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(1) *Company—Winding up—Liability of Company on bill drawn by Directors—Misrepresentation—Indian Contract Act* (IX *of* 1872), *ss.* 18 *and* 19.—On the 9th October, 1878, the National Bank purchased from the N. Company a bill of exchange for 4,000 dollars, equivalent to Rs. 8,630, drawn by the N. Company upon the firm of N. K. & Co., of Hongkong. The bill was in the following form :—"Sixty days after sight of this first of exchange) (second and third of same tenor and date not being paid) pay to the order of the National Bank of India the sum of dollars four thousand only, value received, and place the same to account of Nursey Kessowji, Ghelabhoy Pudumsey, Directors. Nursey Kessowji, Secretary, Treasurer and Agent. The Nursey Spinning and Weaving Company, Limited." The bill was duly accepted and presented for payment, but was dishonoured. On the 6th January, 1879, the bank gave notice of dishonour, and demanded payment from the company as drawers of the bill. On the 18th January, 1879, the N. Company was ordered to be wound up, and the bank sent in a claim against the company as *drawers* of the bill, and subsequently sent in an alternative claim for Rs. 8,630, being the "amount paid by the bank to and received by the company."

Held, on the authority of *In re The New Fleming Spinning and Weaving Company, Limited*, that, having regard to the form of the bill, the N. Company could not be made liable as *drawers*, but *held* also that the bank was entitled to recover the amount of the bill from the N. Company as money received to the use of the bank on the ground that the directors of the N. Company, while acting within their authority, had sold to the bank on behalf of the company as a bill, upon which the company was liable, one upon which the company was not liable, and had, therefore, been guilty of misrepresentation within the meaning of ss. 18 and 19 of the Indian Contract Act (IX of 1872). *In the matter of* THE NURSEY SPINNING AND WEAVING COMPANY, 5 B. 92 ... 63

(2) *Suit on bill by indorsee for value against acceptor—Sale by indorsee of goods against which bill drawn—Acceptor entitled to credit for amount of proceeds of sales.*—J. consigned goods to defendant, and, for the price, drew on the defendant two bills of exchange, each for the sum of Rs. 1,406-4-0 payable thirty days after sight, which were duly accepted by defendant. J. indorsed the bills for value to the plaintiffs, who, in default of payment by defendant, sold the goods, and credited him with the amount realized. After giving him credit for this amount, there remained due by the defendant to the plaintiffs, in respect of the said bills, a sum of Rs. 1,017. The plaintiffs abandoned Rs. 17 of this amount, and sued the defendant for Rs. 1,000 in the Small Cause Court at Bombay. In that suit the defendant pleaded that the goods, in respect of which the bills were drawn, were damaged, and that he had, therefore, refused to accept them, as he was entitled to do. The Judge thereupon dismissed the suit on the authority of *Shortt* v. *Abdul Rahiman*, holding that the plaintiffs could not, under the circumstances, give the defendant credit for the goods, and that the claim was not, therefore, within the jurisdiction of the Small Cause Court. The plaintiffs then brought the present suit in the High Court upon the bills of exchange, alleging that they held the proceeds of the goods for the consignor. The defendant contended that in no case could the plaintiffs recover from him more than the amount of the bills less the proceeds of the goods.

Held that the defendant was entitled to credit for the net proceeds of the sale of the goods. The plaintiffs had by the sale already, realized part of the amount due to them; and to allow them now to recover from the defendant the whole amount due on the bills, would be to permit them to realize this part of their claim a second time: in that case they would be bound to hand over the amount, so realized, to the drawers. But the drawers when they negotiated the bills with the plaintiffs got all they were entitled to, and would have to account, in equity, to the defendant for anything further obtained by them.

Held, therefore, that the defendant was exonerated to the amount of the proceeds of the goods, but was liable for the remainder of the sum claimed by the plaintiffs. THE AGRA BANK, LIMITED v. ABDUL RAHIMAN, 6 B. 1=6 Ind. Jur. 194 ... 457

Bill of Lading. PAGE

Small Cause Court—Ship—Charter-party—Incorporation in bill of lading of terms of charter-party—Cargo—Freight payable on intake measurement—Measurement at port of delivery—Discrepancy in measurements—Evidence—Burden of proof—Suit by consignee for excess freight.—K. V. at Moulmein consigned to the plaintiff at Bombay 135 logs of teak timber shipped on board the defendant's ship. The bill of lading, which was signed by the defendant, described the logs as marked K. V., and measuring tons 115-12-10-0, and it provided for the payment of freight thereon at Bombay at the rate of Rs. 17 per ton of 50 cubic feet on right delivery. The last clause of the bill of lading was in the handwriting of the defendant, and was as follows:—"Marks, number, quantity and measurement unknown: all other conditions as per charter-party." The charter-party was expressed to be between the owners of the ship and Messrs. B., of Rangoon, as charterers of the whole ship, and provided for the payment of freight "at the rate of Rs. 18 per ton of 50 cubic feet for all timber, one rate throughout, except 100 tons broken stowage at half freight, by intake measurement." On arrival of the ship at Bombay, the plaintiff, as consignee of the timber and holder of the bill of lading, paid the defendant (the captain of the ship) Rs. 1,500 on account of freight, and took delivery of the 135 logs. On measuring them he found that, according to his method of measurement, the total measurement of the 135 logs came only to tons 58-27-11-6, and not tons 115-12-10 as mentioned in the bill of lading. He claimed, therefore, to be chargeable with freight only on the smaller quantity (*viz.*, Rs. 995-8), and to recover from the defendant the difference (*viz.*, Rs. 504-8-0) between that sum and Rs. 1,500 paid on account as for an overpayment of freight. It was proved that all the timber on board had been measured at Moulmein by an employee of the charterers acting apparently as agent of all the different shippers, and that the measurements in the bills of lading were supplied by this person to the defendant as the measurements of the different consignments. It was also proved that the 135 logs received and measured by the plaintiff in Bombay were the same logs that were shipped under the bill of lading, and that the plaintiff's measurement of them was correct according to the mode of measurement which he adopted. There was no evidence as to what was the mode of measurement followed at Moulmein, nor, except the statements in the bill of lading, as to what was the actual intake measurement of the timber there.

Held that the effect of the last clause in the bill of lading was to incorporate into that document the clause of the charter party which provided that freight should be payable on the intake measurement; that the burden of proving what the intake measurement actually was, lay upon the plaintiff who sought to recover back money which he alleged he had paid in excess of what was due; and that, in the absence of such evidence on behalf of the plaintiff, the statement of quantity contained in the bill of lading was *prima facie* evidence of the intake measurement of the timber. CURSETJI RUSTOMJI SETNA v. THOMAS WILLIAMS, 5 B. 313 ... 207

Breach of Contract.

Registered bond—Compensation for breach of contract—See LIMITATION ACT, (XV OF 1877), 6 B. 75.

Broach.

See HINDU LAW (INHERITANCE), 5 B. 482.

Building Lease.

See ARBITRATION, 6 B. 528.

Burden of Proof.

(1) See BENAMI TRANSACTION, 6 B. 717.
(2) See BILL OF LADING, 5 B. 313.
(3) See EJECTMENT, 6 B. 215, 508.
(4) See GOSAINS, 5 B. 682.
(5) See HINDU LAW (ALIENATION), 6 B. 520.
(6) See MORTGAGE (REDEMPTION), 6 B. 669.
(7) See SARANJAM, 6 B. 598.

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See COMPANY, 5 B. 425.

Carrier.

Railway Company—Loss of goods—Liability—Agreement for interchange of traffic—Principal and Agent—See RAILWAY COMPANY, 5 B. 371.

Caste Question.

(1) *Jurisdiction—Reg.* II *of* 1827, *s.* 21—*Suit for fees appurtenant to the office of* guru—*Jurisdiction of Civil Courts.*—A claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy privileges and honors at the hands of the members of the caste in virtue of that office is a caste question, and not cognizable by a Civil Court. The same rule applies where there are fees appurtenant to the office.

The plaintiff belonged to the Mahar caste, and used to recover from the defendants certain fees which, he alleged, were appurtenant to the office of *guru* to the members of the Mahar caste living in a certain village. The defendants denied that the plaintiff was their *guru*. Both the lower Courts dismissed the suit on the ground that it involved a caste question.

The High Court, on second appeal, confirmed the decrees of the Courts below. MURARI v. SUBA, 6 B. 725, ... 938

(2) *Jurisdiction—Suit to recover cooking vessels—Reg.* II *of* 1827, *s.* 21.—A claim by the members of one division of a caste against the members of the other division of that caste, for recovery of half of certain vessels belonging to the caste or their value, is a caste question within the meaning of s. 21 of Reg. II of 1827, and cannot be made the subject-matter of a suit cognizable by a Civil Court. GIRDHAR v. KALYA, 5 B. 83 ... 57

Cause of Action.

(1) Jurisdiction—Offering of food to idol—Suit for damages on account of omission to offer food—See JURISDICTION, 6 B. 122.

(2) Jurisdiction—Suit to parade bullock on the Pola—Damages—Dignity—See JURISDICTION, 6 B. 116.

(3) See COMPANY, 5 B. 42 ; 6 B. 266.

(4) See CRIM. PRO. CODE (ACT X OF 1872), 5 B. 387.

(5) See DEFAMATION, 5 B. 580.

(6) See EXECUTION OF DECREE, 5 B. 382.

(7) See LIMITATION ACT (IX OF 1871), 5 B. 25.

(8) See LIMITATION ACT (XV OF 1877), 5 B. 554.

(9) See MORTGAGE (REDEMPTION), 5 B. 22.

(10) See PRACTICE, 6 B. 390.

Certificate.

(1) As to value of subject-matter—See APPEAL (TO PRIVY COUNCIL), 6 B. 260.

(2) Of administration—See MINOR, 5 B. 310.

(3) Of Collector—See VATAN, 5 B. 283.

(4) Of sale—See MORTGAGE (REDEMPTION), 6 B. 139.

(5) Of sale—See REGISTRATION ACT (III OF 1877), 5 B. 653.

(6) Of sale—See STAMP ACT (I OF 1879), 5 B. 470.

(7) Of sale, application for—Limitation—Act XV of 1877, sch. II, art. 178—Act X of 1877, ss. 316, 318 and 319—Purchaser's right to certificate of sale—Res judicata—See LIMITATION ACT (XV OF 1877), 6 B. 586.

(8) Of sale application for—Limitation Act (XV of 1877), sch. I, art. 178—Civ. Pro. Code—Act VIII of 1859, ss. 256, 257, 259—Act X of 1877, s. 317—Purchaser's right to certificate of sale—See LIMITATION ACT (XV OF 1877), 5 B. 202.

(9) *Of sale, application for—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 178—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 264—*Possession without certificate.*—Where an application for a certificate of sale was made five years and a half after the confirmation of the sale.

Certificate—(*Concluded*). PAGE

Held that it was barred by art. 178 of sch. II of Act XV of 1877.

It was not incumbent on the Court, under the Civ. Pro. Code (Act VIII of 1859), s. 264, to put a purchaser into possession until he had his certificate of sale.

Quære.—Whether a purchaser, who, without a certificate of sale, has been put into possession, could be lawfully ejected because he has not such a certificate. TUKARAM v. SATVAJI KHANDUJI, 5 B. 206 ... 137

(10) See ACT III OF 1874 (HEREDITARY OFFICERS), 6 B. 463.

(11) See MORTGAGE (FORECLOSURE), 5 B. 14.

Charge.

(1) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 463.

(2) See HINDU LAW (MAINTENANCE), 5 B. 99.

Charities.

What are—Trust for maintenance of idol, for the benefit of poor, for building tanks—See MAHOMEDAN LAW (WAKF), 6 B. 42.

Charter-Party.

(1) *Agreement for a charter-party—Threatened breach of charter-party—Interim injunction.*—Where a charter-party has been actually completed, the Court will, by injunction, prevent an employment of the ship inconsistent with the terms of the charter party; but where there is only an agreement for a charter-party, no such injunction will be granted. HAJI ABDUL ALLARAKHI v. HAJI ABDUL BACHA, 6 B. 5 ... 459

(2) Principal and Agent—Right to sue—Liability of agent—Undisclosed principal—Actual knowledge—Disclosure of name of principal at time of making the contract—Presumption of liability of agent where name of principal not disclosed—Indian Contract Act (IX of 1892), s. 230—See PRINCIPAL AND AGENT, 5 B. 584.

(3) "*Safe port or as near thereunto as she may safely get always afloat*"—*Ship unable to enter port or lie there without previous lightening—Rights of parties.*—Where a vessel is chartered to load a full and complete cargo, and being so loaded to proceed therewith to a "safe port or so near thereunto as she may safely get, and deliver the same always afloat," the master is not bound to sign bills of lading for, or to sail to, a port where the vessel cannot, by reason of her draught of water, lie and discharge "always afloat" without being previously lightened, even if the cost of the requisite lightening would, by the charter-party, fall on the charterers.

By the terms of a charter-party a vessel was to take in a full cargo at Bombay, and therewith proceed to a "safe port in the Mediterranean (Spanish ports excluded), as ordered on signing bills of lading, or so near thereunto as she may safely get, and deliver the same to the said charterers or their assignees always afloat. Marsailles was at first named as the port of discharge, but subsequently the vessel was ordered to Cette, a French port a little to the west of Marsailles; and bills of lading, made out for Cette, were tendered to the master for signature. The master refused to sign the bills of lading, or sail for Cette. The vessel's draught of water when loaded was such that she could not have entered or lain afloat in Cette harbour without discharging a portion of her cargo. The cost of lightening the vessel by lighters outside the harbour would, under the charter-party, fall on the charterers, and they were willing to incur the expenses necessary for that purpose.

Held that it was no breach of the charter-party by the master to refuse to sail to Cette, or to sign bills of lading for that port. W. & A. GRAHAM & Co. v. MERVANJI NUSSERVANJI, 5 B. 539 ... 355

(4) Small Cause Court—Ship—Bill of lading—Incorporation in bill of lading of terms of charter-party—Cargo—Freight payable on intake measurement—Measurement at port of delivery—Discrepancy in measurements—Evidence—Burden of proof—Suit by consignee for excess freight.—See BILL OF LADING, 5 B. 313.

Civil Court.

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(1) See ACT XV OF 1871 (BROACH TALUKDARS), 5 B. 135.
(2) See ACT XXIII OF 1871 (PENSIONS), 6 B. 209.
(3) See ACT III OF 1874 (HEREDITARY OFFICERS, BOMBAY), 6 B. 129.
(4) See CASTE QUESTION, 5 B. 83 ; 6 B. 725.
(5) See EJECTMENT, 5 B. 572.
(6) See EXECUTION OF DECREE, 5 B. 673.
(7) See HINDU LAW (RELIGIOUS ENDOWMENTS), 5 B. 80.
(8) See JURISDICTION, 5 B. 578.
(9) See SANCTION, 5 B. 137.

Civ. Pro. Code (Act VIII of 1859).

(1) S. 2—See EXECUTION OF DECREE, 6 B. 54.
(2) S. 2—See HINDU LAW (ALIENATION), 5 B. 48.
(3) S. 2—See HINDU LAW (JOINT FAMILY), 5 B. 685.
(4) S. 2—Res judicata—Appeal—Effect of appealing against a judgment—Civ. Pro. Code (Act X of 1877), s. 13, Expl. 4—Title—Trespass—Damages—See RES JUDICATA, 6 B. 110.
(5) Ss. 230, 246—See EJECTMENT, 6 B. 215.
(6) Ss. 256, 257, 259—See LIMITATION ACT (XV OF 1877), 5 B. 202.
(7) S. 264—See CERTIFICATE, 5 B. 206.
(8) *Ss.* 268, 269—*Order—Limitation.*—A purchaser of immoveable property at Court sale, having been obstructed by the defendant, made an application to the Court, under s. 268 of Act VIII of 1859, for the removal of the obstruction, but subsequently withdrew his application. The Court thereupon made an endorsement upon the application to the effect that, as the applicant did not wish to proceed further, no investigation was made.
Held that no such order had been made as was contemplated by s. 269 of Act VIII of 1859, that section contemplating, at least, an order against one party or the other ; and that, therefore, the provisions contained in the same section as to the time within which a suit may be brought, did not apply to the case of the plaintiff. DHIKHA *v.* SAKARLAL, 5 B. 440 ... 290
(9) S. 269—See MORTGAGE (GENERAL), 6 B. 64.

Civ. Pro. Code (Act XXIII of 1861).

(1) S. 11—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 45 ; 6 B. 148.
(2) S. 11—See EXECUTION OF DECREE, 5 B. 332.

Civ. Pro. Code (Act X of 1877).

(1) See SUCCESSION (ACT X OF 1865), 5 B. 638.
(2) *Ss.* 2, 24, 503, 540, 588—*Practice—Appeal—Order refusing to remove a receiver—Act* XXIII of 1861, *s.* 11.—By a decree in an administration suit, A was appointed receiver "to manage the estate." A died, and by a subsequent order B was appointed receiver. One of the defendants in the suit applied to have B removed from the office of receiver on the ground of his alleged mismanagement of the estate. The application was refused.
Held that the order of refusal was appealable, whether the former Code or the present Code of Civil Procedure was deemed to be applicable, being an order made in respect of a question arising between the parties to a suit relating to the execution of the decree. MITHIBAI v. LIMJI NOWROJI BANAJI, 5 B. 45=5 Ind. Jur. 424 ... 32
(3) Ss. 2, 244 (*c*). 591—See EXECUTION OF DECREE, 5 B. 673.
(4) S. 11—See HINDU LAW (RELIGIOUS ENDOWMENTS), 5 B. 80.
(5) S. 13—See FRAUD, 6 B. 703.
(6) S. 13—See RES JUDICATA, 6 B. 477.
(7) S. 13, Expl. 4—Res judicata—Appeal — Effect of appealing against a judgment—Civ. Pro. Code, Act VIII of 1859, s. 2—Title—Trespass—Damages—See RES JUDICATA, 6 B. 110.
(8) Ss. 13, 102, 103, 381—See RES JUDICATA, 6 B. 482.

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(9) *Ss.* 25 *and* 647, *sch.* II—*Decree—Execution—Power of the District Court to withdraw applications for execution—Mofussil Courts of Small Causes—Jurisdiction.*—Ss. 25 and 647 of the Civ. Pro. Code, Act X of 1877, are both applicable to Courts of Small Causes in the Mofussil, and the former section is extended by the latter to execution proceedings in such Courts.

Under s. 25 of the Civ. Pro. Code (Act X of 1877) the District Judge has power to withdraw an application for execution of a decree from a Subordinate Court (such as a Mofussil Court of Small Causes) and to dispose of it himself, or to transfer it to another Subordinate Court, competent to deal with it.

The distinction made for the purposes of limitation between suits, appeals and applications by the Limitation Acts has no bearing upon a question of jurisdiction. BALAJI RANCHODAS, *Applicant*, 5 B. 680 ... 449

(10) Ss. 26 and 31—See COMPANY, 6 B. 266.

(11) *Ss.* 28 *and* 45—*Misjoinder of parties—Specific performance—Specific Relief Act* I *of* 1877, *s.* 42, *Ill.* (*a*).—A stranger to a contract, of which specific performance is sought, cannot be a party to the suit. Where, therefore, the plaintiff sued as against one defendant for specific performance of a contract to sell land, and as against another for a declaration that he was not entitled to any charge upon the said lands, *held* that the latter defendant was improperly made a party to the suit. LUCKUMSEY OOKERDA v. FAZULLA CASSUMBHOY, 5 B. 177 ... 118

(12) *Ss.* 32, 34, 53—*First hearing — Plaint — Practice—Amendment of plaint—Issues.*—The words in paragraph 1 of s. 53 of the Code of Civil Procedure (Act X of 1877) "at or before the first hearing" are merely directory and not mandatory, and, therefore, a plaintiff may, subsequently to the "first hearing" amend his plaint, provided such amendment does not alter the original character of his suit.

The plaintiffs (mortgagors) in a suit against their mortgagees sought only for production of the mortgage deed or for an account, although the averments in the plaint warranted a prayer for redemption. Subsequently to the first hearing of the suit they applied to be allowed to amend the plaint by adding a prayer for redemption. *Held* that the provisions of s. 53 of the Civ. Pro. Code (Act X of 1877) did not preclude the Court from permitting the amendment to be made.

It is competent to a Court, at any time before passing a decree, to frame an additional issue embracing a matter not included in the plaint (provided it be not inconsistent with it) or in the written statement, but which may appear upon the allegations made on oath by the parties, or by any person present on their behalf, or made by the pleaders of such parties or persons.

S. 34 of the Civ. Pro. Code (Act X of 1877) limits the time within which a defendant may object for want of parties, but it does not so limit the right of the plaintiff to add parties. In some cases s. 34 would not prevent even a defendant from objecting to the want of a proper party after the first hearing, *e. g.*, where, after the first hearing and before decree, a co-parcener or remainderman or reversioner is born, or where a woman (who is a party) is married to a man who is not a party to the suit. The objection did not exist at or before the first hearing, and therefore could not have been made or waived by the defendant; and if he made it at the earliest opportunity after it came into existence, he would have satisfied the spirit of s. 34. R. AND N. MODHE v. S. DONGRE, 5 B. 609 ... 401

(13) *S.* 37, *cl.* (*a*)—*Non-resident—Recognized agent.*—The term 'non-resident' in s. 37, cl. (*a*), of the Code of Civil Procedure (Act X of 1877) covers every absence which may reasonably be supposed to have been within the contemplation of the Legislature in using that term: thus, where a Marwadi had resided for forty years at Pen, and had also a place of business there, but who had gone to his native country to get his sisters married, and had been absent up-wards of four months, it was.

Held that he was 'non-resident' within the local limits of the jurisdiction of the Pen Court, and that a person holding a general power of attorney from him was a recognized agent within the meaning of the section. RAMCHANDRA SAKHARAM v. KESHAV DURGAJI, 6 B. 100 ... 524

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(14) *S.* 43—*Entitled to more than one remedy—Leave to omit to sue—First hearing—Mortgage—Suit on personal covenant—Limitation Act* XV *of* 1877, *art.* 132—*Money charged upon immoveable property.*—The plaintiff held a mortgage of certain immoveable property given to him by the defendant to secure the repayment of a loan of money with interest. The plaint stated the fact of the mortgage, but prayed only for a money decree. The mortgage contained a personal undertaking to repay. Plaintiff's counsel, directly upon the case being called on for hearing and before the case had in any way been gone into, applied (under s. 43 of Act X of 1877, Civ. Pro. Code,) for leave to reserve his remedies under the mortgage, taking then only a money decree—an application which it is provided by that section must be made "before the first hearing."

Held that the application was not too late.

The said mortgage was dated 16th February, 1870, and the plaint in this suit was filed on the 28th April 1881. The plaintiff maintained that he was not time-barred, as he had twelve years within which to bring the suit under art. 132 of Act XV of 1877.

Held that plaintiff was too late in bringing a suit for a money decree on the promise to pay in the mortgage, inasmuch as the article referred to was meant to apply to suits brought to enforce *against the property* payment of "money charged upon immoveable property," and not, under any circumstances whatever, to a suit for a mere money decree. PESTONJI BEZONJI v. ABDOOL RAHIMAN, 5 B. 463 ... 305

(15) S. 44—See LIMITATION ACT (XV OF 1877), 5 B. 554.

(16) S. 44, Rule (*b*)—See PRACTICE, 6 B. 390.

(17) S. 50—Probate—Wills—Wills in Mofussil—See PROBATE, 6 B. 73.

(18) *Ss.* 100, 101—*Practice—Procedure—Right of defendant to call witnesses.*—The plaintiff sued, under s. 8, cls. (*w*) of Act XVII of 1875, for money due on a bond dated the 8th September, 1877. The defendant, though duly summoned, did not appear on the day fixed in the summons, which was for the final disposal of the suit. The Court, therefore, proceeded with it *ex-parte*. The defendant, being subsequently summoned and examined as a witness under s. 7 of the Act, admitted the bond sued upon, but pleaded part payment of the plaintiff's claim. He then applied to the Court that his witnesses should be summoned, and their evidence be taken in support of his allegation. The Subordinate Judge was of opinion that he (defendant) was not entitled to offer the evidence. On his referring the case to the High Court,

Held that it was his duty to summon the witnesses named by the defendant. DULICHAND v. DHONDI, 5 B. 184 ... 123

(19) *S.* 110—*Written statement—Court fee—The Code of Civil Procedure, Act* VIII *of* 1859, *s.* 123—*Court Fees Act* VII *of* 1870, *s.* 19.—A written statement of his case, tendered by a party to a suit at any time before, or at the first hearing of the suit, is not liable to any Court fee, and may be written on plain paper (s. 110 of Act X of 1877).

A written statement called for by the Court after the first hearing is also exempt from stamp duty (s. 19 of Act VII of 1870). NAGU v. YEKNATH, 5 B. 400=5 Ind. Jur. 650 ... 263

(20) S. 123—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 400.

(21) S. 132—Inspection where to be given—Contract made in Bombay to be performed up-country—See INSPECTION, 5 B. 467.

(22) *S.* 135—*Practice—Discovery—Inspection—Trial of issue before inspection granted.*—The intention of s. 135 of the Civ. Pro. Code (Act X of 1877) is to give the Court the power of raising and determining an issue for the exclusive purpose of deciding the right to discovery of evidence which is to be used at the trial, and, therefore, from the nature of the case before the hearing of the cause.

It should be a rule of practice that when an order is made under s. 135 of the Civ. Pro. Code (Act X of 1877) by the Judge in Chambers, the suit should be set down for the trial of the particular issue as well as of the cause itself when it comes to a hearing before the same Judge. AHMEDBHOY HUBIBHOY v. VULLEEBHOY CASSUMBHOY, 6 B. 572 ... 837

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(23) S. 210—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 5 B. 604.

(24) S. 230—See LIMITATION (ACT XV OF 1877) 6 B. 258.

(25) *S.* 230—*Decree—Application for execution—Limitation.*—On the 1st June, 1880, several decree-holders applied to the Subordinate Civil Court of Parner, for execution of their decrees. They had taken out execution several times previously, the date of their last preceding applications being 1st June, 1877. The Subordinate Judge was of opinion that the applications were barred under the last clause of s. 230 of the Civ. Pro. Code, Act X of 1877. On his referring the cases to the High Court,

Held, that the applications were not barred, inasmuch as the previous applications for execution had not been made under s. 230 of Act X of 1877, that Act not being then in force. ANANDRAV CHIMUJI v. THAKARCHAND, 5 B. 245 ... 162

(26) S. 244—See DECREE, 6 B. 7.

(27) *S.* 244—*Decree—Compromise effected by fraud—Execution—Question arising in execution—Separate suit—Act* XXIII *of* 1861, *s.* 11—*Practice—Power of Court to vacate any judgment or order procured by fraud.*—The plaintiff held two decrees against the defendant for Rs. 5,490-1-6 and applied for execution. The defendant, by misrepresentation, induced the plaintiff to receive Rs. 3,900 only in full satisfaction of those decrees, and to withdraw the application. The plaintiff, on discovering the misrepresentation, brought this suit to recover the difference.

Held that the suit was barred by s. 11 of Act XXIII of 1861 (which corresponds with s. 244 of Act X of 1877), the question between the parties being a question relating to the execution of a decree.

It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud; and in the case of orders made in execution, s. 11 of Act XXIII of 1861, excludes all other remedy. PARANJPEE *v.* KANADE, 6 B. 148 ... 537

(28) *S.* 244, *cl.* (*c*) *and s.* 412—*Suit* in forma pauperis—*Order as to costs—Appeal—Jurisdiction.*— Subordinate Judge admitted a plaint *in forma pauperis*, but, holding that he had no jurisdiction to try the suit, returned the plaint to the plaintiff for its presentation in the proper Court, and ordered each party to pay his own costs. After the presentation of the plaint in another Court, and before the termination of the suit, the Collector applied to the Subordinate Judge for execution of the order as to costs, by seeking to recover the amount of the stamp duty from the plaintiff. The Subordinate Judge refused to execute the order, on the ground that the pauper suit was still pending in another Court. His order was affirmed by the District Judge in appeal. On second appeal to the High Court.

Held, that there was no appeal, and, therefore, no second appeal, under s. 244, to cl. (*c*) of the Civ. Pro. Code, (Act X of 1877), against the order of the Subordinate Judge refusing execution of the order as to costs, inasmuch as the question was not between the parties to the suit.

Held, further that, under s. 412 of Act X of 1877, the Subordinate Judge had no jurisdiction to make the order for payment of Court fees by the plaintiff.

The High Court, accordingly, in the exercise of its extraordinary jurisdiction, annulled the Subordinate Judge's order about costs, and all the subsequent proceedings consequent upon that order. THE COLLECTOR OF RATNAGIRI *v.* JANARDAN KAMAT, 6 B. 590=7 Ind. Jur. 36 ... 849

(29) *Ss.* 244, 258—*Decree—Execution—Satisfaction or part satisfaction out of Court, but not certified—Subsequent execution of decree for full amount—Suit for money previously paid—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 161.—A suit for the recovery of money paid to a judgment-creditor out of Court in satisfaction of a decree, but not certified, is barred by s. 244 (*c*) of Act X of 1877, and by the last paragraph of s. 258, as amended by Act XII of 1879. PATANKAR v. DEVJI, 6 B. 146=6 Ind. Jur. 317 ... 536

(30) *S.* 266—*Jurisdiction—Decree—Execution—Attachment of debts arising out of claims over which the Courts have no jurisdiction—Debt—Subject of the*

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Gaikwar—Subject of a Kathiawar state—Rajkot.—Debts due to a British subject by the Gaikwar Government or by a subject of that Government, or of a state in the province of Kathiawar, are not debts which, under s. 266 of the Code of Civil Procedure (Act X of 1877), are liable to attachment in execution of a decree.

Claims over which no Court in British India has jurisdiction are not debts liable to be attached, under s. 266 of the Civ. Pro. Code, (Act X) of 1877.

The mere circumstance that the garnishee is at the time of the application for attachment beyond the limits of British India, would not of itself render the debts not liable to be attached. GHAMSHMALAL v. BHANSALI, 5 B. 249 ... 165

(31) *S.* 266, *cl.* (*j*)—*Labourer—Wages—Execution—Attachment.*—Persons who agree to spin cotton belonging to a spinning and weaving company, and to receive a certain amount of money for a certain quantity of cotton spun by them, are labourers within the meaning of s. 266 of the Code of Civil Procedure, Act X of 1877, and therefore their remuneration is wages which, under cl. (*j*) of the section, cannot be attached in execution of a decree. JECHAND KHUSAL v. ABA, 5 B. 132 ... 89

(32) *Ss.* 293, 294, 306, 307, *and* 308—*Court sale—Defaulting purchaser—Failure to pay deposit—Re-sale—Redress against defaulter—Bidding without permission of Court—Benami purchase.*—A purchaser of property at a Court sale who fails to pay the deposit (25 per cent. on the purchase money) directed to be paid by s. 306 of the Civ. Pro. Code, is a defaulting purchaser within the meaning of s. 293 of that Code, and liable, as such, to make good any deficiency of price which may happen on a re-sale, and all expenses attending the same.

A sale at which the decree-holder himself, or some other person for him, without the permission of the Court first obtained, becomes the purchaser, is not *ipso facto* void; it is a good sale, unless and until set aside by the Court under the provisions of s. 294 of the Civ. Pro. Code. JAVHERBAI v. HARIBHAI, 5 B. 575=6 Ind. Jur. 98 ... 378

(33) S. 294.—See EXECUTION OF DECREE, 5 B. 130.

(34) *Ss.* 294 *to* 295—*Competing decree-holders—Purchase by permission of Court.*—Where there are competing decree holders, who have applied for execution of their decrees, s. 294 of the Civ. Pro. Code (Act X of 1877), must be taken as subject to the provisions of s. 295, so that the decree-holder, who has been permitted under the former section to purchase the property in execution of his own decree, must share the proceeds of the sale rateably with such competing decree-holders, and will not be allowed to set off the purchase-money against the amount due to him on his decree. SHRINIVAS v. RADHABAI, 6 B. 570 ... 835

(35) *S.* 295—*Assets realized by sale or otherwise.*—Money paid by a judgment-debtor under arrest, in satisfaction of the decree against him, are not assets realized by sale or otherwise, under s. 295 of the Civ. Pro. Code, (Act X of 1877).

S. 295 of the Civ. Pro. Code, (Act X of 1877), must be read as if the words "from the property of the judgment-debtor" were inserted after the word "realized." PURSHOTAMDASS TRIBHOVANDASS v. MAHANANT SURAJBHARTHI, 6 B. 588 ... 847

(36) *S.* 295—*Decree—Execution—Rateable distribution of assets.*—The salary of a karkun, who was employed in the Second Class Subordinate Judge's Court of Anklesvar, was attached, in execution of a decree of the First Class Subordinate Judge's Court of Surat, by an order issued by the Surat Court directing the Anklesvar Court to stop and remit, every month, a moiety of the said karkun's salary to itself (the Surat Court), until satisfaction of the decree. While the decree of the Surat Court was thus in course of execution, another judgment-creditor of the karkun, who had obtained a decree in the Anklesvar Court, applied to it for a rateable distribution of the moiety between himself and the Surat decree-holder, under s. 295 of the Civ. Pro. Code, Act X of 1877.

Held, that the application was not sustainable, inasmuch as the decree of the Surat Court was being executed by itself and not by the Anklesvar

Civ. Pro. Code (Act X of 1877)—(*Continued*). PAGE

Court to which the order of attachment was sent as the head of a department or as "the officer whose duty it was to disburse the salary," and not as a Court executing the decree of another Court. KRISHNASHANKAR v. CHANDRASHANHAR, 5 B. 198 ... 132

(37) *S.* 295—*Decree—Sale—Assets—Distribution.*—Moneys paid into Court by sale or otherwise in execution of a decree are assets from the moment of their payment into Court, and are available, under s. 295 of the Code of Civil Procedure (Act X of 1877), for rateable distribution only amongst decree-holders who have applied for execution prior to that time. VISHVANATH MAHESHVAR v. VIRCHAND PANACHAND, 6 B. 16 ... 467

(38) S. 316—See LIMITATION ACT (XV OF 1877), 5 B. 202.

(39) Ss. 316, 318 and 319.—See LIMITATION ACT (XV OF 1877), 6 B. 586.

(40) *Ss.* 374, 647—*Limitation—Decree—Execution—Act* XV *of* 1877, *s.* 14, *sch* II, *art.* 179, *cl.* 4.—The rule laid down in s. 374 of the Code of Civil Procedure (Act X of 1877), that, where a suit is withdrawn with leave to bring a fresh suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought, applies to applications for execution; and, therefore, in counting the time of three years prescribed by the Limitation Act, XV of 1877, sch. II, art. 179, cl. 4, an application allowed to be withdrawn must be discarded as if it had never been presented. The bar created by s. 374 of the Code of Civil Procedure, is, in such a case, not removed by s. 14 of the Limitation Act, as causes for which the withdrawal of a suit or application may be permitted, are not causes "of a like nature" with defect of jurisdiction. PIRJADE v. PIRJADE, 6 B. 681 ... 909

(41) *S.* 386—*Act* XII *of* 1879, *ss.* 60 *and* 108—*Limitation Act*, XV *of* 1877, *sch.* II, *art.* 171 *B—Deceased defendant—Application to make legal representative defendant—Construction of Limitation Acts.*—Subsequently to the constitution of the plaintiffs' suit, one of the defendants died, and his son, as his legal representative, was made a defendant in his stead. The new defendant (*inter alia*) objected that his father had been dead more than six months before the application to the plaintiffs to make him a defendant, and that, therefore, the suit should abate, as provided by the last clause of s. 368 of the Civ. Pro. Code, Act X of 1877, (introduced by the amending Act XII of 1879) and art. 171-B of the Limitation Act, XV of 1877, which prescribes a period of sixty days within which an application should be made to have the representative of a deceased defendant made a defendant to a suit.

When the amending Act XII of 1879 was passed,—that is, on the 29th of July, 1879,—the original defendant had been dead more than six months; but the plaintiff made an application to have the representative of the deceased defendant made a defendant before the publication of the Act in the local gazette.

Held that the provisions of art. 171-B of the Limitation Act, should not be given retrospective effect, and that the plaintiffs' application was not time-barred. The general rule as laid down in *Reg.* v. *Dorabji*—that "an Act of limitation, being a law of procedure, governs all proceedings, to which its terms are applicable, from the moment of its enactment, except so far as its operation is expressly excluded or postponed"—admits of the qualification that, when the retrospective application of a statute of limitation would destroy vested rights, or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, then the statute is not, any more than any other law, to be construed retrospectively. KHUSALABHAI v. KABHAI, 6 B. 26 ... 474

(42) S. 416—Bombay Act V of 1879, s. 37—Practice—Procedure—Amendment of plaint—Substitution of parties—Crim. Pro. Code (Act X of 1872), s. 521—Order by Magistrate for removal of obstruction from a public thoroughfare—Suit against Magistrate to establish right—See CRIM. PRO. CODE (ACT X OF 1872), 6 B. 670.

(43) S. 416—Practice—Procedure—Amendment of plaint—Substitution of parties—Act X of 1872, ss. 523 and 526—Order by Magistrate for removal of obstruction from public thoroughfare—Suit to establish right—See CRIM. PRO. CODE (ACT X OF 1872), 6 B. 672.

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(44) S. 434—See FOREIGN JUDGMENT, 6 B. 292.

(45) Ss. 443, 456, 458—See MINOR, 5 B. 306.

(46) *S.* 484—*Attachment—Security.*—The defendants were, on the 10th of March, 1881, called upon, under s. 484 of the Civ. Pro. Code (Act X of 1877), to furnish security for the satisfaction of a decree that the plaintiff might obtain against them, or to show cause on the 28th March, 1881, why security should not be furnished. To this direction the order was appended, which is provided by the form at the end of the Code of Civil Procedure for a provisional attachment, under s. 484. The defendants, to avoid the attachment, gave security on the 12th March, 1881, for satisfaction of the decree, and the attachment was not carried out. On the 28th March, 1881, they showed cause why security should not be furnished; but the Subordinate Judge, as security had been furnished, thought the matter was at an end, and that he could not cancel the security bond.

Held, that the Subordinate Judge was wrong; the security so given was really not the security expressly provided under s. 484, and did not preclude the defendants from showing cause why no security should be furnished. LOTLIKAR v. LOTLIKAR, 5 B. 643 ... 424

(47) Ss. 525, 526—See ARBITRATION, 6 B. 663.

(48) Ss. 595, 600—See APPEAL (TO PRIVY COUNCIL), 6 B. 260.

Commission.

(1) *Criminal trial—Evidence of Government servant ordered on service taken by commission previously to departure—High Court Criminal Procedure (Act X of 1875), s. 76.*—Where a Government servant who had executed his recognizance to appear and give evidence for the prosecution at a criminal trial to take place in the High Court of Bombay was subsequently ordered to a distant station on the public service, and could not, with due regard to the public interest, return to Bombay in time for the trial.

Held, on the application of Government, that his evidence might be taken by commission before his departure from Bombay under the provisions of s. 76 of the High Court Criminal Procedure (Act X of 1875). EMPRESS v. BAL GANGADHAR TILAK, 6 B. 285=6 Ind. Jur. 482 ... 647

(2) To take evidence, power of High Court to grant on application of prisoner—See RECEIVING STOLEN GOODS, 5 B. 338.

Companies Act (X of 1866).

See COMPANY, 5 B. 425.

Companies Act (VI of 1882).

Ss. 186, 187, 195—See COMPANY, 6 B. 640.

Company.

'Indian Companies' Act X of 1866, *s.* 22—*Member of company*—"*Subscriber of the memorandum*"—"*Agreement to become a member*"—*Company not in existence—Rescission—Liability for calls.*—The defendant, amongst others, subscribed (for 101 shares) a copy of the memorandum and articles of association of the plaintiff company then in process of formation, but subsequently, and before registration, gave notice to the persons most active in the promotion of the said company, that he would withdraw his signature, and would have no connection thenceforth with the proposed company. His withdrawal, however, was not accepted. Subsequently to the receipt of the said notice the memorandum and articles of association, so signed by the defendant and others, were presented for registration; but registration was refused, on the ground that the said documents were not printed. A printed copy of each was then procured and registered. The registered copies differed, in respect of the signatures subscribed thereto, from the copies signed by the defendant. The defendant's name was put upon the register of the company as the holder of 101 shares, but without the defendant's assent or knowledge, and two calls were made upon him in respect of the said shares. The defendant denied that he was a member of the said company, or liable for calls.

Held that the defendant was not a member of the plaintiff company; either (i) as a "subscriber of the memorandum of association" under the earlier

part of s. 22 of the Indian Companies' Act, inasmuch as the memorandum there referred to was the *the registered* memorandum, of which the document signed by the defendant was not even a true copy; or (ii) by reason of an "agreement to take shares" under the latter part of that section, inasmuch as the agreement there alluded to was an agreement *with the company*, and the agreement (if any) entered into by the defendant was not, and could not have been, an agreement with the company, the company not being at that time in existence.

Quære—Whether it is enough, to constitute a person a member of a company under the earlier part of s. 22, to subscribe a true copy of the registered memorandum of association. THE GUZERAT SPINNING AND WEAVING COMPANY v. GIRDHARLAL DALPATRAM, 5 B. 425 ... 280

(2) *Injunction—Suit by agents of company to restrain it from carrying into effect a resolution of directors—Power to appoint solicitors to company—Practice—Joinder of causes of action—Same parties suing in different capacities—Civ. Pro. Code (Act X of 1877), ss. 26 and 31.*—By the Memorandum and Articles of Association of the New Dhurumsey Poonjabhoy Spinning and Weaving Company, the plaintiff's firm of M. F. & Co. were appointed agents of the company for twenty-five years, and it was provided that they should have the general control and management of the company. Cl. 98 of the Articles provided that the said firm, as such agents, should have full power and authority (*inter alia*) to appoint and employ, in or for the purposes of the transaction and management of the affairs and business of the company, such solicitors as they should think proper. An agreement, dated 26th August 1874, was also entered into between the company and the partners in the firm of M. F. & Co., their executors, administrators and assigns, *for the time being constituting the partnership firm of M. F. & Co.*, whereby it was agreed that the said firm should be agents to the company for twenty-five years to buy and sell, etc., and particularly to exercise all the powers contained in cl. 98 of the Articles of Association. Messrs. C. & B. were duly appointed solicitors to the company, and acted as such for a considerable time. Merwanji Framji, one of the members of the said firm of M. F. & Co., died in the middle of March 1876. The plaintiffs complained that G., one of the shareholders in the company, became desirous of ousting the plaintiffs from the position of agents of the company, and of becoming the managing director of the company; that, in July 1881, he procured his own election, and that of certain nominees of his as directors of the company; and on the 8th August 1881, procured the passing of a resolution at a Board meeting to the effect that as Messrs. C. & B., the Company's solicitors, were also the solicitors of the agents, it was desirable, for the interests of the company, that a change should be made, and that Messrs. H., C. & L. be appointed solicitors of the company. The plaintiffs alleged that the only object of passing the said resolution was to facilitate the design of G., of ousting the plaintiffs from their agency, and getting the management of the company for himself; that Messrs. H., C., & L. had been for a long time the solicitors of G. and had been advising him in his designs upon the company and upon the plaintiffs, and they contended that the resolution was a breach of the contract between the company and the plaintiffs and a violation of the Articles of Association of the company. The plaintiffs sued G. and two other directors of the company and the company itself, and prayed for an injunction against the defendants to restrain them from committing any breach of the agreement of 26th August 1874, and in particular from carrying into effect the resolution appointing Messrs. H., C., & L. as solicitors for the company, and to restrain them from doing any thing inconsistent with the Memorandum and Articles of Association. The defendants contended that the contract of the 26th August 1874, had been determined by the death of Merwanji, Framji, and that the powers conferred on the agents by cl. 98 of the Articles were, subject to the general powers of management, vested in the directors by the Articles, and that the case was not one in which an injunction could be granted.

Held that, having regard to the Memorandum and Articles of Association, the contract was that the firm of M. F. & Co. for the time being should be

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the agents of the company for twenty-five years, and that the right to sue on the contract by its nature survived to the plaintiffs after the death of Merwanji Framji.

Held, also, that there being no provision either in the Articles of Association or the agreement of 26th August 1874, that the power thereby conferred on the agents should be subject to the control or assent of the directors, there was no right in the directors to interfere with the agents in the exercise of their powers otherwise than as representing the company in virtue of their general powers of management.

It being admitted that the conduct of the defendants would be supported by the company in general meeting, owing to their having a preponderance of votes.

Held that, inasmuch as the Court would not, by a decree for specific performance or by injunction, compel the company to retain the plaintiffs in the confidential position of agents, it would not restrain the defendants or the company from appointing a solicitor, which was only a violation of what was ancillary or incidental to the principal part of the contract, *viz.*, the agreement that the plaintiffs should be the agents of the company for twenty-five years; and further, *semble* that on the merits of the case the Court would not interfere on behalf of the plaintiffs.

Counsel on behalf of the plaintiffs sought to obtain the injunction on the ground that the resolution of the 8th August 1881, appointing Messrs. H.C., & L., solicitors of the company, was contrary to the Memorandum of Association, and, therefore, *ultra vires*; and, in order that this point might be pressed against the defendants, it was proposed that the plaint should be amended by alleging a cause of action in two of the plaintiffs as *shareholders* as well as a cause of action in all the plaintiffs as *parties contracting* with the company.

Held that, under the provisions of ss. 26 and 31 of Civ. Pro. Code (Act X 1877), the amendment could not be allowed. The plaintiff, as shareholders and contractors, had not the same cause of action, by which words were meant not only the act complained of, but also the right violated by that act. The rights of the plaintiffs as contractors, alleged to be violated by the resolution, were rights given to them by their agreement; but the rights of the plaintiffs as shareholders were rights secured to them by the Articles of Association. NUSSERWANJI v. GORDON, 6 B. 266 ... 631

(3) *Jurisdiction—Cause of action—Letters Patent*, 1865, *cl.* 12—*Winding up—Suit on foreign judgment—Balance order, Service on defendant.*—The defendant, who resided outside the jurisdiction of the High Court, was sued at Bombay as a contributory upon a balance order made by the Court of Chancery in England in the winding up of the plaintiff's bank. It was contended on his behalf that no part of the cause of action had arisen within the jurisdiction, and that the suit was, therefore, not maintainable. The plaintiffs contended that service of the balance order upon the defendant was necessary, and constituted part of the cause of action, and that as such service had been effected upon the defendant in Bombay, the Court had jurisdiction.

Held, that service of the balance order upon the defendant was not necessary, and that as no part of the cause of action had arisen within the jurisdiction, the suit should be dismissed. THE LONDON, BOMBAY AND MEDITERRANEAN BANK v. BADEE BEEBEE, 5 B. 42=5 Ind. Jur. 422,.. 29

(4) Winding up—Bill of Exchange—Liability of Company on bill drawn by Directors—Misrepresentation—Indian Contract Act (IX of 1872), ss. 18 and 19—See BILL OF EXCHANGE, 5 B. 92.

(5) *Winding up—Liability of company for loan to secretary, treasurer and agent—Principal and agent—Undisclosed principal—Election—Indian Contract Act* (IX *of* 1872), *ss.* 230, 233, 234.—By the Memorandum and Articles of Association of the New Fleming Spinning and Weaving Company, N.K, was appointed secretary, treasurer, and agent of the company with power to raise or borrow from time to time, in the name or otherwise on behalf of the company, such sums of money as he might think expedient by bonds, debentures, or promissory notes, or in such other manner as he might deem best; and for the purpose of securing the repayment of any

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money so borrowed to make any arrangement which he might deem expedient by conveying or assigning away property of the company to trustees or otherwise. N.K. was also secretary, treasurer, and agent of three other mill companies in Bombay.

On the 31st October 1878, the directors passed the following resolution :—

"That the unallotted shares be filled up in the name of Nursey Kessowji, Esquire, secretary, treasurer, and agent, who is empowered to mortgage them at a fair rate of interest to enable him to obtain funds for the use of the company."

On the 11th November, 1878, P advanced a sum of Rs. 1,00,500 upon the terms contained in a Gujarati writing of that date, and signed by N.K. In this document N.K. acknowledged the receipt of the money for which 335 shares in the New Fleming Spinning and Weaving Company were duly handed over as security, and he agreed to repay it within three months. The last clause in the agreement stated that it was "duly agreed to and approved by him (N.K.) and his heirs and representatives." As an additional security, P., when advancing the loan, obtained from K. N. (father of N. K.) a guarantee in the following terms :—

"To Thuker Purmanundass Jivandass.

"Written by Sha Kessowji Naik.

"To wit :—This day Sha Nursey Kessowji has received from you Rs. 1,00,500, namely, one lakh and five hundred, having deposited by way of security 335, namely three hundred and thirty-five 'shares' of 'The New Fleming Spinning and Weaving Company, Limited.' If your said money cannot be paid with interest by the expiration of the time, and you should sustain any kind of loss in (respect of) that, I am duly to pay the same. As to that I am not to raise any obstacle or objection. In case it should be necessary, I am to fill up and duly deliver to you an 'indemnity bond' on stamped paper through your vakil (solicitor). This writing is duly agreed to and approved by me and my heirs and representatives. Bombay, the 11th of November, in English year 1878."

On the evening of the day on which the loan was made, *viz.*, 11th November 1878, but without the knowledge of K.N., it was agreed between N.K. and P. that the time for the repayment of the loan should be extended to six months. In December 1878, N.K. became insolvent, and on 28th December 1878, a petition was presented to the High Court to wind up the New Fleming Spinning and Weaving Company. On the 30th December, P. through his solicitors wrote a letter to the company, stating that N.K. had obtained a loan from him of Rs.1,00,500 on behalf of the company, and inquiring whether the fact appeared in the company's books. To this letter he received a reply signed by "K.N., Director," stating that the loan appeared in the books in P.'s name. On the 17th January 1879, an order was made for the winding up of the New Fleming Spinning and Weaving Company, and on the 4th February 1879, P gave notice to the official liquidators of the company of his claim against the company for the money advanced by him on the 11th November 1878. In March 1879, he filed a suit against K.N. to enforce his guarantee, but was unsuccessful, the Court holding that, by extending the period of the loan to six months, the agreement of the 11th November 1878, had been materially varied without K.N.'s knowledge, and that K.N. was consequently discharged. On the 24th April 1879 P. filed his affidavit in support of his claim against the company. The company resisted the claim.

Held (1) that the Directors had power, under the Memorandum and Articles of Association, to authorize N. K. to borrow money on behalf of the company, and that they had done so, and with that object had entrusted him with the unallotted shares.

(2) That when P. advanced the loan to N. K., he was led to believe that N. K. was obtaining it on behalf of the four mill companies, of which he was secretary, treasurer and agent, but that P. was not aware and was not informed for which of the said companies the loan was obtained, and that the money was in fact advanced to N. as to an agent acting on behalf of an undisclosed principal.

(3) That P. when he discovered that the money was obtained for the new Fleming Spinning and Weaving Company, was entitled to claim against the

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company and to rank as a creditor of the company for the amount advanced to N.K. with interest from the date of the loan, *viz.*, 11th November 1878, to the date of the presentation of the petition to wind up the company. PURMANUNDAS v. H. R. CORMACK, 6 B. 326

(6) *Winding up—Order for dissolution of company—Voluntary winding up—Winding up under supervision of Court—Official liquidator—Indian Companies Act* VI *of* 1882.—As a general rule a winding up of a company under supervision of the Court should be terminated in the same way as a purely voluntary winding up, *i.e.*, under ss. 186 and 187 of the Indian Companies Act VI of 1882. ... 674

Although, under s. 195 of the Indian Companies Act VI of 1882, the Court has power to make an order dissolving a company in the course of winding up, subject to its supervision, such cases must be exceptional, and can only occur when the Court has deemed it proper to carry on the winding up under supervision in a manner such as clearly to approximate to a winding up by the Court. The ordinary rule is the other way, and it is reasonable that it should be so; as, generally, a winding up under supervision is not conducted under so intimate a control of the Court as to put the Court in a position to judge of the correctness of the liquidators' action and the completeness of the winding up.

So far as the Court does not interfere, a winding up under supervision remains essentially a voluntary winding up; but the Court in a winding up under supervision has full authority to interfere and to exercise to any extent the power which it might have exercised if an order had been made for winding up the company by the Court.

The words "official liquidator" in s. 160 of the Indian Companies Act VI of 1882 do not include the liquidators in a winding up under supervision.

Motion for an order for the dissolution of a company wound up under supervision of the Court, refused. *In re* THE CARWAR COMPANY, 6 B. 640

(7) *Winding up—Suit against contributory—Service of notices and orders—Contributory in India to English company—Last known address or place of abode—R.* 63 *of the rules of* 1862—*Jurisdiction.*—The London, Bombay and Mediterranean Bank, a joint stock company registered under the English Companies' Act, 1862, was ordered to be wound up by an order of the Court of Chancery in England in 1866, and by a subsequent order of the said Court made in the winding up of the bank it was ordered that service of any notice, summons, order, or other proceeding in these matters might be effected by putting such notices, &c., into any post office, either in England or at Bombay, duly addressed to such contributories being past members according to their respective *last known addresses or places of abode.* By a final balance order dated 5th June, 1879, it was ordered by the Court of Chancery in England that the persons named in the schedule to the said order being contributories as past members of the said Bank should, within four days after the service of the said order, pay the amount set opposite to their names, with interest, from the 15th March, 1879. The defendant's name appeared in the said schedule, and the present suit was brought to recover the sum therein appearing as due from him to the Bank, *viz.*, Rs. 3,900. The defendant denied that he had ever held shares in the plaintiff's Bank, or that he ever had notice of any of the proceedings in the winding up. At the trial it appeared that all the various orders and notices to shareholders made in the winding up of the Bank prior to the balance order of the 5th June, 1879, had been sent by post to the defendant, addressed to him at No. 36, Fanasvadi, and were all returned undelivered. It was proved that he had never resided there; but that his brother had a place of business there, and that the defendant used occasionally to go there for the purpose of attending to his brother's business. It further appeared that the residence of the defendant, as given in the register of shareholders, was Loharchall, and not 36, Fanasvadi. ... 882

Held, that the notices, orders, &c., prior to the order of 5th June 1879, were not so served as to make the defendant subject to that final order; that the obligation to obey the command of the Court of Chancery contained therein had not arisen as against the defendant; and that, consequently, the present suit must fail.

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Company—(*Concluded*).

It is a leading principle of English law, always understood except when expressly excluded, that a person proceeded against in a Court must have due notice of the proceeding. Failing such notice he is entitled to protection if the judgment or order obtained in his absence is made the ground of a suit in any Court governed by English principles. The Court of Chancery in England had not in this case so called the defendant before it as to enable it in his absence to pronounce a definitive order against him or to bind him in the Court of his domicile, although he was included in the order of the Court of Chancery.

The fact that the defendant frequently attended his brother's place of business, at No. 36, Fanasvadi, was not sufficient to make that place his "last known address." If there had been evidence that he had used No. 36, Fanasvadi, as an address for receiving letters, that might probably have been sufficient. It would then have been known as his address—at least as an address.

The address or residence of a member of a company entered in the register of shareholders although sufficiently ascertained for the purpose of communication from the company, is not therefore ascertained for a service of legal proceedings. For the purpose of such service, care must be taken to find out the last known place of abode of the alleged contributory, and to effect the substituted service there. THE LONDON, BOMBAY AND MEDITERRANEAN BANK v. GOVIND RAMCHANDRA, 5 B. 223 ... 148

Compensation.

See LIMITATION ACT (XV OF 1877), 6 B. 75.

Complaint.

See CRIM. PRO. CODE (ACT X OF 1872), 5 B. 405.

Compromise.

(1) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 6 B. 77.

(2) See CIV. PRO. CODE (ACT X OF 1877), 6 B. 148.

Conciliator.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 6 B. 31.

Confession.

(1 Evidence—Indian Evidence Act I of 1872, s. 30—Joint trial—Dacoity—Receiving stolen property—Indian Penal Code, ss. 395 and 412—See PENAL CODE (ACT XLV OF 1860), 5 B. 63.

(2) See EVIDENCE, 6 B. 34, 124.

Construction.

(1) Of Limitation Acts—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 26.

(2) See PARTIES, 6 B. 151.

(3) See VATAN, 5 B. 283.

Contract.

(1) Consideration—Agency—Revocation—Specific performance—Indian Contract Act IX of 1872, ss. 202, 203 and 205—See PRINCIPAL AND AGENT, 5 B. 253.

(2) *Suit for damages for non-acceptance—Dispute as to quality of goods tendered—Right to examine goods—Survey—Reasonable time for examination of goods by purchaser—Contract Act* IX *of* 1872, s. 38.—The defendant agreed to purchase from the plaintiffs one hundred full-pressed bales, "fully good fair Kishli cotton" at Rs. 208-8 per candy, to be delivered from March 15th to April 1st. On March 21st the plaintiffs sent the defendant a letter reminding him of the contract and requesting him to take delivery. On receipt of this letter the defendant put the matter into the hands of V. The plaintiff had then no cotton of the specific kind to deliver, nor did the letter refer to any particular bales. At 11-30 o'clock A.M. on March 30th, the plaintiffs sent the defendants a letter enclosing a sampling order directed to an employee of Messrs. H. and S., on whose premises the bales referred to in the order were lying. V., on behalf of the defendant, got samples taken of the cotton and examined them, but

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without reference on that day to any standard. He then, however, conceived doubts as to the quality of the cotton and expressed his doubts to the plaintiff in the evening of that day. On 31st March the plaintiffs sent the defendant a delivery order enclosed in a letter from their solicitors calling on the defendant to attend with his surveyor at 1 P.M. on that day to survey the cotton, as otherwise an *ex parte* survey would be held. This letter reached the defendant at 11-30 o'clock A.M., and was given by him to V at noon of the same day. V. applied to M. to attend as surveyor, but M. was unable to do so. The plaintiffs had an *ex-parte* survey held by Messrs. C. and B. at 1 P.M., and they pronounced the cotton samples of which were submitted to them, to be "fully good fair Kishli cotton." While this survey was going on, the defendant was on the Cotton Green, but declined to attend, saying that V. and his surveyor were coming. Shortly afterwards V. did come, and subsequently wrote a letter to plaintiffs in the defendant's name, stating that the cotton was not of the description contracted to be sold by them, and asking for a survey. This letter reached the plaintiffs at 2-19 o'clock P.M. After this there was a discussion between plaintiffs and defendant and V. On that afternoon (the 31st March) the plaintiffs' solicitors sent a letter to the defendant stating the result of the survey and requiring him to take delivery. This was answered by a letter of next day (April 1st) from the defendant's solicitors denying that the cotton was of proper quality or that proper notice of the survey had been given, alleging that the defendant had that morning attended with his surveyor and asked leave to survey the cotton which had been refused, and stating that the contract must be treated as cancelled. The cotton was sold by auction on April 5th. The plaintiffs brought this suit to recover Rs. 1,631-1-11 as damages for non-acceptance of the cotton. The defendants contended that there had been no reasonable time allowed by the plaintiffs for the examination of the cotton and that a joint survey should have been held.

Held that a joint survey was not necessary under the terms of s. 38 of the Indian Contract Act (IX of 1872), and that the defendant having had a period of twenty-four hours for inspection, had had a reasonable opportunity of seeing whether the cotton offered by the plaintiffs was such cotton as the plaintiffs were bound by their contract to deliver.

A purchaser of goods is not entitled to continue inspecting and examining the goods offered by the vendor until the expiration of the period for delivery. A reasonable opportunity for such inspection and examination is all that he is entitled to. RUTTONSEY MORARJI v. JAMNADAS PITAMBERDAS, 6 B. 692 ... 917

(3) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 177.

(4) See INSPECTION, 5 B. 467.

(5) See PRINCIPAL AND AGENT, 5 B. 584.

(6) See STAMP ACT (I OF 1879), 5 B. 188.

Contract Act (IX of 1872).

(1) See HINDU LAW (JOINT FAMILY), 5 B. 38.
(2) Ss. 18, 19—Misrepresentation—See BILL OF EXCHANGE, 5 B. 92.
(3) S. 25, cl. (3)—See LIMITATION, 6 B. 683.
(4) S. 38—See CONTRACT, 6 B. 692.
(5) S. 43—See PARTNERSHIP, 6 B. 700.
(6) Ss. 69 and 70—See ACT VII OF 1863 (SUMMARY SETTLEMENT), 6 B. 244.
(7) S. 85—See LIMITATION ACT (XV OF 1877), 5 B. 554.
(8) Ss. 126, 147—See LIMITATION ACT (XV OF 1877), 5 B. 647.
(9) Ss. 202, 203, 205—See PRINCIPAL AND AGENT, 5 B. 253.
(10) S. 230—See PRINCIPAL AND AGENT, 5 B. 584.
(11) Ss. 230, 233, 234—See COMPANY, 6 B. 326.
(12) *Ss. 254 and 265—Partnership—Jurisdiction of District Court to wind up under s. 265 of Indian Contract Act—The Bombay Civil Courts' Act, No. XIV of 1869—Power of District Judge to refer Assistant Judge a case*

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Contract Act (IX of 1872)—(*Concluded*).

falling under s. 265 *of Contract Act*—A previous dissolution of partnership is necessary in order to give jurisdiction to the District Court under s. 265 of the Indian Contract Act.

Accordingly, where a suit was instituted in the District Court of Ahmedabad by some members of a partnership (which, however, was not dissolved at the date of the suit) for the winding up of the business of a ginning factory and for distributing among the shareholders any surplus that might remain, after providing for the payment of its debts, under s. 265 of Act IX of 1872, and the Assistant Judge, to whom it was referred for trial by the District Judge, directed the dissolution of the partnership and the winding up of its business, the High Court on appeal reversed the decree of the Assistant Judge, and returned the plaint to the plaintiffs for its presentation to the proper Court.

Quære—whether the District Judge had power, under the Bombay Civil Courts' Act XIV of 1869, to refer to the Assistant Judge a case falling under s. 265 of Act IX of 1872. SORABJI FARDUNJI v. DULABHBHAI HARGOVANDAS, 5 B. 65=5 Ind. Jur. 426 ... 45

(13) S. 265—Appeal—Stamp—Court Fees Act VII of 1870, s. 7, cl. iv (*f*)—See STAMP, 6 B. 143.

Contribution.

See ACT VII OF 1863 (SUMMARY SETTLEMENT), 6 B. 244.

Contributory.

See COMPANY, 5 B. 223.

Cooking Vessels.

See CASTE QUESTION, 5 B. 83.

Co-parcener.

(1) Attachment and sale of the interest of one of several co-parceners in execution —Possession—See DECREE, 5 B. 493.

(2) Power of, to alienate his undivided share in ancestral estate—See HINDU LAW (ALIENATION), 5 B. 48.

(3) Sale of undivided share of ancestral estate—Purchaser at such sale should sue for partition, not possession—See EXECUTION OF DECREE, 5 B. 496.

(4) See APPEAL (GENERAL), 6 B. 113.

(5) See HINDU LAW (PARTITION), 5 B. 499.

Costs.

(1) See ARBITRATION, 6 B. 528.

(2) See CIV. PRO. CODE (ACT X OF 1877), 6 B. 590.

(3) See DIVORCE, 6 B. 487.

(4) See MINOR, 5 B. 306.

Court-fee.

See CIV. PRO. CODE (ACT X OF 1877), 5 B. 400.

Court Fees Act (VII of 1870).

(1) *Memorandum of appeal—Stamp—Suit for recovery of land and money.*—In deciding the amount of stamps to be borne by the memorandum of appeal, the High Court is not bound by the decision of the Court of first instance as to the stamp on the plaint. MOTIGAVRI v. PRANJIVANDAS, 6 B. 302 =6 Ind. Jur. 428 ... 658

(2) S. 7 cl. iv (*f*)—See STAMP, 6 B. 143.

(3) *S. 7, cl. ix, item 1, sch. 1—Suit against a mortgagee for the recovery of a portion of property mortgaged.*—In cases in which it is competent to the mortgagor to sue to recover a portion of the mortgaged property, the debt must be regarded as distributed over the whole property; and, as regards the portion of the property sued for, "the principal money expressed to be secured" must be taken to be the proportionate amount of the debt for which such portion of the property is liable. BALKRISHNA v. NAGVEKAR, 6 B. 324 ... 673

Court Fees Act (VII of 1870)—(*Concluded*).

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(4) S. 19—Written statement—Court fee—The Code of Civil Procedure, Act VIII of 1859, s. 120—Act X of 1877, s. 110—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 400.

(5) Sch. I, art. II—See PROBATE, 6 B. 452.

Covenant.

Right to sue—Stranger to consideration—Building leases—Landlord and tenant—See ARBITRATION, 6 B. 528.

Crim. Pro. Code (Act XV of 1872).

(1) *S.* 122—*Evidence—Confession certificate—The Indian Evidence Act, I of 1872, s.* 30.—If the certificate required by s. 122 of the Code of Criminal Procedure (Act X of 1872) that a confession is voluntarily made is not recorded by the Magistrate at the time the confession is made, or, at any rate, on the day it is reduced to writing, the confession is bad and inadmissible in evidence.

To render the statement of one person jointly tried with another for the same offence liable to consideration against that other, it is necessary that it should amount to a distinct confession of the offence charged. EMPRESS v. DAJI NARSU, 6 B. 288=6 Ind. Jur. 480 ... 649

(2) *S.* 147—*Dismissal of complaint—Revival of compiaint* —A person made a complaint to the police that the accused had enticed away his wife (a non-cognizable offence), and committed theft (a cognizable offence). The police inquired into the latter offence only; and, finding no *prima facie* case made out, reported to that effect to a Magistrate, who directed that that offence be expunged from the list of reported offences.

Held that, under the circumstances, there had been no dismissal of the complaint in respect of the former offence, and that there was no bar to the complaint into that offence being taken up and proceeded with. THE GOVERNMENT OF BOMBAY v. SHIDAPA, 5 B. 405=6 Ind. Jur. 37 ... 267

(3) *Ss.* 186 *and* 423—*Lunatic—Imbecile—Inability to understand proceedings.*—The provisions of s. 186 of the Code of Criminal Procedure do not apply to a person who is of unsound mind; they apply to persons who are unable to understand the proceedings from deafness or dumbness, or ignorance of the language of the country, or other similar cause. But where the inability to understand the proceedings is due to unsoundness of mind, the procedure provided in Chap. XXXI of the Code must be followed.

Where a Magistrate found that an accused person convicted of theft was an imbecile, and consequently unable to understand the proceedings, but that he was not of unsound mind, the High Court held that this distinction was without a difference, and, under s. 297 of the Court, annulled the conviction, and declaring the accused to be of unsound mind, directed that he should be released on sufficient security being given that he would be properly taken care of, and prevented from doing injury to himself or any other person, and for his appearance when required; and that, in default of such security being given, the case should be reported to Government. EMPRESS v. HUSEN, 5 B. 262 ... 173

(4) S. 250—See EVIDENCE, 6 B. 124.

(5) S. 278—See PRACTICE, 6 B. 14.

(6) S. 468—See SANCTION, 5 B. 137.

(7) Ss. 472, 473—See SANCTION TO PROSECUTE, 6 B. 479.

(8) *S.* 521—*Order by Magistrate for removal of obstruction from a public thoroughfare—Suit against Magistrate to establish right—Substitution of parties—Amendment of plaint—Procedure—Practice—Civ. Pro. Code (Act X of 1877), s.* 416—*Bombay Act V of* 1879, *s.* 37.—Under s. 521 of the Crim. Pro. Code (Act X of 1872), a First Class Magistrate in charge of a taluka made an order declaring certain land to be part of a public thoroughfare, and directing the plaintiff to remove the obstruction caused by him to it. The plaintiff sued the Magistrate to establish his right to the land, alleging that it was his private property, and that the Magistrate's order was wrong. The Assistant Judge, who tried the suit, dismissed it, holding that it did not lie against the Magistrate. On appeal to the High Court.

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Crim. Pro. Code (Act XV of 1872)—(*Concluded*).

Held that the Assistant Judge might have properly permitted the plaintiff to amend his suit by striking out the name of the First Class Magistrate as defendant, and substituting in that capacity the Secretary of State for India in Council.

The High Court, accordingly, reversed the decree of the Assistant Judge, and remanded the suit for retrial on the merits, after making the amendment directed. NILKANTHAPA v. THE MAGISTRATE OF SHOLAPUR, 6 B. 670 ... 902

(9) *Ss.* 523 *and* 526—*Civ. Pro. Code* (*Act* X *of* 1877), *s.* 416—*Practice—Procedure—Amendment of plaint—Substitution of parties—Order by Magistrate for removal of obstruction from public thoroughfare—Suit to establish right.*—On the 11th August 1879, the defendant, as a Magistrate in charge of a taluka, made an order under ss. 523 and 526 of the Crim. Pro. Code (Act X of 1872), directing the plaintiff to remove a certain "*ota*," on the ground that it had been built upon a public thoroughfare. The plaintiff thereupon sued the Magistrate for a declaration that the "*ota*," and site belonged to him, and prayed for a reversal of the Magistrate's order. The Assistant Judge, who tried the suit, dismissed it, holding that it did not lie against the defendant.

On appeal, the High Court reversed the decree of the Assistant Judge, and remanded the case, in order that the plaintiff might amend his suit by striking out the name of the First Class Magistrate as defendant, and substituting in that capacity the Secretary of State for India in Council, and directing the lower Court to determine the suit upon its merits after the above amendment and due service of process. BALARAM CHATRUKLAL v. THE MAGISTRATE OF IGATPURI, 6 B. 672 ... 903

(10) *S.* 530—*Mamlatdar's finding as to possession—Magistrate's finding as to possession—Actual possession—Dispossession—Cause of action*—Res judicata.—A Mamlatdar's finding as to the point of actual possession is not conclusive.

A Magistrate's finding is conclusive under s. 530 of Act X of 1872.

Possession actually taken by a person having a right to it is not the less effective as perfecting his title, by reason of an irregularity in taking it. Subsequent ouster will give rise to a new cause of action. LILLU v. ANNAJI PARASHRAM, 5 B. 387 ... 255

Customs.

See ACT VII OF 1873 (SALT), 6 B. 251.

Cutchi Memon Mahomedan.

See PROBATE, 6 B. 452.

Damages.

(1) Suit for non-acceptance—Dispute as to quality of goods tendered—Right to examine goods—Survey—Reasonable time for examination of goods by purchaser—Contract Act (IX of 1872), s. 38—See CONTRACT, 6 B. 692.

(2) See ACT III OF 1874 (HEREDITARY OFFICERS, BOMBAY), 6 B. 129.

(3) See DEFAMATION, 5 B. 580.

(4) See EJECTMENT, 5 B. 572.

(5) See JURISDICTION, 6 B. 116, 122.

(6) See RES JUDICATA, 6 B. 110.

Damdupat.

See EXECUTION OF DECREE, 5 B. 127.

Decree.

(1) *Attachment—Jurisdiction.*—One Dhondu applied to the Subordinate Court of Sasved for the attachment and sale of certain immoveable property in execution of a money decree, under which the sum of Rs. 1,317-4-9 was due to him from his judgment-debtor. On the attachment of the property the applicant presented a petition to the Court to the effect that he (applicant) had a mortgage lien on the property for Rs. 10,368, and that it might be sold subject to his lien and possession as mortgagee. The

Decree—(*Continued*).

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Subordinate Judge raised the question whether he had jurisdiction to entertain the application and inquire into the merits of the alleged mortgage. He was of opinion that he had, and referred the question for the opinion of the High Court, which concurred in his opinion and answered the question in the affirmative PURSHOTAM SIDHESHWAR v. DHONDU AMRIT, 6 B. 582.

(2) Civ. Pro. Code (Act X of 1877), s. 295—Sale—Assets—Distribution—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 16. ... 843

(3) Civ. Pro. Code (Act X of 1877), s. 296, cl. (*j*)—Labourer—Wages—Execution Attachment—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 132.

(4) Execution application for—Decree—Limitation—Civ. Pro. Code (Act X of 1877), s. 230—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 245.

(5) Execution, application for—Limitation Act (IX of 1871) sch. II, art. 167—See LIMITATION ACT (IX OF 1871), 5 B. 246.

(6) Execution—Decree on bond specially registered—Registration Act XX of 1866, ss. 53 and 55—Summary decision—Civ. Pro. Code (Act X of 1877), ss. 2, 234 (*c*), 591—Right of appeal—Limitation Act (IX of 1871), sch. II, arts. 166 and 167—Decree or order in regular suit—Act XVI of 1859, ss. 20 and 22—Applications for execution in suits instituted before 1st April, 1873—See EXECUTION OF DECREE, 5 B. 673.

(7) Execution—Sale of share of one co-parcener—Undivided Hindu family—Ancestral estate—Purchaser at such sale should sue for partition, not for possession—Mortgage by co-parcener of his undivided share—Mortgage affected by acts of mortgagor—Res judicata—Amendment of plaint—See EXECUTION OF DECREE, 5 B. 496.

(8) Execution—Sale—Purchase by son of decree-holder—The Code of Civil Procedure, Act X of 1877, s. 294—See EXECUTION OF DECREE, 5 B. 130.

(9) *Execution—Undivided Hindu family—Attachment and sale of the interest of one co-parcener—Possession.*—A obtained a decree in a suit against B, and executed it by the sale of certain plots of land which B alleged belonged to him—A himself becoming the purchaser thereof. A entered into possession of the plots of land under his purchase, and remained in possession thereof for a considerable time. As a matter of fact, the plots of land belonged—part absolutely and part as to mortgagees in possession—not to B solely, but jointly to him and his father C and others, the members of an undivided Hindu family.

A suit having been brought by C to recover possession of the said plots of land from A, and for mesne profits, and for payment over of a sum of Rs. 800 paid to A by the mortgagor of the mortgaged property in redemption of his mortgage.

Held that A was entitled to stand in B's place, and to retain possession in respect of B's share in the said land, but no further; and that he held the mesne profits and the said sum of Rs. 800 as trustee for the other members of the said undivided family to the extent of their shares in the family property. DUGAPPA SHETI v. VENKATRAMANAYA, 5 B. 493 ... 325

(10) Final, what is—Privy Council, appeal to—Certificate as to value of subject-matter of the suit—Interlocutory order—Civ. Pro. Code (Act X of 1877), ss. 595, 600—See APPEAL (TO PRIVY COUNCIL), 6 B. 260.

(11) Fraud—Decree when binding—Effect of fraud—Parties—And privies to suit—Strangers to suit—Collusive fraud between parties in obtaining decree—Civ. Pro. Code (Act X of 1877), s. 13—Res judicata—Evidence Act (I of 1872), s. 44—Khoja Mahomedan administrator with the will annexed—See FRAUD, 6 B. 703.

(12) Injunction restraining execution—Practice—Revival of proceedings by representative of decree-holder—Substitution of name of representative on the record—Limitation Act XV of 1877, sch. II, arts. 178-179—Act IX of 1871, art. 167—See EXECUTION OF DECREE, 5 B. 29.

(13) *Limitation—Suit on decree the execution of which is barred by limitation—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 122—*Civ. Pro. Code* (*Act* XI *of* 1877), *s.* 244—*Suit in High Court on judgment of Small Cause Court—Practice—Averments in plaint—Evidence necessary in such suits.*—A suit will not lie upon a decree the execution of which is barred by the provisions of the Limitation Act.

Decree—(*Concluded*). PAGE

A suit may be brought in the High Court of Bombay upon a judgment obtained in the Court of Small Causes of Bombay. The execution of the decree in such suits is rigorously confined to immoveable estate.

The ground of the interference of the High Court in such cases, is that, practically, the judgment-creditor could not recover his debt except by process against the immoveable estate of the debtor.

In such cases the plaint must contain an averment, and the plaintiff must establish to the satisfaction of the High Court that there is not any sufficient moveable property of the defendant against which the decree of the Court of Small Causes can be fully executed, and that he has immoveable property situated within the original jurisdiction of the High Court against which execution can be had. FAKIRAPPA v. PANDURANGAPA, 6 B. 7 ... 461

(14) Mortgage—Suit for foreclosure and sale—Parties—Minor—Guardian—Certificate—Madras Reg. V of 1804—Act XX of 1864—Form of decree—See MORTGAGE (FORECLOSURE), 5 B. 14.

(15) Reg. XXVIII of 1827, s. 14, cl. 1 — Mortgage — Execution — Sale — Purchaser of mortgagor's interest—Third party—Stamp — Interest — Damdupat—See EXECUTION OF DECREE, 5 B. 127.

(16) Res judicata—Decree against manager of joint Hindu family binding on members of family, though not parties to suit—Civ. Pro. Code (Act VIII of 1859), s. 2—See HINDU LAW (JOINT FAMILY), 5 B. 685.

(17) Sale *pendente lite*—Prior attachment—*Lis pendens*—See LIS PENDENS, 6 B. 567.

(18) Satisfaction—Assets realized by sale or otherwise—Civ. Pro. Code (Act X of 1877), s. 295—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 588.

(19) Security—Attachment—Code of Civil Procedure (Act X of 1877), s. 484—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 643.

(20) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 5 B. 604.

(21) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 198, 249; 6 B. 146, 148.

(22) See EJECTMENT, 6 B. 215.

(23) See EXECUTION OF DECREE, 5 B. 5.

(24) See LIMITATION ACT (XV OF 1877), 6 B. 258.

(25) See MORTGAGE (FORECLOSURE), 5 B. 14.

(26) See MORTGAGE (PRIORITY), 6 B. 538.

Deed.

Deed of sale set aside—Fraud—Undue influence—Old and illiterate woman near to her death—No independent advice—Inadequate consideration—Terms on which deed will be set aside—Purchase-money declared a charge—Funeral expenses of Hindu widow declared a charge—No allowance for repairs and improvements.—C was the widow of one R, deceased, and from the death of R until her own death remained in occupation of a house and chawl which had belonged to him. D was a sister of C's, and, shortly after R's death, D and her son, B, the first and second defendants, went to live with C on the said property, and lived with C, and were her only companions until C's death. While so living with C, D and B advanced to C at various times, in joint account, various sums of money—amounting to Rs. 3,500—for purposes such as would have justified C in pledging the property of her late husband to secure the repayment of the same. C became very ill; and D and B, fearing she might be going to die, requested her to take some steps to secure to them the repayment of the sums they had advanced to her. C thereupon offered to give D and B an absolute deed of sale of the said house and chawl in consideration of the said sum of Rs. 3,500—already advanced to her, and of an additional sum of Rs. 500 then to be paid to her to defray her funeral expenses and the costs of the said conveyance. D and B consented, and called in their solicitor to take C's instructions and draw up the deed in question, which he accordingly did; and within three days of the said agreement the deed was executed. At that time, C was very ill, and, twelve days after the execution of the deed, C died. C was an illiterate woman, over sixty years of age, and had in this matter no independent professional or other advice. The additional sum of Rs. 500, agreed to be paid to C, was never so paid to her; but, after her death

Deed—(*Concluded*).

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D and her son expended moneys in and about her funeral ceremonies, amounting, as they alleged to, upwards of Rs. 400. The property in question, so pledged to them for Rs. 4,000, was worth, at least, Rs. 5,200. The plaintiff, one of the heirs of R, sued to set the deed aside and for possession of the said property.

Held, that the deed of sale must be set aside as obtained under circumstances which amounted to fraud.

Held, also, that the advances amounting to Rs. 3,500 made to C by D and her son B—being made for purposes for which C would have been justified in pledging the said property—the deed of sale should be set aside only on the terms that the property in question should stand charged with the repayment of the sums so advanced.

Held, also, that the property must stand charged with the repayment to D, and B of such a sum as, having regard to her position and station in life, should be found to be a reasonable sum for the funeral expenses of C.

After C's death, D and B remained in possession of the said property under the deed of sale, and expended considerable sums of money in and about repairs and improvements to the same; and they now claimed that, if the sale was to be set aside, the sums so expended should be repaid to them.

Held that no allowance could be made to D and B for sums so expended by them, such sums having been expended at a time when D and B must be taken to have known that they were fraudulently in possession of the property in question. SADASHIV BHASKAR JOSHI v. DHAKUBAI, 5 B. 450 ... 297

Defamation.

Defamation of a deceased person—Suit by surviving member of family of deceased—Cause of action—Damage to reputation of family of deceased by reason of defamation of deceased.—A suit for defamation can only be brought by the person who has been defamed. The fact that the defamatory statement has caused injury to other persons, does not entitle them to sue.

A suit brought by the heir and nearest relation of a deceased person for defamatory words spoken of such deceased person, but alleged to have caused damage to the plaintiff as a member of the same family, *held* not maintainable. LUCKUMSEY ROWJI v. HURBUN NURSEY, 5 B. 580 = 6 Ind. Jur. 138 ... 382

Deposit.

See CIV. PRO. CODE (ACT X OF 1877), 5 B. 575.

Deshmukh.

Jurisdiction of Civil Courts—See ACT XXIII OF 1871 (PENSIONS), 6 B. 209.

Dignity.

See JURISDICTION, 6 B. 116.

Directors.

See BILL OF EXCHANGE, 5 B. 92.

Discharge.

Prosecution, malicious action for—Reasonable and probable cause—Effect of order of discharge of a person accused of an offence before a Magistrate—Presidency Magistrates' Act IV of 1877, ss. 87, 121, 122—See ACT IV OF 1877 (PRESIDENCY MAGISTRATE) 6 B. 376.

Disclaimer.

See EJECTMENT, 5 B. 208.

Discretion.

Judicial—Appeal—Review—Judge—Limitation—See JUDGE, 6 B. 304.

Divorce.

(1) *Husband and wife—Appeal by a wife from order made in suit for divorce—Wife's costs—Surety for costs—Memorandum of appeal admitted without requiring security—Limitation Act XV of 1877, s. 5—Period of limitation expiring during vacation—Power of Prothonotary to receive and file memorandum of appeal presented on the day the Court re-opens.*—In a suit for

Divorce—(*Continued*).

divorce brought by a wife against her husband, the wife obtained a decree *nisi* which ordered the respondent to pay a monthly sum by way of alimony to the wife, and also ordered him to pay the wife's costs of suit. Under this decree a sum of Rs. 3,369 was due to the wife, on the 26th May 1882. The wife appealed from an order made in the suit, and the Court, under the circumstances, admitted the appeal without requiring from the appellant the usual security for costs.

Where the period of limitation for the filing of an appeal has expired during vacation, a party to a suit has a right, under the provisions of the Limitation Act (XV of 1877), to have his appeal admitted on the day the Court re-opens, and the Prothonotary of the High Court has power to receive and file a memorandum of appeal on that day. KING v. KING, 6 B. 487 ... 779

(2) *Indian Penal Code (Act XLV of 1860), ss. 494 and 109—Marrying again during the lifetime of husband—Abetment—Divorce among Rajput Guzars in Khandesh—Deed of divorce by husband—Validity of divorce.* — A member of the caste of Ajanya Rajput Guzars residing in Khandesh executed a deed of divorce to his wife The Court held on the evidence that the deed was proved, and that in this case a husband was for a sufficient reason, such as incontinence, allowed to divorce his wife; that the deed in the present case had not been executed for a sufficient reason; and that, consequently, the parties entering into a second marriage were guilty of an offence under s. 494 of the Indian Penal Code (XLV of 1860); and that the priest who officiated at that marriage was an abettor under ss. 494 and 109.

Mere consent of persons to be present at an illegal marriage, or their presence in pursuance of such consent, or the grant of accommodation in a house for the marriage, does not necessarily constitute abetment of such marriage. EMPRESS v. UMI, 6 B. 126 ... 542

(3) *Intervenor—Right of third person to intervene—Procedure in case of intervening after decree* nisi—*Right to move for new trial—Practice—Procedure—Review—Motion to make absolute a decree* nisi—*Discretion of Court to refuse motion—Further inquiry ordered by Court—Indian Divorce Act IV of* 1869.—A wife sued for dissolution of marriage on the grounds of her husband's adultery and cruelty. The respondent entered an appearance through a solicitor, but did not file any written statement, and did not appear at the hearing and a decree was made for the petitioner on the 26th July 1881. On the 3rd October, T., who had acted as solicitor for the respondent, appeared as intervenor, and under s. 16 of the Indian Divorce Act (IV of 1869) obtained a rule *nisi* calling on the petitioner to show cause why a new trial should not be had and all further proceedings under the decree *nisi* should not be stayed. The rule was obtained upon an affidavit of T., in which he stated that since the date of the decree *nisi* he had been informed by the respondent that the petitioner had been, prior to that date, guilty of adultery with a person whose name he mentioned; that he was informed by the respondent that the reason why he (the respondent) had not defended the suit was that he wished to avoid making public the fact of his wife's adultery, and thus injuring the prospects of his children; that application had been made both to the Advocate General of Bombay and to the Government Solicitor that they should intervene as representing the Queen's Proctor in India, but that both had declined. The respondent also filed an affidavit corroborating the statements made in T's affidavit. In showing cause against the rule it was contended on behalf of the petitioner that, under the Indian Divorce Act (IV of 1869), the proper course for a third person wishing to intervene was to file an appearance, and then to show cause on the motion to make absolute the decree *nisi*, and that the rule for a new trial was wrong in form.

Held that a new trial could not be granted, there being no provision in the Civ. Pro. Code (Act X of 1877) for the granting of a new trial. The respondent himself could only have applied for a review of judgment under s. 623, and, even if otherwise entitled to a review the motion of the 23rd October 1881, regarded as an application for a review, was too late under cl. 162, sch. II of the Limitation Act (XV of 1877). Assuming that a third person had the right to apply for a review of judgment, T's application of 3rd October 1881, was also barred.

Divorce—(*Concluded*).

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Held, also, that, under the Indian Divorce Act (IV of 1869), a third person may show cause against a decree *nisi* being made absolute, but is not at liberty to institute proceedings, *e.g*, by obtaining a rule, as was done in this case.

Held, also, that T., who had been the solicitor to the respondent and who was, in fact, acting at the instance of the respondent, was not entitled to intervene or to show cause against the decree being made absolute. A respondent has no right to show cause, and he cannot do indirectly through another what he is not permitted to do himself.

Counsel on behalf of the petitioner subsequently moved to make the decree *nisi* absolute, and contended that the Court having held that T. had no right to intervene or to show cause, the affidavits filed by him should be disregarded and taken off the file, and that, no cause having been shown by any other person, the petitioner was entitled, under the provisions of s. 16 of the Indian Divorce Act (IV of 1869), to have the decree made absolute. The Court, however, refused the motion, and adjourned the case, directing that the petitioner should attend personally on a day specified, in order that the matters alleged in the affidavits might be investigated. KING v. KING, 6 B. 416 ... 733

(4) See PENAL CODE (ACT XLV OF 1860), 6 B. 126.

Divorce Act (IV of 1869).

S. 16—See DIVORCE, 6 B. 416.

Document.

(1) See HINDU LAW (ALIENATION), 5 B. 621.

(2) See REGISTRATION ACT (III OF 1877), 5 B. 143, 232.

Easement.

Continuing nuisance—Limitation—Prescription—Act XV *of* 1877, *ss.* 23 *and* 26. —From time immemorial, and certainly for more than twenty years prior to the date of the obstruction by the defendants, the plaintiff enjoyed the right of having an egress for his rain water through a drain in the defendant's land. The plaintiff, more than two years after the date of the obstruction, sued the defendants for the removal of the obstruction.

Held that though, under the circumstances, the plaintiff had failed to prove a title acquired under s. 26 of Act XV of 1877, yet the plaintiff, having a title, evidenced by immemorial user, did not require the aid of that Act; and inasmuch as the obstruction complained of constituted a continuing nuisance as to which the cause of action was renewed *de die in diem*, the plaintiff's claim was not barred by any provision of the Act, but, on the contrary, was saved by the express provision of s. 23. PUNJA KUVARJI v. BAI KUVAR, 6 B. 20 ... 470

Ejectment.

(1) *Burden of proof—Evidence—Title by possession—Decree—Attachment and sale under a decree of property claimed by a third person—Suit by a third person to establish his title—Civ. Pro. Code* (*Act* VIII *of* 1859), *ss.* 230-246. —S. obtained a money decree against the sons and heirs of A., and under that decree attached a shop as part of A's estate. N. (father of A.) applied to have the attachment removed under s. 246 of the Civ. Pro. Code (Act VIII of 1859), alleging that the shop was his. The application was rejected, and the shop was sold in execution, and bought by P., the defendant. N. then brought this suit against P. (the purchaser) to establish his title. The Subordinate Judge dismissed the suit. In appeal, the District Judge reversed that decree, holding that the plaintiff had been in possession of the shop, and had proved his title. The defendant appealed to the High Court.

Held that the plaintiff having proved his possession at the date of the execution sale, it lay upon the defendant (*P.*), who claimed the property, to prove a title in himself or in the judgment-debtor A., and that, he having failed to do this, the plaintiff was entitled to a decree declaratory of his right to the property as against the defendant.

Possession is a good title against all persons except the rightful owner, and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses him.

Ejectment—(*Continued*). PAGE

The above rule held to be applicable where the plaintiff alleged title by conveyance, and also relied upon possession, but failed to prove his title while his possession was held proved.

Where a dispossessed party proceeds, under s. 230 of Act VIII of 1859, to vindicate the possession of which he has been deprived, although he may give evidence of his title, he is not bound to do so, but may rest his right to recover on his possession, and cast upon the decree-holder the burden of proving his title, *i.e.*, his right to dispossess the applicant.

Per WEST, J.—A person in possession of property which is sold in execution as that of another, is not called upon, when suing to establish his title, to prove his proprietorship as by an action *in rem* against all the world. It is enough if he establishes a good title as against the judgment-debtor whose right has been sold; and as he is in possession, that possession in itself affords a ground for an assertion of full proprietorship for the purpose of the suit except so far as the right vested in the judgment-debtor can be shown affirmatively to contradict or qualify it. Possession constitutes an interest requiring affirmative proof of a superior title on the part of any one who seeks to disturb it, and, therefore, where a person in possession of property which has been sold in execution as being the property of another sues to establish his title to such property, the burden of proof lies, and upon him, but upon the person who claims as purchaser at the execution sale. PEMRAJ BHEVANIRAM v. NARAYAN SHEVARAM, 6 B. 215 (F. B.)=6 Ind. Jur. 416 ... 601

(2) *Damages on account of rent—Suit for use and occupation—Trespass—Mesne profits—Court of Small Causes—Jurisdiction.*—The plaintiff, alleging that the defendant, without her permission, removed a lock placed by her on her house and took possession of it, sued in a Court of Small Causes for "damages on account of rent" of which she was thus deprived. The Court, regarding the suit as one for use and occupation, made a decree in favour of the plaintiff.

Held, that the suit was not rightly regarded as one for use and occupation, for the claim was not based on any contract, express or implied: it should have been regarded as an action of trespass, brought to try a question of title, an action in which the Court of Small Causes had no jurisdiction. The plaintiff's proper remedy was by an action of ejectment in the ordinary Civil Courts, to which, if he chose, he could add a claim for mesne profits for the period during which the defendant had been in occupation.

The decree of the Court of Small Causes was, accordingly, annulled. JAMNADAS v. BAI SHIVKOR, 5 B. 572=6 Ind. Jur. 96 ... 376

(3) *Evidence—Burden of proof.*—In an ejectment suit where the plaintiff claims land from which he alleges that he has been dispossessed, the general rule is that the burden is upon the plaintiff to show possession and dispossession within twelve years, or, at least, that the cause of action arose within twelve years, and this rule is not intended to be interfered with by the Privy Council in *Radha Gobind Roy* v. *Inglis*. MORO DESAI v. RAMCHANDRA DESAI, 6 B. 508 ... 794

(4) Inamdar—Landlord and tenant—Notice to quit—See LANDLORD AND TENANT, 6 B. 70.

(5) Inamdar—Notice to quit—Partition—See LANDLORD AND TENANT, 6 B. 67.

(6) *Possession—Suit to recover possession under Specific Relief Act* (I *of* 1877), *s.* 9—*Proper parties in such suit—Mis-statement in pleading of area of land sued for—Interest in land—Disclaimer—Estoppel.*—The plaintiffs sued under s. 9 of the Specific Relief Act (I of 1877), to recover possession of certain lands which they alleged had been in their possession since 1856. They alleged that while retaining possession of the said land through caretakers appointed by them, they had been in the habit of yearly selling the grass of the land to purchasers who themselves cut the grass so purchased; that in 1878 the grass of the land for the ensuing year was sold to T; that in the month of August 1879, the defendants forcibly dispossessed the plaintiffs of said land, and prevented them and their servants and T from entering the same. Defendant No. 2 denied the dispossession, and disclaimed any interest in the land. Defendants Nos. 1 and 3 denied that the land in question belonged to the plaintiffs, and alleged that

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it was the property of A, of whom defendant No. 1 was manager, and No. 3 the lessee of the said land. They also alleged that the plaintiffs had tried to take forcible possession of the said land, and that defendant No. 1, acting on A's behalf, prevented them. They submitted that A was a necessary party to the suit.

Held that the three defendants were properly made parties to the suit, and that A was not a necessary party. Defendant No. 1 (the lessee) had the physical occupation of the land sued for; but all three defendants, not having made any declaration, in taking possession, that it was taken for one or two of their number, acquired it jointly, and handed on a derivative possession to the actual occupant, which as against third parties ranked as their own. If it was properly assumed, they all had a right to defend it; if not, they might all be called on for restitution. As to A, he was not actually in possession, and had taken no personal part in the dispossession. He was said to be owner, but that did not imply that he committed the alleged acts of defendants, or insisted on his ownership. As he had not the physical possession of the land, it could not be assumed that he had the jural possession merely on the assertion of the defendants. He, therefore, having done no palpable wrong, was not a necessary party.

Held, also, that defendant No. 2 was properly made a defendant, and that, in case the dispossession should be established, he should be retained as a defendant notwithstanding his disclaimer. It was possible that No. 3, held the land on terms beneficial to No. 2, and the disclaimer in the present suit would not estop No. 2 from enforcing these terms in a subsequent suit against No. 3.

Where, under a contract between A and B, an exclusive occupation of immoveable property is given to A, he is the proper plaintiff in a suit for possession brought under s. 9 of the Specific Relief Act (I of 1877). If B desires to sue immediately on the possessory right, he should sue in A's name, though for an injury to the reversion he (B) may properly sue in his own name.

The intention of the Specific Relief Act (I of 1877), s. 9, is not to be frustrated by any private arrangement under which the ejector has acted, or by which he may consent to hold on behalf of some other person. As between him and that person, his possession may be that of an agent, but to the former holder he is the dispossessor: possession derived from him cannot be superior to his, and (the right of suit being given in general terms) is equally subject, as his, to the result of proceedings taken within the prescribed six months.

A person who has been ejected from his property in suing to recover it under s. 9 of the Specific Relief Act (I of 1877), may sue the actual ejector or the person under whose orders or by whose authority the actual ejector has acted, or he may sue both; but the wrong-doer who has taken possession is the one from whom primarily it is to be reclaimed. If a third party, desire to maintain the expulsion as an act done on his behalf, it is for him to come forward and avow it. He may claim to be admitted as a defendant; but if he had himself a right to do what his agent has done, his right and his authority may be pleaded by the agent, and will be an effectual answer. The alleged owner or principal, therefore, is not a necessary party for the protection of the agent. The suit against the latter will fail if he acted on due authority where that authority is shown.

In a suit for ejectment a mere mis-statement of the area of the land sought to be recovered ought not to be regarded as any thing more than a "false demonstration." If the space is precisely defined by other description, the statement of its measurement in square yards may be treated as surplusage, and of no consequence. VIRJIVANDAS MADHAVDAS v. MAHOMED ALI KHAN IBRAHIM KHAN, 5 B. 208 ... 139

(7) See SMALL CAUSE COURT, 6 B. 79.

(8) See VENDOR AND PURCHASER, 6 B. 380.

Election.

See COMPANY, 6 B. 326.

Endorsement.

See GIFT, 5 B. 268.

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Estoppel.

(1) Mortgage—Execution—Sale—See EXECUTION OF DECREE, 5 B. 2.

(2) See ACT III OF 1874 (HEREDITARY OFFICERS, BOMBAY), 6 B. 463.

(3) See EJECTMENT, 5 B. 208.

(4) See EXECUTION OF DECREE, 5 B. 5.

(5) See MAHOMEDAN LAW (WAKF), 6 B. 42.

Evidence.

(1) Burden of proof — Ejectment—Title by possession—Decree—Attachment and sale under a decree of property claimed by a third person—Suit by a third person to establish his title—Civ. Pro. Code (Act VIII of 1859), ss. 230-246—See EJECTMENT, 6 B. 215.

(2) Burden of proof—Forfeiture—See GOSAINS, 5 B. 682.

(3) Burden of proof—Suit by consignee for excess freight—See BILL OF LADING, 5 B. 313.

(4) *Confession—Admission—Self-exculpatory statement to police officer in police custody—Indian Evidence Act I of* 1872, *ss.* 25 *and* 26—*Re-trial.*—A statement made to a police officer by an accused person while in the custody of the police, although intended to be made in self-exculpation and not as a confession, may be nevertheless an admission of a criminating circumstance, and, if so, under ss. 25 and 26 of the Indian Evidence Act I of 1872, it cannot be proved against the accused.

After excluding evidence improperly admitted and put before the jury, the High Court found that the remaining evidence was not of such a character that a conviction might reasonably be based upon it. It accordingly reversed the conviction and sentence of the accused, declining to order his retrial. EMPRESS v. PANDHARINATH, 6 B. 34 ... 479

(5) Confession—Certificate—The Indian Evidence Act, I of 1872, s. 30—See CRIM. PRO. CODE, ACT X OF 1872, 6 B. 288.

(6) Confession—Indian Evidence Act, I of 1872, s. 30—Joint trial—Dacoity—Receiving stolen property—Indian Penal Code, ss. 395 and 412—See PENAL CODE (ACT XLV OF 1860), 5 B. 63.

(7) *Confession—Joint trial—Evidence Act* (*I of* 1872), *s.* 30—*The Code of Criminal Procedure* (*X of* 1872), *s.* 250.—The two accused persons were jointly tried before the Session Judge on a charge of murder. Session Judge examined each of the accused in the absence of the other, making the latter withdraw from the Court during the examination of the former, though without objection from the pleaders of the accused persons.

Held that the examination of each accused could be used only against himself, and not against his fellow accused. EMPRESS v. LAKSHMAN BALA, 6 B. 124=6 Ind. Jur. 317 ... 540

(8) Ejectment—Burden of proof—See EJECTMENT, 6 B. 508.

(9) *Possession of stolen goods—Presumption—Dishonest receipt of stolen property—Dacoity—Jury.*—In considering whether the possession of stolen goods raises a presumption of dishonest receipt of stolen property, the attention of the jury should be drawn to the necessity of satisfying themselves that the possession is clearly traced to the accused.

The fact of stolen property being found concealed in a man's house would be sufficient to raise a presumption that he knew the property to be stolen property, but it would not be sufficient to show that it had been acquired by dacoity. EMPRESS v. MALHARI, 6 B. 731 ... 943

(10) Registration Act III of 1877, cls. *b* and *h* of s. 17—Document creating a right to obtain another document—Pleading—Admission—Effect of admission in pleading of execution of contract—Evidence to prove an admitted document not necessary—Evidence—See REGISTRATION ACT (III of 1877), 5 B. 143.

(11) *Registration—Act* III *of* 1877, *s.* 17. *cl.* (c)—*Mortgage—Receipts by mortgagee—Suit on mortgage payable on demand—Amendment of plaint.*—Unregistered receipts given by a mortgagee to a mortgagor for sums paid on account of the mortgage-debt are not inadmissible in evidence under cl. (c), s. 17, of the Registration Act III of 1877.

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Where a mortgage-debt is payable on demand, the mortgagee ought to sue, not for interest only, but for an account and payment of what remains due on the mortgage for principal and interest up to the filing of the plaint. ANNAPA v. GANPATI, 5 B. 181. ... 112

(12) Registration Act III of 1877, ss. 17, 49, cls. (*b*) & (*c*)— Unregistered document—Document to contradict witness—Meaning of word "declare" in s. 17 of Act III of 1877—Acknowledgment, necessity for registration of—See REGISTRATION ACT (III OF 1877), 5 B. 232.

(13) Stamp—Intention to defraud Government of stamp revenue—Regulation XVIII of 1827, s. 13—Act XXXIV of 1860, s. 13—Act X of 1862. s. 15—Admissibility of insufficiently stamped document—See HINDU LAW (ALIENATION), 5 B. 621.

(14) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 6 B. 729.

(15) See BENAMI TRANSACTION, 6 B. 717.

(16) See COMMISSION, 6 B. 285.

(17) See DECREE, 6 B. 7.

(18) See HINDU LAW—ALIENATION, 6 B. 520.

(19) See RECEIVING STOLEN GOODS, 5 B. 338.

(20) See SARANJAM, 6 B. 598.

Evidence Act (I of 1872).

(1) Ss. 25 and 26—Evidence—Confession—Admission—Self-exculpatory statement to Police Officer in police custody—Retrial—See EVIDENCE, 6 B. 34.

(2) S. 30—Confession—Evidence—See PENAL CODE (ACT XLV OF 1860), 5 B. 63 ; 6 B. 124.

(3) S. 30—See CRIM. PRO. CODE (ACT X OF 1872), 6 B. 288.

(4) S. 44—See FRAUD, 6 B. 703.

Excise Duty.

See ACT VII OF 1873 (SALT), 6 B. 251.

Execution of Decree.

(1) *Act* XXIII *of* 1861, *s.* 11—*Procedure—Possession—New cause of action.*—A plaintiff, who has obtained a decree declaring him entitled to the possession of immoveable property, must, under s. 11 of Act XXIII of 1861, proceed by execution of the said decree, and not otherwise ; if he neglect to do so till he is time-barred, he cannot any the more on that account bring another suit for possession of the same property, whether founded on the old decree in his favour, or on the continued occupation of the said property by the defendant. SAYAD NASRUDIN v. VENKATESH PRABHU, 5 B. 382 ... 251

(2) Application for—Limitation Act (IX of 1871), sch. II, art. 167—See LIMITATION ACT (IX OF 1871), 5 B. 246.

(3) Attachment and sale of the interest of one of several co-parceners—Possession—Undivided Hindu family—See DECREE, 5 B. 493.

(4) Attachment and sale under decree, of property claimed by a third person—Suit by a third person to establish his title—Title by possession—Evidence—Burden of proof—Civ. Pro. Code (Act VIII of 1859), ss. 230-246—See EJECTMENT, 6 B. 215.

(5) Certificate of sale, application for—Limitation Act (XV of 1877), sch. I, art. 178—Civ. Pro. Code, Act VIII of 1859, ss. 256, 257, 259; Act X of 1877, s. 316—Purchaser's right to certificate of sale—See LIMITATION ACT (XV OF 1877), 5 B. 202.

(6) Certificate of sale, application for—Lmitation Act, XV of 1877, sch. II, art. 178—Civ. Pro. Code (Act VIII of 1859), s. 264—Possession without certificate—See CERTIFICATE, 5 B. 206.

(7) Civ. Pro. Code (Act X of 1877), s. 230—Decree—Application for execution—Limitation—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 245.

(8) Civ. Pro. Code (Act X of 1877), s. 266—Jurisdiction—Execution—Attachment of debts arising out of claims over which the Courts have no jurisdiction—Debt—Subject of the Gaikwar—Subject of a Kathiawar State—Rajkot—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 249.

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(9) Civ. Pro. Code (Act X of 1877), s. 266, cl. (*j*)—Labourer—Wages—Attachment—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 132.

(10) Civ. Pro. Code (Act X of 1877), ss. 294 and 295—Competing decree-holders—Purchase by permission of Court—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 570.

(11) Compromise effected by fraud—Execution—Question arising in execution—Separate suit—Act XXIII of 1861, s. 11—Practice—Power of Court to vacate any judgment or order procured by fraud—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 148.

(12) *Decree on bond specially registered—Execution—Registration Act* XX *of* 1866, *ss.* 53 *and* 55—*Summary decision—Civ. Pro. Code* (*Act* X *of* 1877), *ss.* 2, 244 (*c*), 591—*Right of appeal—Limitation Act* IX *of* 1871, *sch.* II, *arts.* 166 *and* 167—*Decree or order in regular suit—Act* XIV *of* 1859, *ss.* 20 *and* 22—*Applications for execution in suits instituted before* 1st *April* 1873.—An appeal lies from an order in execution of a decree made under s. 53 of Act XX of 1866.

An application for the execution of a decree made under s. 53 of Act XX of 1866 falls within art. 166, and not within art. 167, sch. II of Act IX of 1871.

A proceeding under s. 53 of Act XX of 1866, though in the nature of a suit, is not a regular suit, and a decree made in such a proceeding is a decision of a Civil Court other than a decree passed in a regular suit.

The ruling of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry*—that Act XIV of 1859, and not Act IX of 1871, applied to applications in suits instituted before the 1st April 1873—followed.

On the 13th July 1872, the appellant obtained a decree, under s. 53 of Act XX of 1866, on a bond specially registered under s. 52 of that Act. He applied for the execution of it,—first on the 2nd September 1872, and, again, on the 18th August 1875. The Court made an order on the 15th November 1875, dismissing the proceedings on his second application for execution. The decree not being fully satisfied, he again applied for its execution on the 11th September 1878.

Held that the application of the 11th September, 1878, was barred both under s. 22 of Act XIV of 1859 and art. 166 of sch. II of Act IX of 1871, no proceeding having been taken to enforce the summary decree within one year next preceding the said application. BHIKAMBHAT v. JOSEPH FERNANDEZ, 5 B. 673 (**F.B.**) ... 445

(13) *Injunction restraining execution—Practice—Revival of proceedings by representative of decree-holder—Substitution of name of representative on the record—Limitation Act* XV *of* 1877, *sch.* II, *arts.* 178, 179—*Act* IX *of* 1871, *art.* 167.—J. obtained a decree against the firm of M. R. in 1863, and, on the 16th September, 1869, applied for execution by attachment and sale of certain immoveable property. The property was attached, but the sale was delayed by various causes until the 5th February, 1876, when it was ordered to take place on the 18th March, 1877. Meanwhile P. brought a suit against J., and on the 14th March, 1876, he obtained an injunction restraining J. from proceeding *pendente lite* to the sale of the attached property. J. appealed against the order granting the injunction, which, however, was confirmed on the 26th June, 1878. Meanwhile, on the 22nd January, 1877, J had died, and thereupon the proceedings in the matter of the injunction as well as in P's suit were carried on by G. as his representative. On the 19th January, 1880, P's suit was dismissed, and with it the injunction of the 14th March, 1876, fell to the ground. On the 5th February, 1880, G. applied to have his name substituted for that of J. in the application for execution of the 16th September, 1869, and to proceed with the case, and on the 19th February, 1880, this application was granted, and an order made that execution should be proceeded with on J's application of September 1869, K, as representing the firm of M.R. appealed.

Held that G was entitled to execution.

Where an application for execution has been made and granted, but the right to execute has been subsequently suspended by an injunction or

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other obstacle, the decree-holder may apply for a revival of the proceedings within three years from the date on which the right to apply accrues, *i.e.*, the date on which the injunction or other obstacle is removed: art. 178 of sch. II of Act XV of 1877.

Where a decree-holder, whose right of execution has been thus temporarily suspended, dies, his representative has the same rights as he had himself to apply for and obtain a revival of the proceedings.

Where an injunction obtained against the execution of a decree has been dissolved, the time during which it was in force cannot be deducted under s. 15 of Act XV of 1877 in computing the period of limitation within which an application for execution may be made. S. 15 only relates to injunctions which stay the institution of suits, and the word "suit" does not include an application (s. 3).

It was contended in the above case that G had no right to apply for a revival of proceedings unless his name was substituted on the record as J's representative; that as his right to apply for such substitution accrued immediately upon J's death which had happened more than three years previously, so much of his application of 3rd February, 1880, as related to the substitution of names was barred by art. 178 of sch. II of Act XV of 1877; and that, consequently, the other portion of his application which related to execution was necessarily inadmissible, inasmuch as it depended upon the substitution of G's name, which it was too late to effect.

Held that, under the circumstances of the case, G's right to apply for the entry of his name in the place of that of J could not be regarded as having accrued immediately upon J's death. At that time J's application for execution, being suspended by the injunction, was to all intents and purposes non-existent. It could not be revived until the injunction was removed. During the continuance of the injunction an application by G for the entry of his name could not have been entertained by the Court, inasmuch as J's application for execution was in abeyance, and would never be revived at all in the event of P succeeding in his suit; and even if P failed, it might also happen that J's application would not be revived in favour of G, for, although he might be J's representative at the date of his application, he might be dead before the decision of P's suit. KALYANBHAI DIPCHAND v. GHANASHAMLAL JADUNATHJI, 5 B. 29 ... 21

(14) *Jurisdiction—Collateral inquiry into a mortgage lien on attached property—Insolvency of a judgment-debtor.*—The plaintiff obtained a decree against N. and R. for Rs. 165-11-0 in the First Class Subordinate Court of Satara, and applied for execution against the person of R. When brought before the Court, R. applied to be declared an insolvent under s. 344 of the Civ. Pro. Code (Act X of 1877). The plaintiff then moved the Court to strike off his application for execution, and to send his decree to the Second Class Subordinate Court of Vita for execution. The Satara Court, accordingly, sent the decree to the Vita Court, and granted a certificate to the plaintiff under ss. 223 and 224 of the Civ. Pro. Code. The Satara Court also informed the Vita Court that proceedings were pending in the Satara Court regarding the insolvency of R. On the application of the plaintiff the Vita Court attached certain immoveable property as belonging to N. and R. Thereupon one V. T. claimed a mortgage lien on it for Rs. 9,415-9-3. The Vita Court, therefore, referred for the opinion of the High Court the questions whether it had jurisdiction to inquire into the validity of the mortgage lien claimed by V. T., and whether the execution of the decree in the Vita Court was to be stayed, pending the inquiry into the alleged insolvency of R. in the Satara Court.

Held, that the Vita Court had jurisdiction to inquire into the validity of the alleged mortgage lien; that execution in that Court against R was to be stayed pending the inquiry in the Satara Court regarding his alleged insolvency, but that there was no reason for staying the execution of the decree against N. in the Vita Court. VISHNU DIKSHIT v. NARSINGRAV, 6 B. 584=7 Ind. Jur. 34 ... 844

(15) *Limitation—Act* XIV *of* 1859—*Act* IX *of* 1871—*Applications in suits instituted before the 1st April* 1873—*Act* VIII *of* 1859, *s.* 2—*Act* X *of* 1877, *s.* 13—Res judicata—*Meaning of "suit"*.—The decision, by a competent Court,

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that an application for the execution of a decree is barred by limitation, has the effect of *res judicata* ; and although such decision may be erroneous, yet so long as it remains unreversed in appeal it is valid and binding, and the question cannot be re-opened. A decision, that an application for execution is not time-barred, has a similar effect.

On the 15th April 1868, the plaintiff applied for the execution of a decree held by him against the defendant, and certain houses were thereupon attached. In April 1869, the attachment was raised on the intervention of a third person. The plaintiff then brought a suit to establish his right to attach the houses, and obtained a decree on the 28th February 1871. An appeal was made, and the suit was finally decided in the plaintiff's favour in April, 1873. After the plaintiff had obtained his original decree, and while the appeal was pending, he applied for the sale of the houses in execution on the 30th November 1871, and subsequently made three other applications within three years of each other, the last of which was dated the 30th October, 1876. The Court rejected this last application on the 28th November 1876, on the ground that the execution of the decree was barred, as more than three years had elapsed between the first and second applications (*i.e.*, the applications of the 15th April 1868 and 30th November 1871). The plaintiff appealed against the order ; but his appeal was rejected, because he had failed to produce with it a copy of the order appealed against. The plaintiff took no further steps in that proceeding, but made a fresh application for execution on the 10th August 1878. The Subordinate Judge rejected it on the ground that the execution was barred, the matter being *res judicata*. In appeal, the District Judge reversed that order, and allowed execution. On appeal to the High Court,

Held on the authority of *Mungal Pershad Dichit* v. *Grija Kant Lahiri Chowdry* that the rule of *res judicata* applied, and that the application of the 30th November 1871, was time-barred, and, *a fortiori*, every subsequent application was barred.

Semble.—A proceeding in execution is a proceeding which terminates in a decree as defined by s. 244 of the Civ. Pro. Code (Act X of 1877), and is, therefore, a suit within the meaning of the Code. MANJUNATH BADRABHAT v. VENKATESH GOVIND, 6 B. 54 ... 493

(16) Limitation—Act XV of 1877, s. 14, sch. II, art. 179, cl. 4—The Code of Civil Procedure (Act X of 1877), ss. 374 and 647--See CIV. PRO. CODE (ACT X OF 1877), 6 B. 681.

(17) Limitation Act (XV of 1877), sch. II, cl. 180—Civ. Pro. Code (Act X of 1877), s. 230—See LIMITATION ACT (XV OF 1877), 6 B. 258.

(18) *Mortgage—Sale—Effect of sale in execution of decree*.—A mortgaged his land to B in 1861, which mortgage was then registered, but the mortgagee did not enter into possession. Subsequently in 1866, A leased the same land to C. That lease was registered and C entered into possession. In 1867, B obtained a decree upon his mortgage, and in execution attached and sold the mortgaged property C, who had applied to have this attachment of the land removed, and failed in his application sued to establish his right under the lease and recover possession.

Held, that, under the lease of 1866, he could only take what the mortgagor had to give him, *viz.*, a lease subject to the registered mortgage.

Where a decree is obtained upon his mortgage by a mortgagee and the mortgaged property is sold under the decree for the purpose of paying off the mortgagee, the interest of both mortgagor and mortgagee passes to the purchaser. The mortgagee is estopped from disputing that such is the effect of the sale, so far as his interest is concerned, although the officer of the Court may only have described the sale as one of the right title, and interest of the mortgagor. It is not the practice, in the Mufassal, to require the mortgagee to convey to the purchaser. The transfer takes place by estoppel. SHESHGIRI SHANBHOG v. SALVADOR VAS, 5 B, 5 ... 4

(19) *Mortgage—Sale—Right of purchaser—Effect of sale—Estoppel—Minor—Act* XX *of* 1864.—On 10th September, 1863, A mortgaged a house to B., who registered the deed, but did not obtain possession of the premises. On 2nd July, 1868, A. mortgaged the same house to C., who registered

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the mortgage deed and took possession of the premises. On 10th October, 1868, B. sued on his mortgage, and obtained a decree against A.'s son who was a minor, and who was represented by his mother as his guardian. She, however, had obtained no certificate of administration under the Minors' Act XX of 1864. On 17th December, 1869, the mortgaged property was sold by the Court in execution of B's decree. The plaintiff bought it, and obtained a certificate of sale. On the plaintiff's attempting to take possession of the property, the defendant, who was C.'s widow and heiress, resisted him, and he thereupon sued to recover it.

Held that the plaintiff was entitled to possession. He stood at least in the same position as had been occupied by B. before the sale, and B, as prior mortgagee, had a superior title to that of defendant, who claimed under a subsequent deed.

Where mortgaged property is sold in execution of a decree in a suit brought upon the mortgage, the interest of the mortgagee, at whose instance the sale is made, is held to pass to the purchaser, and the mortgagee is estopped from disputing that such is the effect of the sale. KHEVRAJ JUSRUP v. LINGAYA, 5 B. 2 ... 2

(20) Power of the District Court to withdraw applications for execution—Mufassal Courts of Small Causes—Jurisdiction—Civ. Pro. Code (Act X of 1877), ss. 25 and 647 sch. II—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 680.

(21) Priority as between a purchaser at execution sale and prior mortgage by unregistered *san*-mortgage—See REGISTRATION, 6 B. 193.

(22) Rateable distribution of assets—Civ. Pro. Code (Act X of 1877), s. 295—See CIV. PRO. CODE (ACT X OF 1877), 5 B, 198.

(23) *Reg.* XXVIII *of* 1827, *s.* 14, *cl.* 1—*Mortgage— Sale — Purchaser of mortgagor's interest—Third party—Stamp— Interest— Damdupat.*—The purchaser at a Court sale of the right, title, and interest of the judgment-debtor is a third party within the meaning of s. 14, Reg. XXVIII of 1827, cl. 1, and, therefore, as against him a mortgage deed passed by the latter to a mortgagee is valid—not from the date of its execution, but from that on which it was stamped. NARAYAN DESHPANDE v. RANGUBAI, 5 B. 127 ... 86

(24) Sale—Ancestral estate—Attachment and sale of the interest of one co-parcener—Purchaser at execution sale should sue for partition, not possession—See HINDU LAW, PARTITION, 5 B. 499.

(25) Sale—Code of Civil Procedure, Act VIII of 1859, ss. 268 and 269—Order—Limitation—See CIV. PRO. CODE (ACT VIII OF 1859), 5 B. 440.

(26) *Sale of share of one co-parcener—Undivided Hindu family—Ancestral estate—Purchaser at such sales should sue for partition, not possession—Mortgage by a co-parcener of his undivided share—Mortgage affected by acts of mortgagor*—Res judicata—*Amendment of plaint.*—A mortgagor's acts prior to the date of the mortgage bind the mortgagee; but his subsequent acts do not bind the latter, unless they are done by the mortgagor as agent for the mortgagee.

A, one of three members of an undivided Hindu family, mortgaged his share in the immoveable family property to B. The mortgage recited that the money was raised in order to enable A to sue his co-parceners for partition of the family property and possession of his share therein. A subsequently did bring a suit with that object against his co-parceners, but allowed it to be dismissed against him for default. B now brought a suit against A and his co-parceners for possession of A's share in such family property.

Held that as it was not made out that A, in bringing his suit had acted as the agent of B and at B's request, B's suit was not barred by the dismissal of A's suit.

Held, also, that B's suit, being a suit for possession, was wrongly framed, and was not maintainable, there never having been any partition of the joint family property. Leave, however, was given to B, on certain terms, to amend his plaint, so as to make his suit a suit for partition. KRISHNAJI LAKSHMAN RAJVADE v. SITARAM MURARRAV JAKHI, 5 B. 496 ... 327

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Execution of Decree—(*Concluded*).

(27) Sale of the right, title, and interest of a mortgagor or his heir—Non-joinder—Rights of an auction-purchaser—Equity of redemption—See MORTGAGE (EQUITY OF REDEMPTION), 5 B. 8.

(28) *Sale—Purchase by son of decree-holder—The Code of Civil Procedure, Act X of 1877, s. 294.*—A purchaser by the son of a decree-holder, undivided in interest from his father, is a purchase by the decree-holder within the meaning of s. 294 of Act X of 1877, as it stood previously to its amendment by Act XII of 1879, and is absolutely void, if the purchase were made with funds which were joint property of the father and son.

In the absence of evidence to the contrary, the legal presumption would be that the funds were joint property. NARAYAN DESHPANDE v. ANAJI DESHPANDE, 5 B. 130 ... 88

(29) Satisfaction or part satisfaction out of Court, but not certified—Subsequent execution of decree for full amount—Suit for money previously paid—Limitation Act (XV of 1877), sch. II, art. 161—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 146.

(30) See ACT XIV OF 1877 (BROACH AND KAIRA INCUMBERED ESTATES), 5 B. 448.

(31) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 5 B. 614; 6 B. 31.

(32) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 48; 6 B. 16.

(33) See DECREE, 6 B. 7.

(34) See LANDLORD AND TENANT, 6 B. 67.

(35) See MORTGAGE (PRIORITY), 6 B. 490.

(36) See MORTGAGE (REDEMPTION), 6 B. 139.

Extradition.

See JURISDICTION, 6 B. 622.

Final Decree.

Or order, What is—Privy Council, appeal to—Certificates as to value of subject-matter of the suit—Interlocutory order—Civ. Pro. Code (Act X of 1877), ss. 595, 600—See APPEAL (TO PRIVY COUNCIL), 6 B. 260.

Foreign Judgment.

(1) *Suit on a—Decree—Judgment—Jurisdiction—Native Courts, suit on decree of—Suits in India on judgments of Courts in India—Suit on foreign judgment—Jurisdiction of Small Cause Court—Civ. Pro Code (Act X of 1887), s. 434.*—No suit is maintainable in any Court in British India founded upon the judgment of a Court situate in a Native State.

The Courts of British India cannot enforce the decrees of any Native Courts, except as provided by s. 434 of the Civ. Pro. Code, Act X of 1877. Under that section the decrees of certain Native Courts may be executed in British India, as if they had been made by the Courts of British India.

A suit will not lie in the Courts of India upon the judgment of any Court in British India. The only exception to this rule is in the case of judgments of a Court of Small Causes on which suits are permitted to be brought in the High Court in order to obtain execution against immoveable property.

A foreign judgment creates on obligation belonging to the class of implied contracts.

A Court which entertains a suit on a foreign judgment cannot institute an inquiry into the merits of the original action or the propriety of the decision.

Quare—Whether suits on foreign judgments are maintainable in the Civil Courts of India? BHAVANISHANKAR v. PARSADRI, 6 B. 292=6 Ind. Jur. 424 ... 652

(2) See COMPANY, 5 B. 42.

Forfeiture.

(1) See GOSAINS, 5 B. 682.

(2) See REVENUE, 5 B. 73.

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See CIV. PRO. CODE (ACT X OF 1877), 6 B. 590.

Fraud.

(1) Decree—Compromise effected by fraud—Execution—Question arising in execution—Separate suit—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 148.

(2) *Decree—Decree when binding—Effect of fraud—Parties and privies to suit—Strangers to suit—Collusvie fraud between parties in obtaining decree—Civ. Pro. Code (Act X of* 1877), *s.* 13--Res judicata—*Evidence Act I of* 1872, *s.* 44—*Khoja Mahomedan administrator with the will annexed.*—The powers of a Khoja Mahomedan executor or administrator, like those of a Cutchi Mahomedan, executor or administrator, seem to be generally limited to recovering debts and securing debtors paying such debts.

Where a will gave the executor full powers with regard to the payment of the testator's debts, *held* that an administrator with the will annexed, who was a Khoja Mahomedan, succeeded to those powers, and in a suit brought against him as such administrator by an alleged creditor of the testator's estate represented all the persons interested in the estate.

Where a decree in a suit has been obtained by means of the fraud of one party against the other, it is binding on parties and privies and on persons represented by the parties so long as it remains in force, but it may be impeached for fraud and may be set aside if the fraud is proved. In the case of judgments *in rem* the same rule holds good with regard to persons who are strangers to the suit.

Where a decree has been obtained by the fraud and collusion of both the parties to the suit, it is binding upon the parties. It is also binding upon the privies of the parties, except, probably, where the collusive fraud has been on a provision of the law enacted for the benefit of such privies. But persons represented by but not claiming through the parties to the suit may, in any subsequent proceeding, whether as plaintiff or defendant, treat the previous judgment so obtained by fraud and collusion as a mere nullity, provided the fraud and collusion be clearly established.

The same rule applies with regard to strangers where the previous judgment is a judgment *in rem.*

S. 13 of the Civ. Pro. Code, (Act X of 1877) is not exhaustive as to the effect of *res judicata*. It does not deal with the case of judgments *in rem*, nor with that of parties represented by, though not claiming under the parties to a former suit.

Quære—As to the proper construction of s. 44 of the Indian Evidence Act (1 of 1872). AHMEDBHOY HUBIBHOY v. VULLEEBHOY CASUMBHOY, 6 B. 703 ... 924

(3) Small Causes Court—Jurisdiction—Equitable defence—Plea by defendant of his own fraud—Act IX of 1850, ss. 91, 98, 25—See SMALL CAUSE COURT, 5 B. 295.

(4) Undue influence—Deed of sale set aside—Old and illiterate woman near to her death—No independent advice—Inadequate consideration—Terms on which deed would be set aside—Purchase-money declared a charge—Funeral expenses of Hindu widow declared a charge—No allowance for repairs and improvements—See DEED, 5 B. 450.

(5) See ACT XXVII OF 1866 (TRUSTEE), 5 B. 154.

(6) See SPECIFIC RELIEF ACT (I OF 1877), 5 B. 446.

Freight.

Payable on Intake Measurement—Small Cause Court—Ship—Bill of lading—Charter-party—Incorporation in bill of lading of terms of charter-party—Cargo—Measurement at port of delivery—Discrepancy in measurements—Evidence—Burden of proof—Suit by consignee for excess freight—See BILL OF LADING, 5 B. 313.

Gaikwar.

See CIV. PRO. CODE (ACT X OF 1877), 5 B. 249.

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Gambling.

Coin—Bombay Act III *of* 1866, *s.* 11.—A coin is not an instrument of gaming within the meaning of s. 11 of Bombay Act III of 1866. An instrument of gaming means an implement devised or intended for that purpose. IMPERATRIX v. VITHAL BHAICHAND, 6 B. 19. ... 469

Gift.

Necessity of endorsement of Government notes in order to complete gift—Donor constituting himself trustee for donee—Enforcement of trust by representative of donee—Trust—Trustee, liability of—Gift to sole and separate use among Parsis.— The plaintiffs, Merbai and Ratanji, were Parsis, and were married in the year 1851. The defendant was the widow of Burjorji Merwanji, who was the father of the plaintiff Ratanji. The plaintiffs sued to recover from the defendant certain Government promissory notes which they alleged had been presented by Burjorji to Merbai at her marriage, for her sole and separate use. They alleged that the said notes, then of the nominal value of Rs. 1,500, were endorsed in the name of the said Burjorji, and had been deposited by him for safe custody with Merbai's grandfather, Jehangir; that the said Burjorji during his life time used from time to time to receive the said notes from Jehangir, and drew the interest thereon for Merbai ; that Burjorji died in 1864, and that after his death the defendant, who was his widow and executrix, used to draw the interest for Merbai ; that in 1869 she obtained possession of the said notes, and had ever since continued in possession thereof, informing the plaintiffs that she was duly keeping them and collecting the interest for Merbai ; that the plaintiffs had been living with the defendant until shortly before the present suit, and having then separated from her, had called upon her to hand over the notes and the accumulated interest, which she refused to do. The defendant denied that her husband, Burjorji, had presented Merbai with Government notes for her separate use. She alleged that the notes, which had been deposited by Burjorji with Jehangir, were her own separate property and not Merbai's; that she and her husband had dealt from time to time with them, and that no interest was ever paid to the plaintiffs, or either of them, or for their benefit. She further stated that some of the notes, which had been deposited with Jehangir, had been disposed of by Burjorji in his life-time with her consent; that in 1869, she obtained the remaining notes from Jehangir and sold them, and applied the proceeds to her own benefit. At the hearing it was proved that, on the occasion of the plaintiff's marriage, presents were made to Merbai both by her own family and by that of the bridegroom Ratanji. Two accounts were then opened in the books of the firm of J. N. & Co., of which Merbai's grandfather, Jehangir, was a partner, one of which showed her acquisitions from her own family and the other her acquisitions from the family of her husband. The latter account contained an entry (under date August 1854), to the effect that Burjorji, the father-in-law of Merbai, had brought two Government notes for Rs. 1,500 in Merbai's name, and had obtained the interest on them, which was duly credited to her. Other documents were produced, proved to be in the handwriting of Burjorji and Jehangir, in which the said Government notes were alluded to as the property of Merbai, and as having been purchased with her moneys. In 1864 Burjorji died without having endorsed the notes over to Merbai, or to any one in her behalf, and they remained in his name in the hands of, Jehangir until 1869, when the defendant got possession of them.

Held that the notes not having been endorsed to Merbai, there was no valid gift of them to her by Burjorji. If Burjorji intended to bestow the notes as a gift only, without any intention that his purpose should be affected otherwise that by a substitution of ownership, his purpose remained unfulfilled, and the Court could not fulfil it for him.

Without endorsement, or something equivalent, a gift of Government stock cannot be completed. Where a particular form of transfer is prescribed by law, a transfer in another form is as inefficacious *inter vivos* as in a will.

Held, also, that Burjorjee was liable to answer for the notes *as a trustee*, and after Burjorjee, the defendant as his executrix and representative. In the documents put in evidence Burjorjee alluded to notes as Merbai's property. His placing them, as he did, with Merbai's grandfather, was itself

Gift—(*Concluded*).

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an aknowledgment, according to the practice of the class to which he belonged, that the benefit was to be her's and her children's. He thus sufficiently admitted as obligation as trustee. The legal ownership was his, but he had acknowledged with sufficient clearness an obligation to hold and use the ownership for the benefit of another. Such a purpose clearly manifested constitutes a trust, and burdened with a trust the property passed from Burjorji to the defendant as his representative, and could be enforced against her.

Held, further, that having regard to the general practice among Parsis, the conduct of Burjorji in relation to the notes showed that it was his intention that the property should be enjoyed in sole and separate use by Merbai and her children.

Among Parsis a gift may be made to the separate use of a married woman, or of a woman about to be married. MERBAI v. PEROZBAI, 5 B. 268 ... 178

Gosains.

Hindu law—Inheritance—Office of Mahant—Marriage—Evidence—Forfeiture—Burden of proof.—Among the Gosains of the Deccan and certain other places, marriage does not work a forfeiture of the office of Mahant and the rights and property appendant to it.

Where the plaintiff proved his right of succession to a *math* on the death of its Mahant, the burden of proving that his subsequent marriage worked a forfeiture of his office and its appendant property and rights, lay upon the defendant who impugned the plaintiff's right on account of the marriage. GOSAIN RAMBHARTI JAGRUPBHARTI v. MAHANT SURAJBHARTI HARIBHARTI, 5 B. 682 ... 451

Gotraja Sapinda.

See HINDU LAW (SUCCESSION), 5 B. 110.

Government Notes.

Gift of—Necessity of endorsement—See GIFT, 5 B. 268.

Government Notification.

See STAMP ACT (I OF 1879), 5 B. 188.

Guardian ad litem.

See MINOR, 5 B. 306.

Guravki.

Temple property—Sale of right, title and interest of holder—Service land.—The property of a temple cannot be sold away from the temple; but there is no objection to the sale of the right, title and interest of a servant of the temple in the land belonging to the temple which he holds as remuneration for his service; the interest sold being subject in the hands of the alienee to determination by the death of the original holder, or by his removal from his office on account of his failure to perform the service. LOTLIKAR v. WAGLE, 6 B. 596 ... 853

Guravs.

See JURISDICTION, 6 B. 122.

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See CASTE QUESTION, 6 B. 725.

Heirship.

Certificate of—Minor—Regulation VIII of 1827 — See REGULATION (VIII OF 1827), 6 B. 728.

Hereditary Office.

See LIMITATION ACT (XIV OF 1859), 5 B. 322.

High Court Criminal Procedure Act (X of 1875).

S. 76—See COMMISSION, 6 B. 285.

Hindu Law. PAGE

1.—GENERAL.
2.—ADOPTION.
3.—ALIENATION.
4.—CUSTOM.
5.—DEBTS.
6.—EXCLUSION FROM INHERITANCE.
7.—GIFT.
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18.—STRIDHAN.
19.—SUCCESSION.
20.—WIDOW.
21.—WILL.

1.—General.

See ACT XXVII OF 1866 (TRUSTEE), 5 B. 154.

2.—Adoption.

(1) *By widow—Authority to adopt—Consent to adopt given by husband's family—Adoption in undivided family—Adoption to a husband separated in estate.*—A Hindu widow, who has not the family estate vested in her and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of his undivided co-parceners.

Where the husband of a Hindu widow dies separated, and she herself is the heir, or she and a junior co-widow are the heirs, she may adopt without the sanction of the husband (if he have not, expressly or by implication, indicated his desire that she shall not do so) and without the sanction of his kindred.

N. and J. were two Hindu brothers undivided in estate. N. died first, leaving a widow, K. J. died next, leaving two sons and a widow, G (the defendant). K. adopted the plaintiff as son to her husband and herself without the consent either of J's two sons or his widow, G. On the death of K and the two sons of J. the plaintiff sued G. (the widow of J.) for possession of the family estate. G. claimed the estate as heir of her last surviving son, and while admitting the fact of the plaintiff's adoption by K. denied its validity, on the ground that the members of the family had given no assent to the adoption. It was admitted that K. had not received from her husband N. any permission or direction to adopt a son.

Held that the plaintiff's adoption by K. was invalid, inasmuch as she had not the authority of her husband or the consent of his undivided co-parceners to adopt, nor did she hold any estate in the property. RAMJI v. GHAMAU, 6 B. 498 (**F. B.**)=6 Ind. Jur. 587 ... **787**

(2) Conveyance by a Hindu without male issue—Adoption *pendente lite*—Adoption from improper motive—Will—Gift—See HINDU LAW (WILL), 5 B. 630.

(3) *Of an only son—Lingayats—Hindu law—Gift in adoption by widow, without an express authority from her husband—Practice—Objection taken for the first time on second appeal.*—The plaintiff, a Sudra of the Lingayat caste, sued for possession of certain property, alleging that he had been adopted by the defendant, a widow of the same caste. The defendant denied the adoption, and contended that it was invalid, inasmuch as he was an only son, and had been given in adoption by his widowed mother without an express authority from her husband.

The plaintiff, in support of his adoption, produced two documents executed by the defendant, *viz.*, a deed of adoption and a compromise, in which

Hindu Law—2.—Adoption—(*Concluded*). PAGE

the defendant had ratified the plaintiff's adoption. It was found that the defendant was very young, and did not act independently in the execution of those documents.

Held that the adoption was invalid on two grounds, *viz.*, 1st, that the mother had no authority to give the plaintiff in adoption, because he was the only son of her deceased husband at the time of the adoption; and 2ndly, that the defendant (whether an infant or not) was not, either at the time of the alleged adoption or at that of the alleged ratification of it, a free agent, but was subject to undue influence.

In the case of an only son the High Court refuses to imply authority in the mother to give such a son in adoption.

Quære—Whether the plaintiff was incapable of being adopted by the defendant, because his mother was a second cousin of the defendant's husband.

It is too late to make an objection, for the first time in second appeal, that a certain witness, for whose evidence no application had been made in the Courts below, ought to have been examined by the Appellate Court. SOMASHEKHARA v. SUBHADRAMAJI, 6 B. 524=6 Ind. Jur. 592 ... 804

(4) *Undivided Hindu family—Adoption by widow without the consent of her husband or his undivided co-parceners and without the authority of her husband to adopt.*—A Hindu widow, who has not the estate vested in her, is not competent to adopt a son to her husband, without his authority or the consent of his co-parceners with whom he was united in estate at the time of his death.

K. and V. were two Hindu brothers. K. had a son who died in 1849 in the lifetime of his father, but who was then united in interest with him (K). K. died in 1856, leaving him surviving his two nephews, S. and P. (the sons of his brother V.), and his daughter-in-law, Y. (the widow of his predeceased son). At the time of his death, K. was united in estate with his nephews, S. and P. In 1871, Y. adopted the plaintiff as son to her husband and herself. In 1873 the plaintiff sued P. and the sons of S. (who died in the meantime) for a share in the family estate. It was found that Y. had not the authority either of her husband or of her father-in-law, K., or of any of his co-parceners to adopt.

Held that the adoption was not valid.

Held, further, that a separated kinsman was not qualified to authorize the adoption. DINKAR SITARAM v. GANESH SHIVRAM, 6 B. 505 (**F.B.**) ... 792

(5) See PRACTICE, 6 B. 107.

———3.—Alienation.

(1) *Ancestral property—Undivided Hindu family—Alienation of ancestral property by father—Liability of estate for debts of father and grandfather—Son's interest in ancestral estate—Debt incurred for immoral or illegal purposes—Evidence—Burden of proof.*—Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes), the whole of the estate of a Hindu undivided family is, in the hands of sons or grandsons, liable to the debts of the father or grandfather.

In 1865, certain lands, the ancestral property of D., were sold under a decree passed against D., and were brought by J. These lands had been mortgaged, in 1863, by D. to N., in which transaction D. had been principal and J. his surety. In 1866, N. sued on his mortgage, and on the 21st January 1868, a decree was made, directing the sale of the lands. Under that decree the right, title and interest of J. were sold on the 1st April 1869, to C., and C. afterwards sold the lands to M. In the present suit the plaintiffs (D.'s sons) sued D. and M. for possession of their two-third shares, alleging that the land was ancestral, and that the whole of it had been illegally sold under the decree of the 21st January 1868. Both the lower Courts held that the land was ancestral; that the plaintiffs were united in interest with their father D, when the mortgage-debt was contracted by the latter; that the burden lay upon them (plaintiffs) to prove that the debt had been incurred for immoral or illegal purposes, and they failed to discharge it; that they were, therefore, bound by the sale. The lower Courts, accordingly, dismissed the plaintiffs' claim.

Hindu Law—3.—Alienation—(*Continued*). PAGE

On second appeal the High Court affirmed the decrees of the Courts below, on the grounds mentioned above. SADASHIV JOSHI v. DINKAR JOSHI, 6 B. 520=6 Ind. Jur. 655 ... 801

(2) Hereditary secular and religious office, alienation of, when valid—Partibility of such offices—Partition—Mode of partition of such offices—See RELIGIOUS OFFICE, 6 B. 298.

(3) *Inheritance—Hindu law—Daughter's rights—Alienation by daughter.* — According to the law of the Presidency of Bombay, the daughter of a Hindu dying without male issue takes absolutely, and may alienate lands by deed, or devise them by will. BABAJI v. BALAJI GANESH, 5 B. 660... 435

(4) *Minor—Mortgage by manager— Decree against manager—Sale—Suit by minor for cancelment of sale.*—G. the brother of the plaintiff, executed a mortgage to the defendant during the plaintiff's minority. The deed recited that the money was borrowed to pay off a family debt, and to defray family expenses. The defendant sued G. on the mortgage, and obtained a decree. A house, which was part of the family property, was sold in execution, and was purchased by the defendant himself. The plaintiff sued to have the sale set aside, and to recover his half share in the house.

Held that the defendant was not entitled to hold the plaintiff's share in the property by virtue of the sale to him under the decree obtained against G. alone.

Held, also, that the plaintiff was entitled to be put into possession of the whole house, the defendant being left to his remedy by a suit for partition. The plaintiff, however, having claimed only the restoration of his half share, the decree was limited accordingly.

Held, also, that it was not competent for the Court in this suit to go into the question whether the mortgage by G., was binding on the minor plaintiff. MARUTI NARAYAN v. LILACHAND, 6 B. 564 ... 831

(5) *Mitakshara—Alienability by a co-parcener of his undivided share of ancestral estate—Will—Limitation Act* (XIV *of* 1859), *s.* 1, *cl.* 13—*Res judicata—Act* VIII *of* 1859, *s.* 2.—A Hindu of the Southern Maratha country, having two sons undivided from him, died in 1871, leaving a will disposing of ancestral estate substantially in favour of his second son, excluding the elder, who claimed his share in this suit. In 1861, a suit brought by this elder son against his father and brother to obtain a declaration of his right to a partition of the ancestral estate was dismissed, on the ground that he had no right in his father's lifetime to compel a partition of moveables; and that, as to the immoveables, the claim failed, because they were situated beyond the jurisdiction of the Court.

Held, first, that this suit was not barred under Act VIII of 1859, s. 2; the proceedings of 1861 not having amounted to an adjudication between the brothers as to their rights in the estate arising on their father's death.

Secondly; that the suit was not barred under the Limitation Act XIV of 1859, s. 1, cl. 13. As to the immoveables; setting aside the fact that the plaintiff had remained in possession of one of the houses of the family, which had been treated by the father as continuing to be part of the joint property, the decision of 1861 based as to the immoveables on the absence of jurisdiction to declare partition of them, caused this part of the claim to fall under the provisions of Act XIV of 1859, s. 14. As to the moveables; assuming that they could, on the question of limitation, be treated as distinct from the moveable, and that no payment having been made within twelve years before this suit by the ancestral banking firm to the plaintiff, the adjudication of 1861, whether in law correct or incorrect, had been that the elder son could not assert his rights in the moveables until his father's death. The defendant in this suit, who had taken the benefit of that judgment, could not now insist that it did not suspend the running of limitation on the ground that his brothers might have appealed from it, if erroneous.

So far, also, as the father's interest was concerned, the succession only opened on his death.

Hindu Law—3.—Alienation—(*Continued*).

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Thirdly ; it having been contended that, as a father and his sons were during his life co-parceners in the family estate, one of such co-parceners being able, according to the decisions of the Courts, by act *inter vivos* to make an alienation of his undivided share binding on the others, it followed that the father might dispose by will of his one-third share.

Held that under the Mitakshara law, as received in Bombay, the father could not dispose of his one-third share by will.

The doctrine of the alienability by a co-parcener of his undivided share, without the consent of his co-sharers, should not be extended, in the above manner, beyond the decided cases. The Bombay Court had ruled that a co-parcener could not, without his co-sharer's consent, either give or devise his share, and that the alienation must be for value. The Madras Court had ruled that although a co-parcener could alienate his share by gift, that right was itself founded on his right to partition, and died with the co-parcener, the title of the other co-sharers vesting in them by survivorship at the moment of his death. Without a decision as to which of these conflicting views, in regard to alienation by gift, was correct, the principles upon which the Madras Court had decided against the power of alienation by will, were held to be sound and sufficient to support that decision. LAKSHMAN DADA NAIK v. RAMCHANDRA DADA NAIK, 5 B. 48 (P.C.)=7 I.A. 181=4 Sar. P.C.J. 173=3 Suth. P.C.J. 778=3 Shome L. R. 217=4 Ind. Jur. 472=7 C.L.R. 320 ... 35

(6) *Sale of ancestral property by father for debts incurred for immoral purposes —Son's interest in ancestral estate—Evidence—Stamp—Intention to defraud Government of stamp revenue—Reg.* XVIII *of* 1827, *s.* 13 *—Act* XXXIV *of* 1860, *s.* 13—*Act* X *of* 1862, *s.* 15—*Admissibility of insufficiently stamped documents—Issues.*—Where a document was admitted in evidence by the Court of first instance without any objection by the parties, but the Assistant Judge in Appeal held it inadmissible, because it was insufficiently stamped, although no objection was made to it in the memorandum of appeal.

Held that the Assistant Judge ought not to have excluded it from his consideration.

On documents insufficiently stamped under Reg. XVIII of 1827, the question does not properly arise, under s. 13 of that regulation, whether the intention of the parties in not sufficiently stamping them was to defraud Government of its revenue. That question was rendered important, first, by s. 13 of Act XXXVI of 1860, and subsequently, in a more explicit manner, by s. 15 of Act X of 1862.

The plaintiffs (two of whom were minors) sued to set aside the sale and recover possession of certain ancestral lands, on the ground that they had been sold by their father to pay off debts contracted for immoral purposes. The documentary evidence in the case showed that the lands had been originally mortgaged by the grandfather and father of the plaintiffs to the father of the defendant for Rs. 1,600 ; that they had subsequently taken from him other loans which, together with the mortgage-debt, amounted to Rs. 4,400-15-0 ; that on the 23rd May, 1858, an agreement (Ex. No. 38) was made between the plaintiffs' father and the father of the defendant, by which the former was to sell the equity of redemption in the mortgaged property to the latter in consideration of the latter releasing the former from the said debt of Rs. 4,400-15-0 and paying him the sum of Rs. 235 ; that, accordingly, on the 25th May, 1858, the plaintiffs' father conveyed the property to the defendant's father for Rs. 235 by a deed of sale (Ex. 17), which, however, did not refer either to the agreement (Ex. 28) or to the debts for Rs. 4,400-15-0. There was no allegation or evidence in the case showing that the plaintiff's grandfather had contracted the debt of Rs. 4,400-15-0 for any immoral purpose, nor that their father applied the sum of Rs. 235 to the payment of debts incurred for immoral purposes, although it was in evidence that he drank to excess. The Court of first instance dismissed the suit, holding, *inter alia*, that the plaintiffs had failed to prove the property to have been sold by their father for debts incurred for excessive drinking. One of the issues raised by the Assistant Judge, in appeal, was whether there was any necessity for the sale of the property by the plaintiff's father. He found this

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Hindu Law—3.—Alienation—(*Concluded*).

issue in the negative, and held the sale invalid, except as to the plaintiffs' father's own share. On special appeal to the High Court.

Held, that on the above facts the plaintiffs had failed to establish any case entitling them to set aside the sale of the lands by their father.

Held, also, that it ought to have been ascertained whether the minor-plaintiffs were born before the date of the sale, *viz.*, 25th May 1858, because if they had not been born before that date, their suit would have been unsustainable, as they never could have had any interest in the property.

Quære—Even supposing that the plaintiffs' father had applied the sum of Rs. 235 to the payment of debts incurred for the immoral purpose of excessive drinking, whether that trivial amount would have justified the setting aside of the sale of the 25th May 1858, the main consideration for which was the release of the pre-existing debts for Rs. 4,400 15-0. KASTUR BHAVANI v. APPA, 5 B. 621 ... 409

(7) Widow—Alienation by widow of immoveable property inherited from husband—Hindu law—daughter—Consent of heirs—Legal necessity—See HINDU LAW (WIDOW), 5 B. 563

(8) See HINDU LAW (INHERITANCE), 5 B. 662.

(9) See HINDU LAW (RELIGIOUS ENDOWMENTS), 5 B. 393.

(10) See VATAN, 5 B. 437.

(11) See VENDOR AND PURCHASER, 6 B. 380, 387.

——4.—Custom.

(1) Bhagdari lands in Broach—Custom of inheritance—Priority of nearest male relative to daughter or sister—See HINDU LAW (INHERITANCE), 5 B. 482.

(2) See LIMITATION ACT (XIV OF 1859), 5 B. 322.

(3) See PRACTICE, 6 B. 107.

——5.—Debts.

(1) Ancestral property—Hindu law—Alienation of ancestral property by father—Liability of estate for debts of father and grandfather—Son's interest in ancestral estate—Debt incurred for immoral or illegal purposes—Evidence—Burden of proof—See HINDU LAW (ALIENATION), 6 B. 520.

(2) See HINDU LAW (ALIENATION), 5 B. 621.

——6.—Exclusion from inheritance.

Divesting—Son of excluded person—Deaf and dumb from birth—See HINDU LAW (INHERITANCE), 6 B. 616.

——7.—Gift.

(1) See HINDU LAW (INHERITANCE), 5 B. 662.

(2) See HINDU LAW (MAINTENANCE), 5 B. 99.

(3) See HINDU LAW (WILL), 5 B. 630.

——8.—Impartible Estate.

See SARANJAM, 6 B. 598.

——9.—Inheritance.

(1) *Bandhus—Maternal uncles—Mother's sister's sons.*—Maternal uncles are included in the class of *Bandhus*, and succeed in priority to mother's sister's sons. MOHANDAS v. KRISHNABAI, 5 B. 597 ... 393

(2) Daughter's right—Alienation by daughter—See HINDU LAW (ALIENATION), 5 B. 660.

(3) Daughter's right of survivorship—Joint estate—Widows—Difference in the law of Bombay and the other Presidencies—See HINDU LAW (WIDOW), 6 B. 85.

(4) *Divesting—Son of excluded person—Deaf and dumb from birth.*—One Babuji, a Hindu, died, leaving him surviving Lakshman, his undivided son, born deaf and dumb and the defendant, Pandurang, his (Babuji's) brother's son. Lakshman being disqualified from inheriting, the defendant, Pandurang, at Babuji's death succeeded to the entire family estate, and subsequently sold a part of it. Lakshman subsequently married and had a son, the plaintiff, who sued to recover his half share in a certain village.

Hindu Law—9.—Inheritance—(*Continued*).

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Held that, according to Hindu law obtaining in Western India, the family estate vested in the defendant, Pandurang, at the death of Babuji, to the exclusion of his deaf and dumb son; and the subsequent birth of the plaintiff did not divest the defendant of the inheritance which had solely vested in him. BABUJI v. PANDURANG, 6 B. 616=7 Ind. Jur. 38 ... 866

(5) Gosains—Inheritance—Office of Mahant—Marriage—Evidence—Forfeiture—Burden of proof—See GOSAINS, 5 B. 682.

(6) Gotraja sapinda—Right of widow of collateral relation—Order of succession to inheritance by the Hindu law of Western India—See HINDU LAW (SUCCESSION), 5 B. 110.

(7) Inheritance in Gujarat—In Gujarat the father succeeds to the estate of a son dying without issue or widow, in preference to the mother—See HINDU LAW (SUCCESSION), 6 B. 541.

(8) *Limited estate in immoveable property inherited by females who have become members of family by marriage—Absolute estate in immoveable property taken by females who have not become members of family by marriage—Nature of estate taken by widow, mother, grandmother, daughter, sister, maternal great-niece.*—A maternal great-niece inheriting property is in the same position, as regards the nature of the estate taken by her, as a daughter or a sister.

The rule which in the Presidency of Bombay restricts the alienation of property by a widow succeeding to her husband or a mother succeeding to her son, does not apply to women who have not become members of the family by marriage; *e.g.*, a daughter takes an absolute estate in the property which she inherits from her father, and a sister takes a like estate in property inherited from her brother.

The above rule, which restricts the alienation of property by a widow inheriting from her husband or by a mother inheriting from her son, would seem to be applicable to a grandmother inheriting from her grandson, or to the widow of a *sapinda*, for they, like the widow and mother, enter by marriage into the family whence the property comes which they inherit.

The plaintiff sued to recover the moveable and immoveable property left by his brother's widow, Ladu, who died without issue. The property in question had been given to Ladu and her grandmother Ratan jointly by Ratan's sister, Lakshmi (Ladu's maternal grandaunt), who executed to them a deed of gift dated 17th December, 1843. On her death, Ratan and Ladu took possession, and remained in joint possession until the death of Ratan, which occurred in 1867. Ladu was thenceforward until her death on April 19th, 1869, in sole possession.

The plaintiff had obtained a certificate of heirship to Ladu under Bombay Reg. VIII of 1827. The defendants were Ladu's first cousins once removed. They claimed under a deed of gift executed to them dated 27th February 1869, and duly registered. The Subordinate Judge allowed the plaintiff's claims, holding the deed of gift to be *ultra vires* both as to the moveable and immoveable property. On appeal to the District Court the Judge varied the decree of the lower Court, holding the deed of gift to be *ultra vires* only as to the immoveable property, and he varied the decree by awarding to the plaintiff, as heir of Ladu, the immoveable property only. On appeal to the High Court the only question argued was the nature of the estate taken by Ladu in the immoveable property, her absolute right to the moveable property being admitted.

Held that, whether Ladu took by grant or by inheritance from Lakshmi, she took an absolute estate: and being, as she was, without issue, had complete power to execute the deed of gift in favour of the defendants. TULJARAM MORARJI v. MATHURADAS, 5 B. 662 ... 437

(9) *Right of sisters to succeed—Sisters, endowed and unendowed, equal right of—Appeal against a co-plaintiff—Practice—Procedure.*—Hindu sisters when they succeed take equally. An unendowed sister has no prior right of succession over an endowed sister, such as an unendowed daughter has over an endowed daughter.

By consent of parties the High Court allowed an appeal by one plaintiff against another plaintiff, and adjudicated upon their rights. BHAGIRTHIBAI v. BAYA, 5 B. 264=5 Ind. Jur. 599 ... 175

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Hindu Law—9.—Inheritance—(*Concluded*).

(10) Rule of succession as between relatives of the whole blood and half-blood—Brothers—Brothers' sons—Collaterals—Practice—Plaintiffs entitled to more than they claim in plaint—See HINDU LAW (SUCCESSION), 6 B. 394.

(11) *Special custom—Bhagdari lands in the district of Broach—Preference of nearest male relatives to daughter or sister.*—The plaintiff, as heir of her father (a deceased Hindu *bhagdar*), sued the sons of sisters of her father's paternal uncle for possession of certain *bhagdari* lands situate in a village in the Broach Collectorate. The defendants pleaded that they were entitled to the property under a special custom regulating the succession to *bhagdari* lands in the collectorate of Broach, under which custom on the death of a *bhagdar*, whether Hindu or Mahomedan, without male issue, his nearest male relations (after the death of his widow), whether sprung through male or female relatives of the deceased *bhagdar*, succeed to his *bhagdari* lands, to the exclusion of his daughter or sister.

Held that the custom alleged was sufficiently proved, and that the defendants were entitled to retain possession of the *bhagdari* lands in question.

Per Curiam.—Tne custom alleged being, if not universal, at least general in the Broach Collectorate, it should, in the case of any particular village, at any rate on evidence being given of its continuance in other similar adjacent villages, if not in the particular village itself (though it would always be more satisfactory if this could be done), be held still to survive, unless and until the opposite party prove the adoption of some other custom, or of the ordinary rules of inheritance, in the particular village, or, failing such proof, the general prevalence of such rules or such opposing custom in other similar adjacent villages.

Quære.—Whether males sprung of male relatives of a deceased *bhagdar* have priority over males sprung of female relatives of the same.

Quære.—Whether a daughter or sister of a deceased *bhagdar* is wholly excluded, by the custom, from the line of inheritance, or would, on failure of male relations, succeed to the *bhagdari* lands. PRANJIVAN DAYARAM v. BAI REVA, 5 B. 482 ... 318

——10.—Joint Family.

(1) Bequest for the performance of ceremonies and giving feasts to Brahmans—Bequest of undivided share of joint property—See HINDU LAW (WILL), 6 B. 24.

(2) *Manager—Practice—Parties—Decree against manager binding on members of family, although not parties to suit—Civ. Pro Code, Act* VIII *of* 1859, s. 2—Res judicata.—In 1870 A sued B for a piece of land, and obtained a decree against him in the original suit and appeal. Subsequently in 1875, C and D, the nephews of B brought a suit against A and B for their shares in the land, alleging that there was collusion between A and B in the previous suit. It was found that C and D and their uncle B, had lived together as members of an undivided Hindu family at the time of the former suit, and that he (B) was the manager of the family and assisted by his nephews, C and D, in defending the former suit. C and D made no allegation in their plaint that they were minors at the time of the former suit nor did they assign any reason for not asking to have been made co-defendants in it. Their allegation of collusion between A and B was not proved.

Held that the plaintiff's suit under those circumstances, was barred by the former suit, under s. 2 of Act VIII of 1859. NARAYAN GOP HARBU v. PANDURANG GANU, 5 B. 685 ... 453

(3) *Partnership—Joint Hindu family—Business carried on by one member as manager—Liability of all as joint owners—Ancestral trade and ordinary partnership, difference between—Indian Contract Act* IX *of* 1872.—The father of the three defendants, established a trading firm in 1865, under the name of J. H. He and his three sons lived together as joint Hindu family. J. died in 1872, and the business was continued under the same name by S., as the eldest brother and manager of the family. The youngest of the three brothers was a minor at the date of his father's death. The plaintiff sued the three brothers to recover money due on an account signed by S., in the name of the firm. The second defendant

Hindu Law—10.—Joint Family—(*Concluded*). PAGE

contended that he had never participated in the property of the business; that he had not resided at the family residence for six years; that he could not be considered a partner of the firm, and, therefore, was not liable to the plaintiff.

Held, that he could not repudiate a liability arising out of the ordinary transactions of the firm. During his father's life, he was joint owner, and after his father's death he acquiesced in the continuance of the firm under the same name and ostensibly, therefore, with the same constitution. He had done no act to divest himself of his share. He had given no notice of repudiation, and made no partition, and there was nothing to prevent him from demanding his share of the partnership, or claiming to share in the profits. There was, therefore, nothing to exempt him from the ordinary rule of Hindu law, which makes every member of a united family liable for debts properly incurred by a manager for the benefit of the family. The debt due to the plaintiff for goods supplied to the shop was properly incurred in the course of the ordinary transactions of the firm, and presumably, therefore, for the benefit of all the joint owners of the firm.

The rights and liabilities arising out of joint ownership in a trading business created through the operation of Hindu law between the members of an undivided Hindu family cannot be determined by exclusive reference to the Indian Contract Act (IX of 1872), but must be considered also with regard to the general rules of Hindu law which regulates the transactions of united families.

An ancestral trade may descend, like other inheritable property, upon the members of a Hindu undivided family. The partnership so created or surviving has many, but not all, of the elements existing in an ordinary partnership. For example, the death of one of the partners does not dissolve the partnership; nor, as a rule, can one of the partners, when severing his connection with the business, ask for an account of past profits and losses. SAMALBHAI NATHUBHAI v. SOMESHVAR MANGAL, 5 B. 38 = 5 Ind. Jur. 372

(4) Undivided family—Mortgage by co-parcener of his undivided share—Execution sale of share of one co-parcener—Ancestral estate—Purchaser at such sale should sue for partition, not for possession—Mortgage affected by acts of mortgagor—Res judicata—Amendment of plaint—See EXECUTION OF DECREE, 5 B. 496. ... 26

(5) Undivided Hindu family—Ancestral estate—Attachment and sale of the interest of one of several co-parceners—Possession—See DECREE, 5 B. 493.

(6) See EXECUTION OF DECREE, 5 B. 130.

(7) See HINDU LAW (ALIENATION), 5 B. 48; 6 B. 520.

(8) See HINDU LAW (PARTITION), 5 B. 589.

(9) See MINOR, 6 B. 593.

——11.—Maintenance.

Widow's right to maintenance—Gift of his property by a husband in fraud of his widow's right to maintenance—Nature of wife's interest in her husband's property—Transfer by her of her interest—Release to her husband—Arrears and future maintenance a charge on property of deceased husband.—A Hindu husband cannot alienate, by a deed of gift to his undivided sons by his first and second wives, the whole of his immoveable property, though self-acquired, without making for his third wife, who is destitute and has not forfeited her right to maintenance, a suitable provision to take effect after his death. After the husband's death she is entitled to follow such property in the hands of her step-sons to recover her maintenance, her right to which is not affected by any agreement made by her with her husband in his lifetime.

A Hindu wife has no property or co-ownership in her husband's estate, in the ordinary sense, which involves independent and co-equal powers of disposition and exclusive enjoyment. Her right is merely an inchoate right to partition, which she cannot transfer or assign away by her own individual act; and, unless such right has been defined by partition or otherwise, it cannot be released by her to her husband.

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Hindu Law—11.—Maintenance—(*Concluded*).

Arrears of maintenance, as well as prospective allowance, during the widow's life awarded in the same decree, and held to be a charge on the property in the possession of the donees of her deceased husband. NARBADABAI v. MAHADEO NARAIN, 5 B. 99 ... 68

——12.—Marriage.

Hindu law—Gosains—Office of Mahant—Marriage—Evidence—Forfeiture—Burden of proof—See GOSAINS, 5 B. 682.

——13.—Minority.

See ACT III OF 1874 (HEREDITARY OFFICERS, BOMBAY), 6 B. 463.

——14.—Partition.

(1) *Ancestral estate—Decree—Execution—Attachment and sale of interest of one co-parcener—Purchaser at execution sale should sue for partition, not possession.*—A judgment-creditor attached in execution and caused to be sold the judgment-debtor's alleged one-twelfth share as a member of an undivided Hindu family, in seven parcels of land of which the applicant was in possession as manager. At the sale Y became the purchaser: and subsequently, and without having himself entered into possession, Y assigned his interest in the purchase to G. G claimed to be put into possession, and obtained a Court's order, directing that possession should be given to him. The applicant however, obstructed the execution of the said order, and applied to the High Court to declare G not entitled to the possession he sought. No division of the property in question, by metes or bounds or otherwise, between the members of the undivided family, had ever been made, nor had the judgment-debtor ever had separate occupancy of any definite share of the same.

Held, that G's proper remedy was by a suit for partition, and that he could not claim to be put into joint possession, with the applicant and the other members of the undivided Hindu family, of the family property. BALAJI ANANT RAJADIKSHA v. GANESH JANARDAN KAMATI, 5 B. 499. 330

(2) Death of a co-parcener pendente lite—Decree for partition when a severance—See APPEAL (GENERAL), 6 B. 113.

(3) Decree—Execution—Inamdar—See LANDLORD and TENANT, 6 B. 67.

(4) *Exclusion from share—Limitation Act* XV *of* 1877, *art.* 127.—Where in a suit for partition a District Judge held the plaintiff's claim barred, on the ground that the defendant had been in possession of the property in dispute for more than fifteen years without any claim having been made by the plaintiff.

Held that under the Limitation Act XV of 1877, art. 127, time would not run against the plaintiff until his exclusion (if he was excluded) from the property had become known to him. HARI v. MARUTI, 6 B. 741 ... 950

(5) Gains of science—Hindu law—Self-acquired property—Partition—See HINDU LAW (SELF-ACQUISITION), 6 B. 225.

(6) Hereditary, secular and religious office, alienation of, when valid—Hindu law—Mode of partition of such offices—See RELIGIOUS OFFICE, 6 B. 298.

(7) Res judicata—Limitation Act IX of 1871, sch. II, art. 46—Bombay Act V of 1864—See LIMITATION ACT (IX OF 1871), 5 B. 27.

(8) *Res judicata—Partition—Account in partition suits.*—In a previous suit between the plaintiff and the defendant, the plaintiff alleged that there had been a partition of the family property into two parcels, and, under a deed of partition drawn up at the time, claimed one of these parcels. The deed being held invalid, the suit was rejected, with liberty to the plaintiff to sue for a general partition. In the second suit, the plaintiff prayed for a general partition as a member of an undivided Hindu family.

Held that the second suit was not *res judicata*; for, although the plaintiff *might* in the first suit have made an alternative case and prayed for a general partition in case he failed to establish the previous partition which he alleged, yet it could not be said that he ought to have done so.

Held, also, that in the case of joint enjoyment by the members of the whole family, or enjoyment by different members of different portions of

Hindu Law—14.—Partition—(*Concluded*).

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the family property, the Court will not, except under special circumstances, order an account to be taken of past transactions, but will make division of the property actually existing at the date of partition. KONERRAV v. GURRAV, 5 B. 589

(9) See EXECUNION OF DECREE; 5 B. 496. ... 388

——15.—Religious Endowment.

(1) *Alienation—Pledge—Hereditary trustee—Bombay, Act* II *of* 1863, *s.* 8, *cl.* 3 *—Common law of the country.*—Religious endowments in this country, whether they are Hindu or Muhammadan, are not alienable; though the annual revenues of such endowments, as distinguished from the *corpus*, may occasionally, when it is necessary to do so, in order to raise money for purposes essential to the temple or other institution endowed, but not further or otherwise, be pledged.

Bombay Act II of 1863, s. 8, cl. 3, contained no new law, but merely declared the pre-existing common law of this country. NARAYAN v. CHINTAMAN, 5 B. 393

(2) Office, secular and religious, alienation of, when valid—Hindu law—Partibility of such offices—Partition—Mode of partition of such offices—See RELIGIOUS OFFICE, 6 B. 298. ... 259

(3) *Religious rites and ceremonies—Jurisdiction of the Civil Courts—Civ. Pro. Code,* X *of* 1877, *s.* 11—*Suit by temple committee against pujaris.*—Suits as to religious rites or ceremonies, which involve no question of the right to property are to an office, are not suits of a civil nature, nor are they intended to be brought within the jurisdiction of the Civil Courts. A suit, therefore, by the plaintiffs, as members of a committee of management of a Hindu temple, to compel the hereditary priests of the temple to take out certain ornaments from the treasury of the managing committee, and to place them upon the image of the god, on such high days and holidays as might from time to time be appointed by the managing committee, and to obtain a declaration that the said ornaments, after they had been so taken out of the treasury, were in the custody of the priests, and that they were responsible for their safe custody, was held unsustainable.

S. 11 of the Civ. Pro. Code, Act X of 1877, introduces no new law, but merely declares the law as it has alwas been administered. VASUDEV v. VAMNAJI, 5 B. 80=5 Ind. Jur. 427

——16.—Reversioner. ... 55

Reversionary interest, sales by expectant heirs of—Sale by a young person not a minor—Grounds for its cancelment—Sale by seamen.—In the case of a sale by a person, young indeed and in distressed circumstances, but not without advice or means of information, of an estate actually vested in him, but not to be obtained without litigation, the party seeking to set aside the sale must establish the fraud, actual or constructive, which entitles him to relief. It is not sufficient for him to show that he did not receive the full value of the estate to which the result of the litigation might ultimately show him to be entitled. The difference between that value and the purchase-money, if not too disproportionate, may be legitimately taken to represent the difference between certainty and immediate enjoyment on the one hand, and risk, worry, expense and delay on the other.

The exceptional equitable principles which, in a sale by an expectant heir of a reversionary interest, throw upon the purchaser the *onus* of showing that he gave a fair price, and which, on failure of such proof, entitles the expectant heir to have the sale set aside, have no application in the above case, or in that of every ignorant and improvident person.

Where a person, by right of inheritance, sued for a declaration of his title to a share in a certain sum of money to which the defendants laid claim, and the defendants met that allegation by setting up a sale, which the plaintiff admitted.

Held, that the plaintiff was bound to mention in his plaint the fact that he had parted with his title, and to allege the particular circumstances—misrepresentation, under value, or fraud—on which he relies to have the sale set aside; also that the cause of action arose at some time within

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Hindu Law—16.—Reversioner—(*Concluded*).

the period of limitation applicable to the case. If sufficient cause exists, the Court may require the plaintiff to amend the plaint. MIR AZIMUDIN KHAN v. ZIAUL-NISSA, 6 B. 309 ... 663

———17.—Self acquisition.

Gains of science—Self-acquired property—Partition.—The acquisition of a distinct property by a member of an undivided Hindu family without the aid of joint funds is his self-acquired property, and is not subject to partition; but the improvement or augmentation of the family property by the exertions of one of the members is subject to division.

Hindu Law texts regarding gains of science establish it as a rule of Hindu law that the ordinary gains of science are divisible, when such science has been imparted at the family expense, and acquired while receiving a family maintenance; but that it is otherwise when the science has been imparted at the expense of persons who are not members of the acquirer's family.

When the Hindu texts speak of the gains of science, they intend the special training for a particular profession which is the immediate source of the gains, and not the general elementary education which is the stepping stone to the acquisition of all science. Consequently, the property acquired by a Subordinate Judge who had received elementary education at the family expense, but a knowledge of law and judicial practice without such aid, is impartible.

The ruling of the Privy Council in *Luximon Rao Sudasev* v. *Mullar Rao Bajee* interpreted to mean no more than the law as now settled, *viz.*, that when there is ancestral property by means of which other property may have been acquired, then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate.

Dictum of MITTER J., in *Dhunookdharee* v. *Gunpat Lal*—that the Hindu law nowhere sanctions the contention that the acquisition of a member of a Hindu family who has received education from the joint estate is liable to partition—commented on as not strictly correct. LAKSMAN MAYARAM v. JAMNABAI, 6 B. 225=6 Ind. Jur. 369 ... 608

———18.—Stridhan.

(1) *Husband and wife—Liability of wife—Contract—Liability—Stridhan.*—A Hindu married woman who contracts jointly with her husband is liable to the extent of her *stridhan* only, and not personally. NAROTAM v. NANKA, 6 B. 473 ... 770

(2) See HUSBAND AND WIFE, 6 B. 470.

———19.—Succession.

(1) Inheritance—Bondhus— Maternal uncles—Mother's sister's sons—See HINDU LAW (INHERITANCE), 5 B. 597.

(2) *Inheritance in Gujarat—In Gujarat the father succeeds to the estate of a son, dying without issue or widow, in preference to the mother.*—In Gujarat the right of succession to the estate of a Hindu who is separate in interest and who, at his death, leaves a father and mother, but no issue or widow, devolves upon the father, in preference to the mother. KHODABHAI MAHIJI v. BAHDHAR DALA, 6 B. 541 ... 816

(3) *Order of succession to inheritance by the Hindu law of Western India, Gotraja sapinda—Right of widow of collateral relation.*—By the Hindu law in force in Western India, the widow of a collateral relation, although she is not specified in the texts amongst the heirs to members of her husband's family, may come into the succession as one of the classes of gotraja sapindas of that family.

According to the law of the Mitkashara, as accepted in Western India, the right to inherit in the classes of gotraja sapindas is to be determined by family relationship or the community of corporal particles, and not only by the capacity of performing funeral rites.

The High Court having affirmed as a right, according to the law actually prevalent in Western India, the claim of a widow of a first cousin, on the father's side, of the deceased to inherit his estate as a gotraja sapinda, it was held that there was no reason for withholding from that doctrine the force of law; the right of the widow being mainly rested on the ground of

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positive acceptance and usage. In this case the widow of a first cousin of the deceased, on the father's side, was held to have become by her marriage a gotraja sapinda of her husband's cousin's family, and to have a title to succeed to the estate of that cousin on his decease, in priority to male collateral gotraja sapindas, who were seventh in descent from an ancestor common to them and to the deceased, who was sixth from that common ancestor. LALLUBHAI BAPUBHA v. CASSIBAI, 5 B. 110 (**P.C.**) =7 I.A. 212=4 Sar P.C.J. 1 64=3 Suth. P.C.J. 795=4 Ind. Jur. 533= 3 Shome L.R. 245=7 C.L.R. 445

(4) Right of sisters to succeed—Sisters endowed and unendowed, equal right of—Appeal against a co-plaintiff—Practice—Procedure. See HINDU LAW (INHERITANCE), 5 B. 264. ... 75

(5) *Rule of succession as between relatives of the whole blood and half-blood—Brothers—Brother's son—Collaterals—Practice—Plaintiffs entitled to more than they claim in plaint.*—The plaintiffs (along with others not parties to the suit) were relations of the half-blood to the *propositus*, and the defendants were his relations of the whole blood; but, counting from the ancestor, the plaintiffs were *sapindas* of tha fifth degree, and some of the defendants *sapindas* of the sixth, and the rest *sapindas* of the seventh degree of the *propositus*.

Held that there not being any special provision in the Mitakshara or the Mayukha in respect of persons of the half-blood other than brothers and their sons, the general rule applies, that the nearest *sapinda* succeeds in the absence of special local customs to the contrary, and, therefore, the plaintiffs were the heirs of the *propositus* to the exclusion of the defendants or any of them.

The plaintiffs having sued for a smaller share than they were entitled to, the High Court limited its decree to that amount only. SAMAT v. AMRA, 6 B. 394=6 Ind. Jur. 537

——20.—Widow. ... 718

(1) Adoption—Adoption by widow—Authority to adopt—Consent to adopt given by husband's family—Adoption in undivided family—Adoption to a husband separated in estate—See HINDU LAW (ADOPTION), 6 B. 498.

(2) Adoption—Undivided Hindu family—Adoption by widow without the consent of her husband or his undivided co-parceners and without the authority of her husband to adopt—See HINDU LAW (ADOPTION), 6 B. 505 (**F.B.**).

(3) *Daughter—Alienation—Consent of heirs—Legal necessity.*—An alienation, by a Hindu widow, of immoveable property inherited from her husband, is invalid in the absence of legal necessity, but the invalidity can be removed by the consent of all the heirs of the widow's husband who are likely to be interested in disputing the transaction.

Sale made conjointly by a Hindu widow and her daughter, who subsequently predeceased her mother, of immoveable property inherited by the widow from her husband, in the absence of legal necessity, ordered to be set aside; and the grandsons of the second cousins of the widow's husband held entitled to recover the property on recouping the vendees the expenses incurred on improvements. VARJIVAN RANGJI v. GHELJI GOKALDAS, 5 B. 563=6 Ind. Jur. 38

(4) *Daughter's right of survivorship—Joint estate—Widows—Difference in the law of Bombay and the other Presidencies.*—In those parts of the Presidency of Bombay, where the doctrines of the Mayukha prevail, daughters take not only absolute but several estates, and, consequently, when without any issue, may dispose of such property during life, or may devise it by will. ... 370

The rule is different in Bengal and Madras, where daughters take by inheritance a joint estate with rights of survivorship: *Aumirtolall Bose* v. *Rajoneekant Mitter*; *Kattama Nachiar* v. *Dorasinga Tevar*. Result of the application of the Bombay rule to widows stated. BULAKIDAS v. KESHAVLAL, 6 B. 95=6 Ind. Jur. 260

(5) Funeral expenses of Hindu widow. A charge on husband's property.—See DEED, 5 B. 450. ... 514

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Hindu Law—20.—Widow—(*Concluded*).

(6) Husband and wife—Widow—Re-marriage—Liability of widow who has re-married for debt contracted during widowhood—Liability of wife for debt contracted during coverture—Personal liability of widow—Stridhan—See HUSBAND AND WIFE, 6 B. 470.

(7) Lingayats—Adoption of an only son—Gift in adoption by widow without an express authority from her husband—Practice—Objection taken for the first time on second appeal—See HINDU LAW (ADOPTION), 6 B. 524.

(8) Maintenance—Widow's right to maintenance—Gift of property by husband on ground of widow's right to maintenance—Nature of wife's interest in her husband's property—Transfer by her of her interest—Release to her husband—Arrears and future maintenance as charge on property of deceased husband—See HINDU LAW (MAINTENANCE), 5 B. 99.

(9) See HINDU LAW (INHERITANCE), 5 B. 662.

(10) See HINDU LAW (SUCCESSION), 5 B. 110.

——— **21.—Will.**

(1) *Bequest for the performance of ceremonies and giving feasts to Brahmans—Bequest of undivided share of joint property.*—A bequest by a Hindu for the performance of ceremonies and giving feasts to Brahmans is valid.

A Hindu has no power to bequeath his undivided share of joint family property. LAKSHMISHANKAR v. VAIJNATH, 6 B. 24 ... 472

(2) *Gift—Hindu law—Conveyance by a Hindu without male issue—Adoption pendente lite—Adoption from improper motive.*—A conveyance by a Hindu, without male issue at the date thereof, will bind his subsequently born or adopted male issue. Such issue at birth takes a vested interest in such property only as is that of their father at that time.

C., a Hindu Brahmin without male issue, executed on the 10th September, 1856, a *bakhshishpatra* (a deed of gift) to M, containing words to the following effect:—I have given to you as gift and charity my property at, together with my moveable property. [Here follow the particulars of the property.] The garden and house, &c., &c., I have given to you as gift this day of my own accord, and I have made the same over to you. You shall pay the Government assessment and village expenses, and you and your grandsons should enjoy the same property generation after generation, and live in peace there. As long as I live I will take the profits, and you should maintain me as if I were one of the members of your family * * * I have no ownership whatever in the property; the ownership belongs to you from this day. This day I owe no money to anybody. Whatever property there may be after my death, other than that described above, is all given to you. No person has any claim thereto; the entire ownership belongs to you. I have given in writing this deed in sound mind and of my own accord." The document was registered on the 4th October, 1856. M was put in possession of the property, and managed it for some time. He paid the Government assessment, and held receipts for the same. On the 6th January, 1858, C addressed a letter to the Assistant Magistrate of the place, purporting to revoke the *bakashishpatra*, and he (C) was restored to possession by that officer. In 1859, M brought a suit (No. 446 of 1859) against C for the property. Before any decree was passed in it C, on the 6th June, 1859, adopted the plaintiff, who was then eight years of age. The plaintiff was not made a party to that suit. On the 2nd April, 1860, the Munsif made a decree in favour of M, holding that C had executed the *bakhshishpatra* and given possession of the property to M under it. He directed that property to be restored to the possession of M to be held according to the terms of the *bakhshishpatra*. C appealed, but subsequently withdrew his appeal, admitting the execution of the *bakhshishpatra* and agreeing to give over the property to M according the terms of the Munsif's decree. M accordingly obtained possession of the property. On the 16th March, 1874 the plaintiff brought the present suit against the grandson of M (M then being dead) for a moiety of the property, on the ground that C, his adoptive father, could not alienate more than one-half of the property. Both the lower Courts allowed the plaintiff's claim, the Court of first instance being of opinion that the document was a gift, and did not bind the

Hindu Law—21.—Will—(*Concluded*).

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plaintiff, and the appellate Court holding that it was not a gift but a will, and that it had been revoked by the testator before his death. On appeal to the High Court,

Held, that the document was a conveyance and not a will, and that it vested the property in M, the donee, subject to a trust regarding any surplus that remained of the income after payment of the Government assessment and village expenses in favour of C as long as he lived, and that the donor could not revoke it, inasmuch as the document contained no power of revocation.

Held, also, that inasmuch as the plaintiff had been adopted before the hearing and decree in suit 446 of 1859, and might have been made a party to it, but was not, could not be bound by the proceedings in that suit, and that he was, therefore, at liberty to re-open the question whether the *bakhshishpatra* was intended by C, when executing it, to operate as a deed or as a will. An adoption *pendente lite* is not to be regarded in the same light as an alienation *pendenti lite*. If a legitimate son had been born to C during the suit, such son, to be bound by a pending suit affecting his father's ancestral property, must have been made a party, and a son adopted during the suit was in the same position. The one at his birth and the other at his adoption would take a vested interest in his father's property according to the Hindu law in the Presidency of Bombay. The circumstances that C might have adopted the plaintiff for the purpose of endeavouring to defeat the *bakhshishpatra* did not alter the case. As a sonless Hindu he had a right to adopt a son, and he was not under any obligation to M not to adopt; and even if he had so contracted, *quære*—whether such a contract would affect the validity of the adoption. RAMBHAT v. LAKSHMAN CHINTAMAN MAYALAY, 5 B. 630 ... 415

(3) *Person competent to take under will.*—The doctrine laid down by the Privy Council in the *Tagore Case*—that only a person, either in fact or in contemplation of law in existence at the death of a testator, can take under his will—is a general principle of Hindu law applicable as well to Hindus governed by the law of the Mitakshara as to those governed by the Dayabhaga. SIR MANGALDAS NATHUBHOY v. KRISHNABAI, 6 B. 38=6 Ind. Jur. 196 ... 482

(4) Probate—Revocation—Indian Succession Act (X of 1865), s. 234—Practice—Review in testamentary matters—See SUCCESSION (ACT X OF 1865), 5 B. 638.

(5) See HINDU LAW (ALIENATION), 5 B. 48, 660.

Hindu Sovereign.

See LIMITATION ACT (XIV OF 1859), 5 B. 322.

Hindu Temple.

See LIMITATION ACT (XIV OF 1859), 5 B. 322.

Husband and Wife.

(1) Divorce—Appeal by a wife from order made in suit for divorce—Wife's costs—Security for costs—Memorandum of appeal admitted without requiring security—Limitation Act XV of 1877, s. 5—Period of limitation expiring during vacation—Power of Prothonotary to receive and file memorandum of appeal presented on the day the Court re-opens—See DIVORCE, 6 B. 487.

(2) Hindu law—Liability of wife—Contract—Liability—Stridhan—See HINDU LAW (STRIDHAN), 6 B. 473.

(3) *Hindu law—Widow—Remarriage—Liability of widow who has remarried for debt contracted during widowhood—Liability of wife for debt contracted during coverture—Personal liability of widow—Stridhan.*—A Hindu woman who was a widow when she executed a money bond, but has subsequently remarried, is personally liable for the debt. Her liability is not restricted merely to her *stridhan*. NAHALCHAND v. BAI SIVA, 6 B. 470. 768

(4) Nature of wife's interest in husband's property—Transfer by him of her interest—Release to husband—See HINDU LAW (MAINTENANCE), 5 B. 99.

(5) See DIVORCE, 6 B. 126.

(6) See PENAL CODE (ACT XLV OF 1860), 6 B. 126.

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Idol.

(1) See JURISDICTION, 6 B. 122.

(2) See MAHOMEDAN LAW (WAKF), 6 B. 42.

Immoveable Property.

(1) *What is—Jurisdiction—Mofussil Small Cause Courts—Act* XI *of* 1865, s. 6—*Suit by Vatandar Mahars to recover "aya."*—A suit for *balute* or *aya* is a claim in respect of a *hak* belonging to, and forming the emoluments of, an hereditary office amongst Hindus, and one in respect of immoveable and not moveable or personal property. A Mofussil Small Cause Court has no jurisdiction to entertain a suit for such a claim.

There is no difference, in principle, between the *haks* of hereditary officiating Mahars of a village and the *haks* appendant to the hereditary office of a village joshi, or of the office of an hereditary priest of a temple and its emoluments. The *haks* of the former are not personal property. APPANA v. NAGIA, 6 B. 512 (F.B.) ... 796

(2) *What is—Limitation—Act* XIV *of* 1859, *s.* 1, *cls.* 12 *and* 16—*Grant by a Hindu sovereign to a Hindu temple—Hindu law to be applied to determine questions of limitation—Nibandha--Antastha Sadilvar—Kherij Jamabandi Parbhare Paiki—Religious penalty for resumption.*—The Peishwa, by a *sanad* dated 1790, granted to an ancestor of the plaintiffs, for the support of a Hindu temple, an annual cash allowance of Rs. 350 out of the "*Antastha Sadilvar*" and three khandis of rice out of the "*Kherij Jamabandi Parbhare*," to be levied from certain mahals and forts mentioned in the *sanad*. The allowances were paid till the death of the plaintiff's father on the 26th December 1859, when the Collector of Thana stopped them. On the 23rd December 1870, the plaintiffs sued to establish their right to the grant and to recover six years' arrears of the allowances. The defendant pleaded that the suit was barred by the law of limitation. The question for consideration was whether the suit was governed by cl. 12 or cl. 16 of s. 1 of the Limitation Act XIV of 1859.

Held, by a Full Bench that the grant made by the *sanad* was "*nibandha*," and that the subject-matter of the suit was immoveable property, or an interest in immoveable property, within the meaning of the Limitation Act, XIV of 1859, s. 1, cl. 12.

Held, also, that the Hindu law might be properly resorted to for the purpose of determining whether the subject-matter of the suit was immoveable property (*i. e. nibandha* within the meaning of the Limitation Act XIV of 1859, s. 1, cl. 12.

Assuming that it was incorrect to apply Hindu law to ascertain the nature of the grant in question, nevertheless *held* that the grant was an interest in immoveable property within the meaning of the Limitation Act XIV of 1859, s. 1, cl. 12. The grant savoured throughout of locality, and was undoubtedly irresumable, inalienable and perpetual. The Indian Legislature did not intend to exclude such property from s. 1, cl. 12 of the Act.

The Indian Legislature, which passed the Limitation Act XIV of 1859, has not given any explanation or definition in the Act of the phrase 'immoveable property,' but has left suitors to their former ideas on the subject. Under these circumstances it would be a hardship upon them to construe the Act inconsistently with such ideas, inasmuch as they were furnished with no guide which could have led them to suppose that "immoveable property," according to Act XIV of 1859, meant any thing less than what they had previously known as such. And that the Indian Legislature were not disposed to be very harsh, is shown by its subsequent more fully developed legislation on the subject of limitation, which to *haks* and other periodical payments assigns the twelve years' limit.

Held, further, that the grant was irresumable, inalienable and perpetual. It was not a grant from the revenues of the State at large or even of the zilla, but was made up of certain small special grants charged upon the *Antastha Sadilvar*, produced by certain special localities in the zilla. Thus the grant was essentially localized, and whatever there might have been of contingency or variability in the levy or application of the *Antastha Sadilvar* previously to the making of the grant, such contingency or variability ceased to the extent of the grant from the moment of its being made to a Hindu temple.

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The religious penalty for the resumption of a royal grant made for Hindu religious purposes is sometimes expressed in the grant and sometimes omitted from it. But its omission does not in any wise derogate from the durability of the grant. The Hindu law implies the religious penalty for resumption, albeit not expressed in the *sanad*.

A pension or other periodical payment or allowance granted in permanence is *nibandha*, whether secured on land or not.

Quære.—Whether a private individual as well as a royal personage may create a *nibandha*.

A Hindu religious endowment cannot be sold or permanently alienated though its income may be temporarily pledged for necessary purposes, such as the repair, &c., &c., of the temple. THE COLLECTOR OF THANA v. HARI SITARAM, 6 B. 546

(3) What is—Limitation—Act XIV of 1859, s. 1, cls. 12 and 16—Grant by a Hindu sovereign to a Hindu temple—Applicability of Hindu law to determine questions of limitation—Antastha sadilwar — Kherij jamabandi parbhare paiki—Nibandh—See LIMITATION ACT (XIV OF 1859), 5 B. 322. ... 588

(4) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 6 B. 592.

(5) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 463.

Inam Chithi.

See VAKIL AND CLIENT, 5 B. 258.

Inamdar.

(1) Landlord and tenant—Notice to quit—Ejectment—See LANDLORD AND TENANT, 6 B. 70.

(2) Landlord and tenant—Notice to quit—Ejectment—Partition—See LANDLORD AND TENANT, 6 B. 67.

(3) The Summary Settlement (Bombay) Act VII of 1863, ss. 2, 6, 9—Jaghirdar—Suit for contribution—The Indian Contract Act IX of 1872, ss. 69 and 70—See ACT VII OF 1863 (SUMMARY SETTLEMENT), 6 B. 244.

Indemnity Bond.

See STAMP, 5 B. 478.

Indemnity Note.

Stamp duty on—Stamp Act I of 1879, sch. I, arts. 5 and 28—See STAMP, 5 B. 478.

Injunction.

(1) Company—Suit by agents of company to restrain it from carrying into effect a resolution of directors—Power to appoint solicitors to company—Practice—Joinder of causes of action—Same parties suing in different capacities—Civ. Pro. Code, Act X of 1877, ss. 26 and 31—See COMPANY, 6 B. 266.

(2) Interim injunction—Charter-party—Agreement for a charter-party—Threatened breach of charter-party—See CHARTER PARTY, 6 B. 5.

(3) See EXECUTION OF DECREE, 5 B. 29.

(4) See JURISDICTION, 6 B. 116.

Insolvency.

See EXECUTION OF DECREE, 6 B. 584.

Insolvent Act (11 and 12 Vic., C. 21).

S. 60—*Trader—Mukadam.*—A mukadam is not a trader within the meaning of the Indian Insolvent Act, 11 and 12 Vic., c. 21, and is not, therefore, entitled to obtain a discharge, in the nature of a certificate, under s. 60 of that Act. *In the matter of* COWASJI EDALJI, 5 B. 1 ... 1

Inspection.

(1) *Contract made in Bombay to be performed up-country—Civ. Pro. Code, s.* 132.—Defendant was owner of certain cotton-ginning factories at and near A, in the Mufassal, and had also a place of business in Bombay. He entered into a contract in Bombay with the plaintiffs to gain certain cotton of the plaintiff's at the said factories of the defendant in the Mufassal. Plaintiff brought a suit for damages for the breach of this contract and demanded inspection, in Bombay, of all defendant's books relating to the business

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Inspection—(*Concluded*).

of the said ginning factories belonging to the defendant. The defendant was willing to give the inspection asked for; but contended that it should be had at A, where all the books in question were kept and objected to bringing the books down to Bombay as demanded by the plaintiff.

Held that the contract though made in Bombay, having been intended to be performed at a considerable distance from Bombay, at and near A, where the business of ginning was conducted, and where the books relating to the said business were kept, A was the proper place at which to give inspection. KEVALDAS SAKARCHAND v. PESTONJI NASSERVANJI, 5 B. 467 ... 308

(2) Practice—Civ. Pro. Code (Act X of 1877), s. 135—Discovery—Trial of issue before inspection granted—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 572.

Interest.

(1) See EXECUTION OF DECREE, 5 B. 127.

(2) See MORTGAGE (PRIORITY), 6 B. 490.

(3) See STAMP ACT (I OF 1879), 5 B. 470.

Intervenor.

See DIVORCE, 6 B. 416.

Jaghir.

See SARANJAM, 6 B. 598.

Jaghirdar.

The Summary Settlement (Bombay), Act VII of 1863, ss. 2, 6, 9—Inamdar—Suit for contribution—The Indian Contract Act IX of 1872, ss. 69 and 70—See ACT VII OF 1863 (SUMMARY SETTLEMENT, BOMBAY), 6 B. 244.

Joinder.

See LIMITATION ACT (XV OF 1877), 5 B. 554.

Joint Trial.

(1) See EVIDENCE, 6 B. 124.

(2) See PENAL CODE (ACT XLV OF 1860), 5 B. 63.

Judge.

Discretion of—Appeal—Review—Limitation.—Where the law leaves a matter within the discretion of a Court, and the Court, after proper inquiry and due consideration, has exercised the discretion in a sound and reasonable manner, the High Court will not interfere with the conclusion arrived at, even though it would itself have arrived at a different conclusion.

Consequently where a District Judge, after due inquiry, refused to admit an appeal presented after the time prescribed by the Statute of Limitations, the High Court would not interfere with his order. RANCHODJI v. LALLU, 6 B. 304 ... 659

udgment.

(1) Decree—Jurisdiction—Judgment—Native Courts, suit on decree of—Suits in India on judgments of Courts in India—Suit on foreign judgment—Jurisdiction of Small Cause Court—Civ. Pro. Code (Act X of 1877), s. 434—See FOREIGN JUDGMENT, 6 B. 292.

(2) Foreign suit on a—Jurisdiction—Company—Winding up—Balance order—See COMPANY, 5 B. 42.

(3) Suit in High Court on judgment of Small Cause Court—Practice—Averments in point—Evidence necessary in such suits—See DECREE, 6 B. 7.

Jurisdiction.

(1) Appeal—Power of the Court of appeal to vary decrees appealed from in consequences of circumstances occurring subsequently to the date of such decrees—Partition suit—Death of a co-parcener *pendente lite*—Decree for partition when severance—See APPEAL (GENERAL), 6 B. 113.

(2) Broach Talukdars' Relief Act, XV of 1871—Civil Court jurisdiction—See ACT XV OF 1871 (BROACH TALUKDARS RELIEF), 5 B. 134.

(3) Caste question—Suit to recover cooking vessels—Regulation II of 1827, s. 21—See CASTE QUESTION, 5 B. 83.

Jurisdiction—(*Continued*).

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(4) Cause of action—Letters Patent, 1865, cl. 12—Company—Winding up—Suit on foreign judgment—Balance order—Service on defendant—See COMPANY, 5 B. 42.

(5) *Cause of action—Offering of food to idol—Suit for damages on account of omission to offer food.*—The plaintiff, alleging that he was a member of a family of *Guravs* holding a *vatan* attached to a temple, complained that the defendant was the holder of an *inam* allowance, granted in consideration of his daily offering to the idol some rice and cake, and burning a lamp; and that he had omitted to make such offering for one year. The plaintiff claimed Rs. 15 damages.

Held that the plaintiff had no cause of action. The defendant's obligation, if any, was towards the idol; and, if that obligation had not been performed, it could only be enforced by some person claiming to have a right to insist that the worship of the idol should be properly performed. DHADPHALE v. GUREV, 6 B. 122 ... 539

(6) *Cause of action—Suit to parade bullock on the Pola—Damages—Dignity.*—A suit does not lie in a Civil Court for a declaration that the plaintiffs have the right of parading their bullock on the *Pola* (the last day of the month of Shravan) of one year, and the defendants on the *Pola* of the next; for damages for the invasion of the plaintiff's right in a given year; and for an injunction restraining the defendants from interfering with the said right. RAMA v. SHIVRAM, 6 B. 116 ... 535

(7) Collateral inquiry into a mortgage lien on attached property—Insolvency of a judgment-debtor—See EXECUTION OF DECREE, 6 B. 584.

(8) Court of Small Causes—"Damages on account of rent"—Suit for use and occupation—Trespass—Ejectment—Mesne profits—See SMALL CAUSE COURT, 6 B. 79.

(9) Decree—Attachment—See DECREE, 6 B. 582.

(10) Equitable, of High Court—See ACT XXVII OF 1866 (TRUSTEES), 5 B. 154.

(11) Mufassil Small Cause Courts—Act XI of 1865, s. 6—Suit by vatandar mahars to recover "aya"—Immoveable property, what is—See IMMOVEABLE PROPERTY, 6 B. 512.

(12) Native Courts, suit on decree of—Suits in India on judgments of Courts in India—Suit on foreign judgment—Jurisdiction of Small Cause Court—Civ. Pro. Code (Act X of 1877), s. 434—See FOREIGN JUDGMENT, 6 B. 292.

(13) *Of Civil Courts—Bombay Act* III *of* 1874—*Act* X *of* 1876.—Neither Bombay Act III of 1874 nor Act X of 1876 contains any provision excluding the jurisdiction of Civil Courts in a suit brought to establish a share in the emoluments of a *vatan* which has ceased to be a service *vatan*. MOHEYODIN v. CHHOTIBIBI, 5 B. 578 ... 380

(14) *Offence in foreign territory—Extradition—Acts* XXI *of* 1879 *and* XI *of* 1872 *Native Indian subject.*—A Native Indian subject of Her Majesty committed an offence (*viz.*, theft in a dwelling-house) in the territory of a Native State in alliance with Her Majesty, and was discovered in the territory of another Native State in alliance with Her Majesty, and from there brought down or came of his own accord to Ahmedabad. A certificate was granted to the Political Agent that the offence ought, in his opinion, to be inquired into in British India. At Ahmedabad a preliminary inquiry was held by a Magistrate, who committed the accused for trial by the Court of Session.

Held that the Session Court at Ahmedabad was competent to try the offence committed in foreign territory as if it had been committed in the Ahmedabad District under s. 9 of the Foreign Jurisdiction and Extradition Act XXI of 1879, for when the accused was brought from foreign territory to Ahmedabad he was "found" at a place in British India within the meaning of the section. The expression "was found" used in this section must be taken to mean, not where a person is discovered, but where he is actually present. EMPRESS v. MAGANLAL, 6 B. 622 ... 870

(15) Receiving and retaining stolen goods within jurisdiction where the theft was committed out of jurisdiction—Indian Penal Code, ss. 410 and 411—

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Jurisdiction—(*Concluded*).

Commission to take evidence ; power of High Court to grant, on application of prisoner—See RECEIVING STOLEN GOODS, 5 B. 338.

(16) Regulation II of 1827, s. 21—Suit for fees appurtenant to the office of guru —Jurisdiction of Civil Courts—See CASTE QUESTION, 6 B. 725.

(17) Religious rights and ceremonies—Civ. Pro. Code, (Act X of 1877) s. 11—Suit by temple committee against Pujaris—See HINDU LAW (RELIGIOUS ENDOWMENTS), 5 B. 80.

(18) Sanction to prosecute granted by District Judge—Power of same person as Session Judge to try the offence—Crim. Pro. Code (Act X of 1872), ss. 472 and 473—See SANCTION TO PROSECUTE, 6 B. 479.

(19) Small Cause Court—Damages on account of rent—Suit for use and occupation—Trespass—Ejectment—Mesne profits—See EJECTMENT, 5 B. 572.

(20) See ACT XXIII OF 1871 (PENSIONS), 6 B. 209.

(21) See ACT III OF 1874 (HEREDITARY OFFICERS, BOMBAY), 6 B. 463.

(22) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 5 B. 180.

(23) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 249, 680 ; 6 B. 590.

(24) See CONTRACT ACT (IX OF 1872), 5 B. 65.

(25) See MINOR, 5 B. 306 ; 6 B. 593.

(26) See REVENUE, 5 B. 73.

(27) See SMALL CAUSE COURT, 5 B. 295.

Jury.

See EVIDENCE, 6 B. 731.

Kathiawar State.

See CIV. PRO. CODE (ACT X OF 1877), 5 B. 249.

Khadki.

See ACT VI OF 1873 (BOMBAY DISTRICT MUNICIPAL), 6 B. 686.

Kherij Jamabandi Parbhare Paiki.

(1) See IMMOVEABLE PROPERTY, 6 B. 546.

(2) See LIMITATION ACT (XIV OF 1859), 5 B. 322.

Khoja Mahomedan.

Khoja Mahomedan Administrator with the will Annexed—See FRAUD, 6 B. 703.

Labourer.

See CIV. PRO. CODE (ACT X OF 1877), 5 B. 132.

Landlord and Tenant.

(1) Building leases—Covenant—Right to sue—Stranger to consideration—See ARBITRATION, 6 B. 528.

(2) Damages "on account of rent"—Suit for use and occupation—Trespass—Ejectment—Mesne profits—Court of Small Causes—Jurisdiction—See EJECTMENT, 5 B. 572.

(3) *Inamdar—Notice to quit—Ejectment.*—Tenants cannot be ejected as mere trespassers. If they are yearly tenants, they are entitled to a clear six months' notice to quit before they can be evicted. If they are tenants for a term of years or for a life or lives, there must be proof of an expiration of the term by effluxion of time or of the falling of the life or lives. PANDURANG SAKHARAM v. YEDNESHWAR, 6 B. 70 ... 504

(4) Inamdar—*Notice to quit—Ejectment—Partition.*—An *inamdar* cannot eject a yearly tenant without six months' notice to quit, ending with the cultivating year. Nor can he eject other tenants, except on the expiration of their term of years or other interest in the land.

Where a family of *inamdars* disagree among themselves, and one of them obtains a decree for partition against the others, he cannot, in execution thereof, eject (without due notice to quit) the tenantry on such portion of the land as may have been allotted to him under that decree in a suit to which such tenantry were not parties, and by which, therefore, their rights are not barred. NARAYAN BHIVRAV v. KASHI, 6 B. 67 ... 502

Land Revenue.

See REVENUE, 5 B. 73.

Land Tenure.

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Narva—Bhag—Alienation previous to Bombay Act V *of* 1862—*Attachment—Dismemberment of bhag.*—The principal object of Bombay Act V of 1862 is to prevent the further dismemberment of bhags or shares in bhagdari villages; it renders null and void any future alienation of any portion of a bhag, other than a recognized sub-division, but it does not invalidate previous alienation. A sale of a portion of bhag, previously to the passing of Bombay Act V of 1862, amounts to a dismemberment of the bhag, and what remains in the bhagdar's hands continues to be a complete bhag, while the portion separated from it becomes a new bhag. BHAI SHANKER v. THE COLLECTOR OF KAIRA, 5 B. 77 ... 53

Lease.

See STAMP ACT (I OF 1879), 6 B. 691.

Letter of Attorney.

See PRINCIPAL AND AGENT, 5 B. 253.

Letters Patent, 1823.

Cls. 29, 33, 41—Equitable jurisdiction of High Court—See ACT XXVII OF 1866 (TRUSTEE), 5 B. 154.

Letters Patent, 1865.

Cl. 12—See COMPANY, 5 B. 42.

Lex Loci.

See PARSIS, 6 B. 151.

Limitation.

(1) *Acknowledgment—Account stated—Adjusted account—Adjustment of accounts, effect of—"Ruzu"—Act* XV *of* 1877, *s.* 19—*Act* IX *of* 1872, *s.* 25, *cl.* 3.—The "*ruzu*" or adjustment of an account can operate either as a revival of an original promise or as evidence of a new contract. If it is to be used as an acknowledgment giving a fresh starting point for computing a new period of limitation it must be made in writing and signed before the expiration of the period of limitation prescribed. If it is to be used as evidence of a new contract furnishing a basis for a new cause of action, it must contain a promise in writing duly signed as required by the Contract Act IX of 1872, s. 25, cl. 3, a bare statement of an account not being such a promise. RAMJI v. DHARMA, 6 B. 683 ... 911

(2) Act IX of 1871, sch. II, cl. 87—Mutual accounts—Reciprocal demands—See MUTUAL ACCOUNTS, 6 B. 134.

(3) Act XII of 1879, ss. 60 and 108—Limitation Act XV of 1877, sch. II, art. 171 B—Deceased defendant—Application to make legal representative defendant—Construction of Limitation Acts—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 26.

(4) Application for execution—Civ. Pro. Code, Act X of 1877, s. 230—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 245.

(5) Decree—Execution—Act XV of 1877, s. 14, sch. II, art. 179, cl. 4—The Code of Civil Procedure Act X of 1877, ss. 374 and 647—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 681.

(6) Decree—Power of the District Court to withdraw applications for execution—Mufassil Court of Small Cause—Jurisdiction—Civ. Pro. Code (Act X of 1877), ss. 25 and 647, sch. II—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 680.

(7) Prescription—Act XV of 1877, ss. 23 and 26—Continuing nuisance—Easement—See EASEMENT, 6 B. 20.

(8) Usufructuary mortgage—Mortgage—Subsequent agreement conveying to mortgagee for a term of years—Effect of such agreement—"Once a mortgage always a mortgage"—Suit by heirs of mortgagor to recover the property—Limitation—See MORTGAGE (USUFRUCTUARY), 6 B. 674.

(9) See ACT VI OF 1873 (BOMBAY DISTRICT MUNICIPAL), 6 B. 580.

(10) See ACT XIV OF 1877 (BROACH AND KAIRA INCUMBERED ESTATES), 5 B. 448.

(11) See ARBITRATION, 6 B. 528.

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Limitation—(*Concluded*).

(12) See CIV. PRO. CODE (ACT VIII OF 1859), 5 B. 440, 463.

(13) See DECREE, 6 B. 7.

(14) See EXECUTION OF DECREE, 6 B. 54.

(15) See JUDGE, 6 B. 304.

(16) See LIMITATION ACT (XV OF 1877), 6 B. 103.

(17) See PARTNERSHIP, 6 B. 628.

(18) See VATAN, 5 B. 437.

Limitation Act (XIV of 1859).

(1) *Limitation Act* IX *of* 1871—*Suit to establish title and for arrears.*—The plaintiff sued the defendants to recover a share of the income of a certain vatan which was admitted to be connected with an hereditary office, but was not, strictly speaking, charged upon immoveable property. In 1861 the plaintiff had brought a previous suit, and obtained a decree declaring his right to share in the vatan, and awarding him arrears for six years. Under this decree he had received payment of his share up to the year 1860. In the present suit the plaintiff olaimed arrears for twelve years, *viz.*, from 1862 to 1874. He admitted that he had received no payment for the year 1861, and that his claim for that year was barred.

The defendants contended that the period of limitation applicable to such a claim was six years, and not twelve years; that this was the case, at any rate, so long as the Limitation Act XIV of 1859 was in force, and that, therefore, the claim to so much of the arrears as was time-barred under that Act could not be revived by Act IX of 1871.

Held, that whether Act XIV of 1859 or Act IX of 1871 applied to the plaintiff's claim, the period of limitation was twelve years. Article 132 of sch. II of Act IX of 1871 was a distinct provision to that effect. There was no similar provision in Act XIV of 1859; but all hereditary offices and all payments or allowances made on account of such officers are to be regarded as immoveable property within the meaning and intention of that Act, and are, therefore, governed by the provisions of cl. xii of s. 1.

It was also contended on behalf of the defendants that even if the period of limitation were held to be twelve years, the plaintiff's claim was nevertheless barred *in toto*, inasmuch as he admitted that he had received no payment on account of his share for thirteen years preceding the institution of the suit. In support of this contention the cases of *Raiji Manor* v. *Desai Kallianrai* and *Madvala* v. *Balvant* were cited, where it was laid down that the cause of action to establish title, and the cause of action to recover arrears which rest on such title, are not distinct and independent of each other; so that if the former be barred, even the arrears which may be within the period of limitation cannot be recovered.

Held, that, while this is the rule which must be applied to cases in which a plaintiff must establish his title before he can ask for arrears accruing due under such title, the same rule does not apply where, as in the present case, the plaintiff has in a former suit obtained a decree declaratory of his title. It is no longer necessary for him to establish his periodically recurring right against any person who is bound by that decree: and that being so there is nothing in the law of limitation which can be construed into a restriction of the plaintiff's right to recover the arrears falling due within the period of limitation. CHHAGANLAL v. BAPUBHAI, 5 B. 68 ... 47

(2) *S.* 1, *cls.* 12 *and* 16—*Grant by a Hindu sovereign to a Hindu temple*—*Applicability of Hindu law as to determine questions of limitation*—*Antastha sadilwar*—*Kherij jamabandi parbhare puki*—*Nibandh*—*What is immoveable property.*—The Peishwa, by a *sanad* dated 1790, granted to the temple of Shri Vyankatesh, at Mahim, an annual sum of Rs. 350 in cash out of the "Antastha sadilwar," and three khandis of rice out of the "kharij jamabandi parbhare" derivable from the several mahals and forts therein particularly mentioned. The Collector of Thana stopped these allowances in 1859, when the plaintiff's father died, and the plaintiffs in 1871 claimed to have their right established to the benefit of the above grant.

Limitation Act (XIV of 1859)—*(Continued)*.

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The right of the plaintiffs admittedly depended on whether the grant was immoveable property or an interest in immoveable property, and, as such, subject to the twelve-years' period of limitation provided by cl. 12 of s. 1 of the Limitation Act XIV of 1859.

Held (*per* SARGENT, J.)—

1. That the grant in question was of the nature of immoveable property, and that the suit, therefore, fell within the provisions of cl. 12 of s. 1 of the Limitation Act XIV of 1859.
2. In using the expression "subject of the suit" in the rule laid down by the Privy Council in the Toda Giras case (*Maharana Fatesangji* v. *Desai Kallianrayaji*) their Lordships intended to include in it all the facts which determine the nature of the plaintiff's claim, and not merely of the allowance itself, and to confine the application of Hindu law to those cases in which the "subject of the suit" has such a distinctive Hindu character as that only Hindu law and usage can be legitimately invoked to determine its quality and nature.
3. It is the fixed and permanent character of an allowance, from whatever source derived, which by Hindu law entitles it to rank with immoveables. Here the grant, from the object which it had in view, was to be deemed to be one in perpetuity, and the fund out of which this perpetual allowance was to be paid was derived from a permanent source. It had, therefore, all the characteristics of permanency and durability which were essential to bring it, according to Hindu law, within the term "immoveable property."

Held (*per* MELVILL, J.)—

1. That the allowance in question was not immoveable property, and that the suit, therefore, did not come within the provisions of cl. 12 of s. 1 of the Limitation Act XIV of 1859.
2. From a consideration of the judgment of the Privy Council in *Maharana Fatesanaji* v. *Desai Kallianrayaji* it would appear that the rule which their Lordships intended to lay down is this, *viz.*, that, whenever it is possible to do so, the terms "immoveable property" and "interest in immoveable property" in Act XIV of 1859 must be interpreted, on general principles of construction, with reference to the nature of the thing sued for, and not to the *status*, race, character, or religion of the parties to the suit: but that in exceptional cases, in which the thing sued for is of such a special and exceptional character that its nature cannot be determined without reference to the special and peculiar law of a particular sect or class, in such cases, and in such cases only, the law of such sect or class may properly be referred to as furnishing a guide to the determination of the question.
3. The Privy Council has thus laid down a rule and an exception, and the question in every case must be whether the rule or the exception applies. The rule is that the terms "immoveable property" and "interest in immoveable property" are to be held to include, not only land and houses, and such other things as are physically incapable of being moved, but also such incorporeal hereditaments as issue out of, or are connected with, immoveable property properly so called, and which, therefore, savour of the reality": *e. g.*, rights of common, rights of way and other profits *in alieno solo*, rents, pensions and annuities secured upon land,—all these clearly constitute an interest in immoveable property. Pensions and annuties not secured upon land, houses, or the like as clearly do not constitute such an interest. When a classification can thus be made, it ought to be so made without reference to the character of the party claiming the right.
4. But there may be cases in which the test prescribed by the rule fails, or is very difficult of application, and then will come in the operation of the exception to the rule, and it may become the duty of the Court to seek for guidance in some arbitrary definition contained in the religious law of the claimant: *e g.*, in the instance of an hereditary office in a Hindu community incapable of being held by any person not a Hindu. The claim now in question is a claim to an annuity granted by a Hindu sovereign to a Hindu temple. The annuity is not made a charge upon land,

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Limitation Act (XIV of 1859)—(*Concluded*).

and it is not, therefore, according to general principles of construction, immoveable property. That being so, it is not necessary to go further. THE COLLECTOR OF THANA v. KRISNANATH GOVIND, 5 B. 322 ... 213

(3) S. 1, cls. 12 and 16—Grant by a Hindu sovereign to a Hindu temple—Hindu law to be applied to determine questions of limitation—Nibandha—What is immoveable property—Antastha Sadilvar—Kherij Jamabandi Parbhare Paiki—Religious penalty for resumption—Ses IMMOVEABLE PROPERTY, 6 B. 546.

(4) S. 1, cl. 13—Hindu law—Mitakshara—Alienability, by a co-parcener, of his undivided share of ancestral estate—Will—*Res judicata*—Act VIII of 1859, s. 2—See HINDU LAW (ALIENATION), 5 B. 48

(5) S. 4—*Acknowledgment—Signature.*—Where an account stated was written by a debtor himself with his name at the top of the entry, it was held to be sufficiently signed within the meaning of s. 4 of Act XIV of 1859. ANDARJI KALYANJI v. DULABH JEEVAN, 5 B. 88 ... 60

(6) Ss. 20 and 22—See EXECUTION OF DECREE, 5 B. 673.

(7) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 680.

(8) See EXECUTION OF DECREE, 6 B. 54.

Limitation Act (IX of 1871).

(1) S. 20*a*, sch. II, art. 59—*Acknowledgment—Prescribed period.*—The expression "prescribed period" in s. 20*a* of the Limitation Act IX of 1871 means the period prescribed by that Act.

Where a suit was brought on the 11th September, 1877, for money paid by the plaintiff on the 16th November, 1868, to the use of the defendant, and the plaintiff based his claim upon two acknowledgments of the defendant in writing, of which the first was dated the 3rd November, 1872.

Held, that, to bring the case within s. 20*a* of the Limitation Act IX of 1871, the first acknowledgment should have been made before the expiration of the period prescribed by art. 59 of sch. II of that Act, *viz.*, three years from the period when the money was paid. LUVAR CHUNILAL v. LUVAR TRIBHOVAN, 5 B. 688 ... 453

(2) S. II, arts. 43, 143—See ACT VI OF 1873 (BOMBAY DISTRICT MUNICIPAL), 6 B. 580.

(3) *Art.* 46—*Partition suit—Bombay Act* V *of* 1864.—Plaintiff in 1876 filed a suit to establish his right to and to recover a fourth share of certain property which he alleged to be ancestral. He stated his cause of action to have accrued on the 17th May 1871, on which day he had been dispossessed by an order by the Mamlatdar, made under Bombay Act V of 1864. The District Court held that the suit was barred by art. 46, sch. II of the Limitation Act IX of 1871.

Held, by the High Court, on special appeal, that art. 46 did not apply, and that the suit was not barred. BHAGUJI v. ANIABA, 5 B. 25 ... 18

(4) *Sch.* II, *art.* 46—*Partition suit*—Res judicata—*Bombay Act* V *of* 1864.—Art 46 of sch. II of the Limitation Act (IX of 1871) is not applicable to a partition suit.

In 1871 the plaintiff sued to establish his sole right to a portion of a field on the ground that it had been allotted to him by partition. The defendant also claimed it as his share obtained by partition. The Court rejected the plaintiff's claim, holding that no partition had taken place, and that the field was the joint property of five co-parceners, including the plaintiff and defendant. In 1878 the plaintiff brought a second suit for a partition of the field, including the portion for which his former suit had been instituted.

Held, that the present suit for partition was not barred by the previous suit which was brought to establish the plaintiff's sole right to the lands in question. SHIVRAM v. NARAYAN, 5 B. 27 ... 19

(5) Sch. II, cl. 87—See MUTUAL ACCOUNTS, 6 B. 134.

(6) Sch. II, art. 132—See LIMITATION ACT (XIV OF 1859), 5 B. 68.

(7) Sch. II, arts. 166 and 167—Decree or order in regular suit—Act XIV of 1859, ss. 20 and 22—Application for execution in suits instituted before 1st April 1873—See EXECUTION OF DECREE, 5 B. 673.

Limitation Act (IX of 1871)—(*Concluded*).

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(8) *Sch.* II, *art.* 167—*Decree—Application to enforce decree.*—G obtained a decree against the defendant on the 29th November, 1867, and applied for execution of it on the 23rd July, 1870. After G.'s death, his son made an application on the 10th March, 1871, praying for substitution of his name in the place of his deceased father, and that the money due under the decree should be recovered and paid to him as heir of the original plaintiff. On the 3rd January, 1874, and several times subsequently, the son applied for execution of the decree, his last application being in 1878. Both the lower Courts held that the application of the 10th March, 1871, was not an application "to enforce or keep in force the decree;" that the application of the 3rd January, 1874, was, therefore, barred by limitation, having been made more than three years after the first application of the 23rd July, 1870, and that, consequently, the subsequent applications were barred. On appeal to the High Court.

Held that the application of the 10th March, 1871, was an application "to enforce the decree," and fell within art. 167 of sch. II of Act IX of 1871.

The High Court accordingly reversed the orders of the Courts below, and directed that the decree should be executed, as prayed by the application of the 3rd January, 1874. GOVIND SHANBHOG v. APPAYA, 5 B. 246=5 Ind. Jur. 534 ... 163

(9) Art. 167—See EXECUTION OF DECREE, 5 B. 29.

(10) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 680.

(11) See EXECUTION OF DECREE, 6 B. 54.

Limitation Act (XV of 1877).

(1) Application for certificate of sale—Civ. Pro. Code (Act VIII of 1859), s. 246—Possession without certificate—See CERTIFICATE, 5 B. 206.

(1-*a*) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 6 B. 31.

(1-*b*) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 680.

(2) S. 5—Period of Limitation expiring during vacation—Power of Prothonotary to receive and file memorandum of appeal presented on the day the Court re-opens—See DIVORCE, 6 B. 487.

(3) *Ss.* 9, 13 *and* 20—*Defendant's absence from British India—Computation of the period of limitation—Adjusted and signed account—Payments under s.* 20 *of the Limitation Act.*—Ss. 9 and 13 of Act XV of 1877 adopt the law of limitation in England, and they must be read together in computing the period of limitation. Where the statutory period has once begun to run in respect of any cause of action, the subsequent absence of the defendant from British India will not stop it from running.

Where, subsequently to the adjustment of his account with the plaintiffs, the defendant had been credited with amounts of surplus proceeds of goods and of a *hundi*, *held*, that such amounts were not payments within the meaning of s. 20 of the Limitation Act.

The defendant adjusted and signed his account with the plaintiffs in Bombay, on the 13th of January, 1871, and shortly afterwards went to reside out of British India, in the territories of His Highness the Nizam. There was no subsequent payment of interest *as such*, and no payment of any part of the principal.

Held that the plaintiffs' suit for the balance of the account was barred by the law of limitation, not having been brought within three years after the adjustment—NARRONJI BHIMJI v. MUGNIRAM CHANDAJI, 6 B. 103. 526

(4) *S.* 19—*Acknowledgment—Signature.*—Where the whole of an account stated (*khata*) was written by a debtor himself with the introduction of his name at the top of the entry, the *khata* was held to be sufficiently signed within the meaning of Act XV of 1877, s. 19. JEKISAN BAPUJI v. BHOWSAR BHOGA JETHA, 5 B. 89=5 Ind. Jur. 427 ... 55

(5) S. 19—See LIMITATION, 6 B. 683.

(6) *S.* 20—*Part payment—Execution sale.*—A sum realized by an execution sale cannot be considered part payment within the meaning of s. 20 of the Limitation Act, XV of 1877, so as to give a new period of limitation. RAMCHANDRA GANESH v. DEVBA, 6 B. 626 ... 873

(7) Ss. 23 and 26—See EASEMENT, 6 B. 20.

Limitation Act (XV of 1877)—(*Continued*). PAGE

(8) *S.* 25—*Native date—Month.*—The plaintiff sued on a note, bearing a native date, Ashad Vadya 13th, Shake 1799 (7th August, 1877), and containing a stipulation for payment of the money to this effect:—"In the month of Kartik, Shake 1799,—that is to say, in four months—we shall pay in full the principal and interest." The plaint was filed on the 6th December, 1880, in the Court of Small Causes at Poona. The Judge was of opinion that the claim was barred. On his referring the case to the High Court for its decision.

Held, that the period of four months was, for the purpose of ascertaining whether the suit was barred by lapse of time, to be calculated according to the Gregorian Calendar, under s. 25 of the Limitation Act, XV of 1877, and that the claim was not barred. RUNGO BUJAJI v. BABAJI, 6 B. 83 ... 513

(9) *Sch.* II, *art.* 49 —*Time when "detainer's possession becomes unlawful"—Sale of immoveable property in the Mufassal—Decree for specific performance operates as a conveyance—Contract for sale of moveable and immoveable property combined—Indian Contract Act*, s 85—*Joinder of causes of action—Objection, not taken in the Court of first instance, too late—Act* X *of* 1877, *s.* 44.—In the Mufassal of this Presidency the transfer of the ownership of immoveable property to a vendee who has obtained a decree ordering the specific performance of the contract of sale to himself, does not wait for the execution of a conveyance—even if the vendor is required, as he seldom is, to execute such a conveyance—but is effected by the passing of the decree itself coupled with the payment of the purchase-money.

A entered into an agreement with B. for the purchase of moveable and immoveable property, and paid a deposit. Under such an agreement, by s. 85 of the Indian Contract Act, the ownership of the moveable property would not pass before the transfer of the immoveable property. B, instead of conveying to A, the property agreed to be conveyed to him, conveyed it to C, and put him, C. in possession. A brought a suit against C and B, and obtained a decree setting aside the conveyance to C, and ordering B specifically to perform his contract and execute a conveyance of the property to himself, A. This decree was confirmed on appeal. B. refusing to execute the conveyance to A, the conveyance was executed by the Court, under the provisions of s. 202 of Act VIII of 1859. C still detaining possession of the moveable and immoveable property in question, A brought this suit against him to recover possession of the same. The suit was brought within three years of the final decree of the Court of Appeal in the former suit, ordering a conveyance of the property to be executed to A, but not within three years of the date of the agreement to purchase, and it was contended that as to the *moveable* property, the suit was time-barred.

Held, that the suit for the possession of the moveable property was not time-barred, as the right to possession of both the moveable and immoveable property accrued to A, at the earliest, on the date of the final decree for specific performance of the agreement of sale, and it was from that time that the "detainer's possession" first became unlawful under art. 49, sch. II of Act XV of 1877.

An objection that the plaintiff has joined together causes of action which, by s. 44 of the Civ. Pro. Code, may not be joined together without leave first obtained, is taken too late if it is taken for the first time in the Court of Appeal after the case has been already heard on its merits. DHONDIBA KRISHNAJI PATEL v. RAMCHANDRA BHAGVAT, 5 B. 554=6 Ind. Jur. 92 365

(10) *Sch.* II, *arts.* 66 *and* 116—*Registered bond—Compensation for breach of contract.*—A suit to recover a specific sum of money due upon a registered bond or other written contract is a suit for compensation for breach of contract in writing registered, within the meaning of art. 116 of sch. II of Act XV of 1877, and may be brought within six years from the time when the period of limitation would begin to run against a suit brought on a similar contract which is not registered. GANESH KRISHNA v. MADHAVRAO RAVJI, 6 B. 75 ... 507

(11) Sch. II, Art. 122—Decree—Suit on decree the execution of which is barred—See DECREE, 6 B. 7.

(12) Art. 122—See DECREE, 6 B. 7.

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(13) Art. 127—Partition—Exclusion from share—See HINDU LAW (PARTITION), 6 B. 741.

(14) Sch. II, art. 132—Money charged on immoveable property—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 463.

(15) *Sch.* II, *art.* 132—*Mortgage—Suit by a mortgagee to recover debt from a mortgagor personally—Money decree.*—Article 132 of the Limitation Act, XV of 1877, sch. II, is applicable to a suit by a mortgagee to obtain a mere money decree, to which suit, therefore, the limitation of twelve years from the time the money sued for becomes due applies. LALLUBHAI v. NARAN, 6 B. 719 (F.B.)

(16) *Sch.* II, *art.* 159—*The Dekkhan Agriculturists' Relief Act,* XVII *of* 1879, *s.* 72 *—Non-agriculturist principal—Agriculturist surety—Remedy against principal barred, but surety held liable—The Indian Contract Act,* IX *of* 1872, *ss.* 126 *to* 147.—On the 11th September, 1880, a suit was instituted against a non-agriculturist principal and agriculturist surety for Rs. 88-8-0, being principal and interest due on a bond, dated the 5th August, 1877, and payable on demand. The action being barred against the principal debtor under Limitation Act XV of 1877, sch. II, art. 59, the question was referred to the High Court, whether, under s. 72 of the Dekkhan Agriculturists' Relief Act, XVII of 1879, the agriculturist surety was still liable for the amount sued for. ... 935

Held, that although the suit was barred as against the principal debtor under art. 59, sch. II of the Limitation Act, yet the surety, being an agriculturist, was still liable, inasmuch as s. 72 of the Dekkhan Agriculturists' Relief Act, which extends the period of limitation in the case of suits against agriculturists, applies to all agriculturists, whether principals or sureties, in the districts affected by that Act.

Ss. 126 to 147 of the Indian Contract Act IX of 1872 considered in connection with the effect of s. 72 of the Dekkhan Agriculturists' Relief Act, XVII of 1879. HAJARIMAL v. KRISHNARAV, 5 B. 647=6 Ind. Jur. 139 ... 426

(17) Art. 161—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 146.

(18) Art. 162—See DIVORCE, 6 B. 416.

(19) *Art.* 178—*Certificate of sale, application for—Act* X *of* 1877, *ss.* 316, 318 *and* 319—*Purchaser's right to certificate of sale*—Res judicata—Cl. 178, sch. II, of the Limitation Act, XV of 1877 is not applicable to applications for certificates of sale.

The provisions of the Indian Limitation Act (No. XV of 1877) do not apply to applications to a Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character. VITHAL JANARDAN v. VITHOJIRAV PUTLAJIRAV, 6 B. 586=7 Ind. Jur. 35 ... 846

(20) *Art.* 178—*Civ. Pro Code, Act* VIII *of* 1859, *ss.* 256, 257, 259; *Act* X *of* 1877, *s.* 316—*Purchaser's right to certificate of sale—Certificate of sale, application for.*—The applicant purchased certain land at a Court sale on the 17th February, 1876. The sale was confirmed on the 20th March of the same year. The purchaser did not apply for a certificate of sale until the 10th March, 1880.

Held, that the application was barred by the Limitation Act, XV of 1877, sch. I, art. 178.

Held, also, that the purchaser's right to a certificate of sale accrued to him under ss. 256, 257 and 259 of the Civ. Pro. Code, Act VIII of 1859. on the 20th March, 1876, when the sale was confirmed. *In re* KHAJA PATTHANJI, 5 B. 202 ... 134

(21) Arts. 178-179—See EXECUTION OF DECREE, 5 B. 29.

(22) *Cl.* 180—*Decree—Execution—Civ. Pro. Code* (*Act* X *of* 1877), *s.* 230.—The plaintiff obtained a decree of the High Court of Bombay against the defendant on 22nd February, 1867. The defendant, after the passing of the decree against him, resided in Ahmedabad. In July plaintiff assigned his decree to L, who in 1876 assigned it to M. From time to time M obtained orders for the execution of the said decree, but was always unable to proceed to execution. The last order for execution made by the High Court was on the 4th February, 1879. In April, 1879,

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the decree was transmitted to the Court at Ahmedabad for execution, and that Court in September, 1879, issued a warrant of arrest against the defendant, against the order for which the defendant appealed. The said order was confirmed by the High Court on 10th February, 1880. In April, 1881, the defendant was in Bombay, and M, the decree-holder, obtained a summons calling on defendant to show cause why the decree should not be executed against him. On 3rd May, the summons was made absolute. The defendant appealed, and contended that the application for execution was barred by limitation under s. 230 of the Civ. Pro. Code (Act X of 1877), which was to be read with cl. 180 of sch. II of Limitation Act XV of 1877.

Held, that the application was not barred. Cl. 180 of the second schedule of the Limitation Act XV of 1877 was intended to be independent of s. 230 of the Civ. Pro. Code, and not to be in any way controlled by it. S. 230 does not apply to decrees made by the High Court. MAYABHAI v. TRIBHUVANDAS, 6 B. 258 ... 629

Lingayats.

See HINDU LAW (ADOPTION), 6 B. 524.

Lis Pendens.

(1) *Decree—Sale* pendente lite—*Prior attachment.*—On the 29th June, 1876, the plaintiff obtained a money decree by consent against Ramapa, the father-in-law of the defendant.

On the 24th of July, 1876, the plaintiff attached a house of Ramapa.

On the 12th October, 1876, the defendant sued Ramapa for maintenance, and alleged that the house in question was the property of her deceased husband and Ramapa, and she claimed the right to continue to live in it.

On the 10th of November, 1876, and during the pendency of the defendant's suit against Ramapa, the house was sold under the plaintiff's decree against Ramapa, and the plaintiff himself became the purchaser.

On the 20th of June, 1877, the defendant obtained a decree against Ramapa in terms of the prayer of her plaint.

On the 27th of August, 1879, the plaintiff brought the present suit to eject the defendant from the house.

Held, that what the plaintiff bought from Ramapa was his right, title and interest in the house, which, being subject to the decree in the defendant's pending suit, the plaintiff's purchase was likewise subject to the same, and the circumstance that the plaintiff had placed a prior attachment on the house made no difference. The plaintiff, therefore, could not eject the defendant during her lifetime. PARVATI v. KISANSING, 6 B. 567 ... 833

(2) See APPEAL (GENERAL), 6 B. 113.

(3) See HINDU LAW (WILL), 5 B. 630.

(4) See REGISTRATION, 6 B. 168.

Lunatic.

Imbecile—Inability to understand proceedings—The Code of Criminal Procedure (X of 1872), ss. 186 and 423—See CRIM. PRO. CODE (ACT X OF 1872), 5 B. 262.

Mahant.

Office of—Marriage—Evidence—Forfeiture—Burden of proof—See GOSSAINS, 5 B. 682.

Mahomedan Law.

1.—ALIENATION.
2.—GIFT.
3.—GUARDIAN.
4.—INHERITANCE.
5.—MINOR.
6.—WAKF.

Mahomedan Law—1.—Alienation.

PAGE

Sale—Possession.—A sale among Mahomedans, unlike a sale between Hindus, is valid as against a third party, even though the vendor was not at the time of the sale in possession of the property sold. ADAMKHAN v. ALARAKHI, 6 B. 645=7 Ind. Jur. 99 ... 885

——— 2.—Gift.

(1) *Possession—Hanifia Code—Imamia Code.*—A Mahomedan bequeathed his property to his two nephews, Gulam Rasul and Gulam Ali, as joint tenants. Gulam Ali died, leaving a widow and a daughter, who continued to be joint tenants with Gulam Rasul; but the latter continued in exclusive possession of the property, subject to any claim which they might establish to a share in, or a charge upon it. Gulam Rasul, by a written instrument, made a gift of that property to his younger son, the father of the defendants, disinheriting his elder son, the plaintiff.

Held, that the gift was valid, and that the doctrine of the Hanifia, though not of the Imamia Code, that the gift of a share in undivided property, which admits of partition, is certainly invalid or, at least, forbidden, has no application to the gift of property so circumstanced. GULAM JAFAR v. MASLUDIN, 5 B. 238 ... 158

(2) *Possession—Possession with mortgagee—Sale—Minors.*—A Mahomedan lady executed a deed of gift in favour of the plaintiff, who was at the date of its execution a minor, of certain lands (including the land in dispute) of which she professed to have obtained possession under a decree against her co-parceners. The plaintiff on the strength of the deed of gift sued for a declaration of his right to the land, alleging that the donor had actually recovered possession in execution of her decree. The original and appellate Courts found that the defendant was at the date of the deed of gift in actual possession under a mortgage executed by the donor's co-parceners, and that she had failed, in executing her decree, to eject the defendant.

Held, (*Kemball, J., Diss.*) that at the date of the deed of gift the donor was simply the owner of property which was in possession of a mortgagee, and could not, under Mahomedan law, make a gift of it, although she could sell the same.

When the donee is a minor, possession may be had by a trustee on his behalf. MOHINUDIN v. MANCHERSHAH, 6 B. 650=7 Ind. Jur. 91 ... 883

———3.—Guardian.

Sale of minor's property—Validity of such sale—Guardian—Sanction of sale by ruling authority.—The plaintiff sued to recover her husband's share in certain property at S, to which he and other persons became entitled as heirs of M. That property had been sold to the defendants by the heirs of M, during the minority of the plaintiff's husband, his elder brother acting for him in the transaction. It was proved that the sale of the property to the defendants had been approved of by H, who was the agent of the Governor of Bombay at S, and the representative of the ruling authority in the management of M.'s estate. The plaintiff contended that, according to Mahomedan law, it was not competent for the elder brother of a minor, as guardian, to alienate a minor's property.

Held that the sanction of the ruling power constituted a sufficient authority for the act of the guardian, provided that the transaction was one which, according to Mahomedan law, a duly constituted guardian might have entered into on behalf of his ward. That law permits a guardian to sell the immoveable property of his ward, when the late incumbent died in debt, or when the sale of such property is necessary for the maintenance of the minor. The evidence in the present case showed that the indebtedness of M, and the distressed condition of his heirs existed in a sufficient degree to justify the sale of the whole property of the heirs. HUSSEIN BEGAM v. ZIA-UL-NISA BEGAM, 6 B. 467 ... 766

———4.—Inheritance.

Wakf—Mahomedan law—Grant—Descent *per stirpes*—Restriction without names—Direction to pray for perpetuity of Government—See MAHOMEDAN (WAKF), 6 B. 88.

Mahomedan Law—5.—Minor. PAGE

(1) See MAHOMEDAN LAW (GIFT), 6 B. 650.

(2) See MAHOMEDAN LAW (GUARDIAN), 6 B. 467.

——6.—Wakf.

(1) *Grant—Descent per stirpes—Restriction without names—Direction to pray for perpetuity of Government.*—A *sanad* of the Emperor Shah Jehan, dated A.D. 1651-52, granted in *inam* to one Sayad Hasan the village of Dharoda and certain lands of another village in these terms:—"Let the whole village above mentioned, as well as the above-mentioned land, be hereby settled and conferred as above, manifestly and knowingly as a help for the means of subsistence for the children of the above-mentioned Sayad Hasan without restriction as to names, in order that, using the income thereof from season to season and from year to year for their own maintenance, they may engage themselves in praying for the perpetuity of this ever-enduring Government."

Held that this grant did not constitute *wakf*, or a religious endowment, making the village descendible to the issue of the donee *per stirpes* (that is, allowing representation) rather than according to the ordinary Mahomedan law; and the direction that the donee and his issue were to pray for the perpetuity of the then existing Government meant no more than an inculcation of gratitude for the gift; and that neither neglect to fulfil the direction nor the downfall of the Government would work a forfeiture or avoidance of the grant.

Although a *wazifa* grant may be a religions endowment, such is neither necessarily nor even generally its nature. Hence the use of term *muzif* (*alias wazif* or *wazifa*), with regard to the grant of a village, does not stamp the grant as a *wakf* or religious endowment. SAYAD MAHOMED ALI v. SAYAD GOBAR ALI, 6 B. 88 ... 516

(2) *Power of revocation—Reservation of rents and profits to donor for life—Ultimate dedication of property to charity with intervening private interests—Rule against perpetuities how far applicable in a colony subject to English law—Charities, what are—Trust for maintenance of idol, for benefit of poor, for building tanks—Dedication by minor—Subsequent ratification—Estoppel.*—A *wakf* must be certain as to the property appropriated, unconditional, and not subject to an option. It must have a final object which cannot fail, and this object must be expressly set forth.

When a *wakf* is created, the reservation in the deed of settlement of the annual profits of the property to the donor for life does not invalidate the deed. If, however, there is a provision for the sale of the *corpus* of the property and an appropriation of the proceeds to the donor, the settlement is invalid.

If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a *wakf* is not rendered invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take, may constitute a perpetuity in the sense of the English law; but according to the Mahomedan law, that does not vitiate the settlement, provided the ultimate charitable object be clearly designated.

The rule against perpetuities extends to a colony in which English law is enforced only so far as it is adopted to the circumstances of the community. The case of "charities useful and beneficial" to the community is an exception to this rule. It is for the Courts to pronounce whether any particular object of bounty falls within this class. In order to decide this question they must, in general, apply the standard of customary law and common opinion amongst the community to which the parties interested belong. Objects which the English law would possibly regard as superstitious uses are allowable and commendable according to Mahomedan law. A trust for the benefit of the poor, for aiding pilgrimages and marriages, and for the support of wells and temples, is a charity amongst Mahomedans. The law and opinion of Mahomedans regard such a trust as a charity; and granting there is a charity, the objection to a perpetuity fails according to the principles of the English law.

Where the proposed object of the endowment is one which is directly contrary to the public law of the State, the above rule does not apply.

Mahomedan Law—6.—Wakf—(*Concluded*). PAGE

By an i denture of voluntary settlement, dated 16th March, 1866, F, a Mahomedan girl of the age of fourteen, conveyed certain immoveable property in the island of Bombay to trustees upon trust—(1) During her lifetime to pay the rents and profits to her for her sole and separate use without power of anticipation. (2) After her death to pay the rents and profits to her children and descendants as she might by deed or will appoint. In default of appointment the trustees were to pay life allowances to such descendants at their discretion. The rents and profits only were to be thus distributed among such descendants for ever, the *corpus* of the property being kept intact. (3) In case there should be no such descendants, or in the event of failure to such descendants, the rents and profits were to be expended on charitable purposes, such as expenses of poor pilgrims going to Mecca, building mosques, funeral and marriage expenses of poor people, sinking wells or tanks, or in such other manner as the trustees should think fit. Shortly after the execution of the settlement the trustees took possession of the property, and for fifteen years continued to pay the rents and profits to the settlor. The settlor was married in 1866 to H, and there was issue of the marriage only one son, who died in 1872, an infant under the age of five years. He died in 1872, and the settlor remained a widow. In 1881 she became desirous of revoking the above settlement, and under s. 527 of the Civ. Pro. Code (Act X of 1877) she stated a case for the opinion of the Court, contending that she could lawfully revoke the trusts declared by the said indenture; that if she could not revoke, then that the trust therein declared in favour of charity was void for remoteness; and generally that she was, under the circumstances, entitled to have the property reconveyed to her by the surviving trustee.

Held that the settlement was irrevocable. The dedication having been once made could not be recalled. The interposed private interests, which might or might not endure, did not avoid the ultimate charitable trust. According to Mahomedan law the latter gave effect to the former. Should the intermediate purposes of the dedication fail, the final trust for charity did not fail with them. It was but accelerated, being itself regarded as the principal object in virtue of which effect was given to the intervening disposition. Charitable grants being thus tenderly regarded, it would be inconsistent that a power of revocation should be recognized in the grantor.

Held, also, that although the dedication by a girl of fourteen was not to be upheld without inquiry, yet the transaction never having being questioned by her husband during his life, and she having for fifteen years confirmed her own act by a continued acceptance of the profits of the estate from the trustees, could not with reason contend that the dedication was invalid on account either of its ceremonial defects or of a want of an accompanying volition. FATMABIBI v. THE ADVOCATE-GENERAL OF BOMBAY, 6 B. 42 =6 Ind. Jur. 253 ... 485

Malicious Prosecution.

Action for—Reasonable and probable cause—Effect of order of discharge of a person accused of an offence before a Magistrate—Presidency Magistrate's Act IV of 1877, ss. 87, 121, 122—See ACT IV OF 1877 (PRESIDENCY MAGISTRATE), 6 B. 376.

Mamlatdar.

(1) See CRIM. PRO. CODE (ACT X OF 1872), 5 B. 387.
(2) See LIMITATION ACT (IX OF 1871), 5 B. 25.

Mamlatdar's Court.

See SANCTION, 5 B. 137.

Manager.

(1) Hindu law—Joint Hindu family—Practice—Parties—Decree against manager binding on members of family, although not parties to suit—Civ. Pro. Code, Act VIII of 1859, s. 2—See HINDU LAW (JOINT FAMILY), 5 B. 685.
(2) Hindu law—Minor—Mortgage by manager—Decree against manager—Sale—Suit by minor for cancelment of sale—See HINDU LAW (ALIENATION), 6 B. 564.

Manager—(*Concluded*). PAGE.

(3) See HINDU LAW (JOINT FAMILY), 5 B. 38.

(4) See MINOR, 6 B. 593.

Married Woman.

See GIFT, 5 B. 268.

Mesne Profits.

(1) See EJECTMENT, 5 B. 572.

(2) See SMALL CAUSE COURT, 6 B. 79.

Minor.

(1) Act XX of 1864—Execution—Sale—Mortgage—Estoppel—See EXECUTION OF DECREE, 5 B. 2.

(2) Act XX of 1864—Parties—Guardian—Certificate—Madras Reg. V of 1804—Form of decree—Suit for foreclosure and sale—Mortgage—See MORTGAGE (FORECLOSURE), 5 B. 14.

(3) *Administration—Manager—Jurisdiction—Account—Act* XX *of* 1864—*Hindu family—Undivided.*—A certificate of administration may be granted, under Act XX of 1864, for the share of a minor who is a member of an undivided Hindu family.

When a certificate is given in such a case the District Court has no jurisdiction to attach the undivided property in which the minor has a share, with a view to ascertain and divide off the minor's share. Such ascertainment and division can only be effected by a regular suit. BABAJI v. SHESHGIRI, 6 B. 593=7 Ind. Jur. 373 ... 851

(4) *Administrator of a minor's estate—Guardian ad litem—Next friend—Minor's Act*, XX *of* 1864, *s.* 2—*Civ. Pro. Code* (*Act* X *of* 1877), *ss.* 443, 456, 458—*Act* XII *of* 1879—*Act* X *of* 1876, *s.* 15—*Act* XV *of* 1880, *s.* 3, *cl. b*—*Courts of Small Causes—Jurisdiction.*—Where no administrator of the estate of a minor is appointed under Act XX of 1864, there is no objection to the appointment of a guardian *ad litem* under s. 443 of the Civ. Pro. Code (Act X of 1877) as amended by Act XII of (1879) for the purpose of defending a suit against the minor. Act XX of 1864, s. 2, has no bearing on the case of a next friend or guardian *ad litem* not claiming charge of the minor's estate.

Neither Act XX of 1864, nor the Civ. Pro. Code (Act X of 1877), (as amended by Act XII of 1879) empowers any Court to appoint a person, against his or her will, to be a next friend, guardian *ad litem*, administrator of the estate, or guardian of the person of a minor.

S. 458 of the Civ. Pro. Code (Act X of 1877) is not, so far as regards payment of costs, applicable to any person appointed to act to as guardian *ad litem* without his previous assent.

S. 3, cl. *b*, of Act XV of 1880 preserves jurisdiction to a Court to try a suit against a minor, notwithstanding the appointment of one of its officers to be the minor's guardian *ad litem*.

The decision in *Mohan Iswar* v. *Haku Rupa* is superseded by Act XV of 1880, s. 3, cl. *b*, in so far as that decision affected officers of the Court appointed guardians *ad litem* under s. 456 of Act X of 1877 as amended by Act XII of 1879.

Inconvenience, pointed out, of introducing into Acts relating, and enacted as relating, to special jurisdiction only, provisions affecting civil procedure generally. JADOW MULJI v. CHHAGAN RAICHAND, 5 B. 306 ... 202

(5) Certificate of heirship—Regulation VIII of 1827—See REGULATION (VIII OF 1827), 6 B. 728.

(6) Hindu law—Mortgage by manager—Decree against manager's sale—Suit by minor for cancelment of sale—See HINDU LAW (ALIENATION), 6 B. 564.

(7) *Minor's Act No.* XX *of* 1864—*Certificate of administration—Defendant—Procedure.*—An order for the issue of a certificate of administration to any particular individual under Act XX of 1864 ought not to be made until it is ascertained whether that individual is willing to take it.

Where an order for the issue of a certificate of administration was made on default of the mother of the infant to appear and show cause why the certificate should not be issued to her.

Minor—(*Concluded*).

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Held, that such default in appearance ought not to be accepted as an assent to the issuing of the certificate to the non-appearing party.

If no relative or friend of the minor can be found who is willing to take a certificate, the District Judge should name some officer of his Court, or some respectable nominee of the suing creditor of the infant. BABAJI v. MARUTI, 5 B. 310.

(8) See HINDU LAW (REVERSIONER), 6 B. 309. ... 205

(9) See MAHOMEDAN LAW (GIFT), 6 B. 650.

(10) See MAHOMEDAN LAW (GUARDIAN), 6 B. 467.

(11) See MAHOMEDAN LAW (WAKF), 6 B. 42.

Misjoinder.

(1) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 177.

(2) See PRACTICE, 6 B. 390.

Month.

See LIMITATION ACT (XV OF 1877), 6 B. 83.

Mortgage.

(1) GENERAL.
(2) EQUITY OF REDEMPTION.
(3) FORECLOSURE.
(4) MERGER.
(5) PRIORITY.
(6) REDEMPTION.
(7) SALE.
(8) SIMPLE.
(9) USUFRUCTUARY.

——1.—General.

(1) Ancestral estate—Mortgage by co-parcener—Mortgagee affected by acts of mortgagor—See EXECUTION OF DECREE, 5 B. 496.

(2) Civ. Pro. Code—Act X of 1877, s. 43—Entitled to more than one remedy—Leave to omit to sue—First hearing—Suit on personal covenant—Limitation Act, XV of 1877, sch. II, art. 132—Money charged upon immoveable property—See CIV. PRO CODE (ACT X OF 1877), 5 B. 463.

(3) Decree—Collateral inquiry into a mortgage lien on attached property—Insolvency of a judgment-debtor—See EXECUTION OF DECREE, 6 B. 584.

(4) Mortgagee in possession—Forcible dispossession by mortgagor—Suit for possession—Specific Relief Act I of 1877, s. 9—Fraud—Appeal—See SPECIFIC RELIEF ACT (I OF 1877), 5 B. 446.

(5) *Of property already sold in execution—Subsequent mortgagee with notice of previous sale—Assignment—Rejection of application under s. 269 of Act* VIII *of* 1859—*Suit within one year.*—On the 7th October, 1866, K (defendant No. 1), one of the three sons of Bahirji., mortgaged certain immoveable property to one Narhar with possession. On the 19th December, 1866, Atmaram (plaintiff No. 1) obtained a money decree against K and the estate of his deceased father. In execution of that decree the property was sold by the Court and purchased by Atmaram himself, who obtained a certificate of sale dated the 30th January, 1868. He subsequently sold and conveyed the property to Damodar and Apaji (plaintiffs Nos. 2 and 3). On applying to the Court for possession, the plaintiffs were resisted by Narhar. The Court rejected the plaintiffs' application on the 11th July, 1868. On the 31st May, 1871, K and his two brothers mortgaged the property to M (defendant No. 2), who took the mortgage with full notice of the Court sale to the plaintiff Atmaram. K and his brothers paid off the mortgage of Narhar out of the money borrowed by them from M (defendant No. 2) on the mortgage of the property. Narhar returned his mortgage-deed to K and his brothers, who made it over to M. In 1878 the plaintiffs brought a suit against K and M for possession of the property. The Subordinate Judge held the plaintiffs entitled to recover it, on payment of the amount due to M on his mortgage, being of opinion that M

was in the same position as Narhar. In appeal, the District Judge dismissed the plaintiff's suit, on the ground that it was not brought within one year from the date when the application for possession was rejected. On appeal to the High Court.

Held that the mortgage by K and his brothers to M, dated the 31st May, 1871, was a mortgage of property which did not then belong to them,—their estate and interest in it having passed to the plaintiff Atmaram at the Court sale.

Held, also, that the order of the 11th July, 1868, rejecting the plaintiffs' application for possession under s. 269 of the Civ. Pro. Code (Act VIII of 1859) did not affect the right to bring a redemption suit against Narhar.

Held, further, that there was nothing to show any assignment, by Narhar, of his mortgage, or any intention on his part to assign it to M, or to keep it on foot for M's benefit.

The High Court accordingly reversed the decrees of the Courts below, and made a decree in favour of the plaintiffs. APAJI BHIVRAV v. KAVJI, 6 B. 64 ... 499

(6) Of vatan property—Reg. XVI of 1827, s. 20—Bombay Act III of 1874—See VATAN, 5 B 435.

(7) Receipts by mortgagee—Suit on mortgage payable on demand -- See EVIDENCE, 5 B. 181.

(8) Reg. XVI of 1827—Mortgage of vatan property—Mortgagor's life-interest—Bombay Act III of 1874—See VATAN, 6 B. 211.

(9) Suit against a mortgagee for the recovery of a portion of property mortgaged —Court Fees Act VII of 1870, s. 7, cl. ix, item 1, sch. I—See COURT FEES ACT (VII OF 1870), 6 B. 324

———2.—Equity of Redemption.

(1) *Decree—Non-joinder—Sale of the right, title, and interest of a mortgagor or his heir—Rights of an auction purchaser—Equity of redemption.*—The usual mode, in the Muffassal Civil Courts, of selling in mortgage suits "the right, title, and interest" of the mortgagor or his heir, is not correct, if deemed to be his right title, and interest at the time of the sale. The intention of the Court is to pass to the purchaser the right, title, and interest both of the mortgagor and mortgagee. What passes to the auction-purchaser under the certificate of sale, is the right, title, and interest of the mortgagor as it stood when he made the mortgage, and not merely as it stood at the time of the Court sale.

One Umar Saiba mortgaged certain immoveable property to A.R. (defendant No. 1) for Rs. 400 on the 7th May, 1865. On the death of Umar, the mortgagee A. R brought a suit (No. 311 of 1871) against his widow K (defendant (No. 2), but did not make his (Umar's) children (who were minors) parties to it. On the 28th July 1871, A.R. obtained a decree for Rs. 460, being the amount of principal and interest due on his mortgage, with further interest from the date of suit to date of payment. That decree directed satisfaction of the amount due under it out of the mortgaged property if it were not paid by the widow K. (defendant No. 2). K having failed to satisfy the decree, the Court, on the application of A R. (the decree-holder) sold the mortgaged property, on the 19th September, 1872, for Rs. 400 to the brother of A.R. On the 7th August, 1873, the auction-purchaser obtained a certificate of sale to the effect that he had purchased at the Court sale "the right, title, and interest of K" (the widow) in the mortgaged property. On the 17th August 1874, the auction-purchaser sold the property for Rs. 700 to the father of the plaintiff. In 1877 the plaintiff sued A.R. (the mortgagee and decree-holder) to recover possession of the property with mesne profits. Umar's widow K, and children (two sons and a daughter) were defendants in the suit, the plaintiff alleging, in addition to the facts just stated, that these defendants had colluded with the tenants of the property in dispute, and collected the produce thereof. Defendant No. 1 (A.R) denied his liability. The answer of defendants 2, 3, 4 and 5 (respectively the widow, two sons, and a daughter of Umar) substantially was that the Court sale did not affect the rights of defendants 3, 4, and 5, as they had not been

Mortgage—2.—Equity of Redemption—(*Concluded*). PAGE

parties to the mortgage suit No. 311 of 1871, and that they were entitled to hold the property. The Subordinate Judge awarded the plaintiff's claim, holding that both the sales, *viz.*, the Court sale under the mortgage decree in suit No. 311 of 1871 and the subsequent private sale by the auction-purchaser, were *bona fide* and binding on defendants 2, 3, 4 and 5, inasmuch as the debt for which the property was sold had been contracted by Umar. This decree was reversed in appeal, on the ground that the Court sale extended only to the right, title, and intereet of K (defendant No. 2) in the mortgaged property, and did not affect the rights of defendants 3, 4 and 5, who were not parties to it. On appeal to the High Court.

Held that the defect in the title of the purchaser (plaintiff) arose from the circumstance that the suit of A-R. (No. 311 of 1871) for foreclosure and sale was insufficiently constituted as to parties, both the sales having been found to be unimpeachable in all other respects, and that the defendants Nos. 3, 4 and 5 were only entitled to the same relief which they would have obtained if they had been made parties to that suit, *viz.*, the right of redeeming the property by paying off the mortgage.

The High Court accordingly reversed the decree of the District Judge, and directed the defendants 3, 4 and 5 to pay to the plaintiffs, within six calendar months from date, the sum of Rs. 460, with interest on the principal (Rs. 400) from date of the institution of suit No. 311 of 1871 until payment. The Court further directed that, in default of payment, the mortgage should be foreclosed, and defendants 3, 4 and 5 precluded from redeeming the property which should be delivered up to the plaintiff. SHAIK ABDULLA SAIBA v. HAJI ABDULLA, 5 B. 8 ... 6

(2) See MORTGAGE (FORECLOSURE), 5 B. 14.

(3) See MORTGAGE (PRIORITY), 6 B. 404 ; 6 B. 538, 561.

(4) See VENDOR AND PURCHASER, 6 B. 380.

———3.—Foreclosure.

(1) *Suit for foreclosure and sale—Parties—Minor—Guardian—Certificate—Madras Regulation V of 1804—Act XX of 1864—Form of decree.*—J. (defendant No. 1) brought a suit (No. 374 of 1861) against the plaintiff's father G. on a mortgage-bond, dated the 2nd April, 1856, G having died before any decree was passed, his widow (plaintiff's mother) was substituted as defendant, and a decree was made against her *ex parte*. It was, however, set aside after her death on the application of M (defendant No. 2), the sister of G, on the ground of want of due service of process upon G, and his widow M was substituted as defendant in the suit, and a new decree was made in her favour. The decree, was reversed, in appeal, by the District Court, which allowed J's claim. In execution of the decree of the Appellate Court the mortgaged property was sold and purchased by J for Rs. 250 J obtained a certificate of sale headed thus :—" Jatha Naik, son of Lakshmi, plaintiff; Govinda, son Naga, deceased, supplement or substitute) his sister Manji, defendant," and it certified that J had purchased " all the right, title, and interest which the said defendant had in the said property." J was put into possession of the property. In 1877 the plaintiff (son of the original mortgagor G) filed the present suit against J and M alleging that the mortgage-bond on which J had obtained his decree had been forged by J ; and contending that the decree and subsequent proceedings under it did not affect his rights, inasmuch as he had not been made a party to them. The prayer in the plaint was that the decree and sale should be set aside, and property restored to possession. The defence of J substantially was that the suit and appeal were defended by persons who were proper guardians of the plaintiff, and had been in the management of his property. M did not appear. The Subordinate Judge rejected the plaintiff's claim holding that M was his guardian and manager of his property in this previous suit and appeal, and the mortgage bond was genuine. In appeal, that decree was reversed by the District Judge on the ground that the plaintiff had not been represented in the previous litigation by a guardian duly appointed under Madras Regulation V of 1804, and was no party to it. He accordingly allowed the plaintiff's claim. On second appeal to the High Court.

Held, that on death of G the plaintiff was his sole heir ; that the equity of redemption in the mortgaged property vested in him ; and that the

Mortgage—3.—Foreclosure—(*Concluded*). PAGE

inheritance was wholly unrepresented in the previous litigation, inasmuch as M was not appointed guardian of the plaintiff's person or administratrix of his estate, either under Madras Regulation V of 1804, ss. 2, 19, 23, or under Act XX of 1864; nor was she appointed his guardian *ad litem* in the mortgage suit. JETHA NAIK v. VENKTAPA, 5 B. 14=5 Ind. Jur. 368 10

(2) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 6 B. 734.

(3) See MORTGAGE (REDEMPTION), 5 B. 22.

——4.—Merger.

See MORTGAGE (PRIORITY), 6 B. 404.

——5.—Priority.

(1) *Prior and puisne mortgagee—Purchase by prior mortgagee of equity of redemption at a Court sale—Evidence of intention to keep mortgage alive.*—Where a prior mortgagee purchased the equity of redemption at a Court sale, *held*, following the Full Bench ruling in *Mulchand Kuba* v. *Lallu Trikam*, that in a contest between himself and a puisne mortgagee he was entitled to fall back upon his original mortgage, and to retain possession until his mortgage was paid off.

Generally, slight evidence will suffice to show that the prior mortgagee intended to retain the benefit of his mortgage. The fact that the mortgage deed remains with the mortgagee who purchases, is evidence that he intends to retain the benefit of his mortgage. SHANTAPA v. BALAPA, 6 B. 561 ... 829

(2) *Purchase of equity of redemption by first mortgagee — Priority—Notice—Merger.*—On the 20th of August 1870 M, the owner of a house in Gujarat, mortgaged it to the defendant's father with possession. On the 2nd of December 1871 he made a *san* mortgage of the same house to the plaintiff. On the 20th of April 1872, M sold the equity of redemption to the defendant's father, who became the purchaser without cancelling his first mortgage. The plaintiff subsequently sued M to enforce his *san*-mortgage, and obtaining a decree, placed an attachment on the house, which attachment, however, was removed on the application of the defendant's father. The plaintiff now sued to establish his right to levy the amount due on his *san*-mortgage. He claimed priority to the defendant on the authority of *Toulmin* v. *Steere*, where it was held that a purchaser of the equity of redemption could not set up a prior mortgage of his own against subsequent incumbrances of which he had notice.

Held that the intention of the defendant's father, when purchasing the equity of redemption, having been to retain the benefit of all his rights, his son, the defendant, might properly require the redemption of his first mortgage as the condition of the plaintiff's enforcing the decree upon his mortgage against the property.

A mortgagee purchasing the equity of redemption may indicate his intention to keep his charge upon the property alive otherwise than by express words.

Per WEST, J.—The successive charges created by the owner of an estate may be regarded as fractions of the ownership, which embraces the aggregate of advantages that can be drawn from it. Each charge in its turn constitutes a deduction from the original aggregate, and the nominal ownership may itself then be reduced to a small fraction of what it once was. Still, be it small or great, it is a possible object of sale or purchase, and there is no ground or reason for saying that an incumbrancer who is already owner of one fraction of the property may not buy this other fraction without forfeiting the former fraction in favour of other fractional owners in the remainder left after deduction of his prior share. MULCHAND KUBER v. LALLU TRIKAM, 6 B. 404 (F.B.) ... 725

(3) *Purchaser for value without notice of a prior san-mortgage—Suit by mortgagee against purchaser to establish right to attach property—Right of purchaser to redeem—Parties—Form of decree.*—On the 23rd March 1869 a house was mortgaged by its owner, P, to J by a *san*-mortgage. After the death of P, his heirs, D and T, on the 9th July 1869, executed to the plaintiff a *san*-mortgage of the same house for Rs. 62. That mortgage was neither registered nor accompanied with possession. On the 27th July 1869 D and T sold the house to the defendant. The deed of sale was not registered. A part of the purchase-money was applied to the payment of the first *san*-mortgage which was then delivered up to the defendant, with

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a receipt on it by J, who acknowledged to have received from the defendant the amount due on his mortgage. The defendant, however, omitted to take an assignment of that mortgage to himself. The plaintiff sued D and T on his *san*-mortgage of the 9th July 1869, and in 1872 obtained a decree for the recovery of the mortgage-debt out of the mortgaged property. The defendant was not made a party to that suit. The plaintiff attached the house in execution of his decree; but the attachment was raised on the application of the defendant under s. 246 of the Civ. Pro. Code, Act VIII of 1859. The plaintiff then sued the defendant to establish his (plaintiff's) right to attach and sell the house under his *san*-mortgage. The defendant answered that he was a purchaser for value, without notice of the plaintiff's mortgage. The plaintiff's claim was dismissed by the first Court, but allowed by the appellate Court. On special appeal,

Held that the defendant's plea that he was a purchaser for valuable consideration, and without notice of the plaintiff's *san*-mortgage, would not avail to defeat that mortgage under the established usage of Gujarat in favour of *san*-mortgages.

Held, further, that the defendant, having become entitled by his purchase at least to the equity of redemption in the house, ought to have been made a party to the plaintiff's original suit on his mortgage, and was not bound by the decree in that suit, and was entitled to a reasonable time to redeem the house from the plaintiff's mortgage. NARAN PURSHOTAM v. DOLATRAM VIRCHAND, 6 B. 538 (**F.B.**) = 8 Ind. Jur. 646 ... 813

(4) *Without possession—Decree—Execution—Judicial sale—Right of mortgagee as against the purchaser—Effect of Court sale—Difference between a mortgage valid as against a private purchaser for valuable consideration and one valid as against a purchaser at a Court sale—Priority—Optional registration—Penalty.*—On the 19th September, 1871, the land in dispute was mortgaged by L. (defendant No. 1) to the plaintiff for Rs. 25. The deed of mortgage was not registered. By it defendant No. 1 agreed to pay interest at the rate of one pice per rupee *per mensem*, and it was provided that the mortgagee was to remain in possession for a period of twenty-five years in lieu of principal and interest, and that the mortgagor was not to claim the property back, unless he paid the principal and interest that might accrue due in twenty-five years from the date of the bond. On the 8th July 1872 the land was sold in execution of a decree against the father of L. and purchased by B (defendant No. 2), who obtained possession under the certificate of sale. In 1874 the plaintiff (the mortgagee) sued L and B for possession of the property. It was contended for B (defendant No. 2) that the mortgage did not bind him, because he was a purchaser for value without notice of the mortgage, and because it was not accompanied with possession,

Held that, although the mortgage to the plaintiff might have been without possession, it would bind the mortgagor himself, and was therefore, binding as against defendant No. 2, who purchased at a Court sale under a decree obtained against the mortgagor. A purchaser at such a sale takes only that which the judgment-debtor could himself honestly dispose of.

Possession or registration is necessary to validate a mortgage in the Deccan or elsewhere in the Presidency of Bombay (except Gujarat) against a private purchaser for valuable consideration, but not against a purchaser at a Court sale.

Held, also, that the clause in the mortgage deed as to payment of twenty-five years' interest was not a penalty. BAPUJI BALAL v. SATYABHAMABAI, 6 B. 490 = 6 Ind. Jur. 590 ... 781

(5) See MORTGAGE (REDEMPTION), 6 B. 515.

(6) See REGISTRATION, 6 B. 193.

(7) See REGISTRATION ACT (III OF 1877), 5 B. 653.

——6.—Redemption.

(1) Agriculturist mortgagor—Dekkhan Agriculturists' Relief Act, XVII of 1879—Suit for account and redemption before the time fixed for payment—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 6 B. 734.

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(2) *Before expiration of time—Cause of action.*—The general principle as to redemption and foreclosure is that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose are co-extensive.

A mortgage deed, dated the 30th April, 1870, stipulated that the mortgagor would pay the debt, with interest, within ten years and redeem the mortgaged property. In a suit instituted on the 30th July 1877, for the redemption of the property, the mortgagee contended that the time had not expired.

Held, that the suit was unsustainable, because prematurely instituted the mere use of the word "within" not being a sufficient indication of the intention of the parties that the mortgagor might redeem in a less period than ten years. VADJU v. VADJU, 5 B. 22 ... 16

(3) By a person not owner—Agent—Ratification—Estoppel—See ACT III OF 1874 (HEREDITARY OFFICERS), BOMBAY 6 B. 463.

(4) Decree in mortgage suit—Instalments—Act XVII of 1879, ss. 20, 74—Act X of 1877, s. 210—Agriculturist—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 5 B. 604.

(5) *Possession—Right to redeem—Parties—Registration Act XX of 1866, s. 50—Priority—Notice of prior unregistered mortgage.*—On the 24th September 1869, G, mortgaged certain land to H. Subsequently, on the 14th June 1870, he mortgaged the same land to P. Both the mortgages were for sums less than Rs. 100. The mortgage to H was unregistered, but the subsequent mortgage to P was registered. On the 21st June 1873 in a suit to which P was not a party, H obtained a decree on his mortgage, and at the execution sale he himself became the purchaser, and was put into possession of the land under his certificate of sale. On the 21st September 1874 P assigned his mortgage to the plaintiff. The deed of assignment was not registered; neither P nor his assignee, the plaintiff, ever had possession under the mortgage of 1870. The plaintiff brought this suit to obtain possession of the land. Both the lower Courts dismissed the plaintiff's claim. On special appeal to the High Court,

Held that if P, at the time of taking his registered mortgage in 1870, had notice of the prior unregistered mortgage to H, he had that which it is the object of the registration law to give, and, consequently, the non-registration of H's mortgage could not, under Act XX of 1866, avail either P or the plaintiff who claimed under him by an assignment executed subsequently to the decree in H's mortgage suit.

A subsequent registered purchaser or mortgagee cannot avail himself of the registration of his deed against a prior unregistered purchase or mortgage of which he had notice.

The High Court reversed the decrees of the Courts below, and remanded the case to the District Judge, to ascertain whether P., at or before the time of the execution of his registered mortgage, had notice of the prior unregistered mortgage to H.

Held, also, that, in order to bind P by the decree passed in 1873 and thus make a good title to the purchaser under that decree, H should have made P a party to his suit, thereby giving P an opportunity of redeeming H's mortgage H having neglected to do this, the plaintiff in the present suit, as the assignee of the rights and equities of P., was entitled to redeem the mortgage of H in case it was proved that P had notice of that mortgage. SHIVRAM v. GENU, 6 B. 515 ... 798

(6) *Rights and liabilities of prior and subsequent mortgagees—Redemption—Suit by second mortgagee—Form of decree.*—S mortgaged a house and site to R on the 4th January 1870; and on the 21st February 1870, he (S) mortgaged the same property to D. On the 3rd January 1874, R brought a suit against S on the mortgage and obtained a decree which directed the satisfaction of the mortgage debt by the sale of the mortgaged property. R did not make D a party to that suit. The property was sold by the Court and purchased by N in his own name, but as trustee for R. At the Court sale, D, the puisne mortgagee, gave notice of his claim to R and N. D sued N, R and S for the amount due on his mortgage. In his evidence R admitted that he, subsequently to the sale to N, pulled down the house

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and sold portion of the materials. The lower Courts dismissed the suit, holding that N (defendant No. 1), the purchaser at the auction sale, was not liable for the plaintiff's claim. On appeal to the High Court,

Held that D being puisne mortgagee, and, as such, representing the equity of redemption to the extent of his mortgage, should have had an opportunity of redeeming the mortgaged premises from R's mortgage, and should have been made a party to R's suit. He could not be deprived of his right by proceedings to which he was not a party, and was, therefore, entitled to a decree framed on the basis of such right of redemption. DAMODAR DEVCHAND v. NARO MAHADEV, 6 B. 11 ... 464

(7) *Right to redeem—Vendor and purchaser—Good title at time of hearing of suit—Certificate of sale.*—The property in dispute was mortgaged by its owner to the defendant with possession on the 23rd October, 1847. On the 3rd December, 1861, A obtained a money-decree against the son and heirs of the mortgagor. In execution of that decree the property was sold subject to the mortgage, and purchased by B on the 12th August, 1864. Before confirmation of the sale, B, on the 1st September, 1864, sold it to C, who, on the 30th March, 1877, conveyed it by deed to the plaintiff. On the 27th September, 1877, the plaintiff brought a suit for redeeming the property, and at the hearing produced a certificate of sale, dated the 27th October, 1877. The certificate was applied for in May, 1877, and issued to C. reciting the sale to B, and the sale by B to C. The Court of first instance allowed the plaintiff to redeem on payment of a certain sum of money to the defendant. The Assistant Judge, in appeal, reversed the decree of the first Court on the ground that the certificate of sale was not in existence at the date of the institution of the suit, and that, therefore, the plaintiff had then no complete title. On appeal to the High Court,

Held that the plaintiff, having purchased and paid for the equity of redemption, was entitled to redeem, although the certificate of sale was not issued until after the suit had commenced.

If a party, whose title is to some extent imperfect, seeks to redeem and is able to prove a perfect title at the hearing of his cause, he should have a decree for redemption. KRISHNAJI RAVJI v. GANESH BAPUJI, 6 B. 139 551

(8) *Suit on mortgage—Account—Evidence—Burden of proof.*—In a mortgage suit, where the defendant admitted that he was in possession of the property in dispute as a mortgagee under the plaintiff, but refused to put in evidence the mortgage-deed which was insufficiently stamped.

Held that the plaintiff was entitled to redeem, on paying what was due from him on the mortgage, together with the costs of the suit, and that if the mortgagee refused to pay the penalty and put the mortgage deed in evidence, he could only be credited in the account with the sum which the plaintiff admitted to be the amount of the principal, and must be debited with the income derived from the land since he (mortgagee) had been in possession.

In taking the account on a mortgagee, it lies upon the mortgagee to prove what is due from the mortgagor in respect of principal and interest. GANGA MULIK v. BAYAJI, 6 B. 669 ... 901

(9) The Dekkhan Agriculturists' Relief Act XVII of 1879, s. 16—Suit by a mortgagor for account only—Decree—Execution of a money decree obtained by mortgagee—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 5 B. 614.

(10) See MORTGAGE (PRIORITY), 6 B. 538.

(11 See REGISTRATION, 6 B. 168.

——7.—Sale.

(1) Decree—Execution—Effect of sale in execution of decree—See EXECUTION OF DECREE, 5 B. 5.

(2) Execution—Sale—Right of purchaser—Effect of sale—Estoppel—Minor—Act XX of 1864—See EXECUTION OF DECREE, 5 B. 2.

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(3) Regulation XXVIII of 1827, s. 14, cl. 1—Execution—Sale—Purchaser of mortgagor's interest—Third party—Stamp—Interest—Damdupat—See EXECUTION OF DECREE, 5 B. 127.

(4) See MORTGAGE (FORECLOSURE), 5 B. 14.

———8.—Simple.

Suit by mortgagee to recover debt from mortgagor personally—Money decree—Limitation Act, XV of 1877, sch. II, art. 132—See LIMITATION ACT, (XV OF 1877), 6 B. 719.

———9.—Usufructuary.

Subsequent agreement conveying to mortgagee for a term of years—Effect of such agreement—"Once a mortgage always a mortgage"—Suit by heirs of mortgagor to recover the property—Limitation—Usufructuary mortgage.—Where, after the expiration of the period prescribed for redemption, the mortgagor and mortgagee agreed that the mortgagee should continue in absolute possession for a fixed term, and then restore the property free from the mortgage lien.

Held, that the agreement was distinct from the original mortgage, and was not intended to be a mortgage, but a conveyance for a term of years, and a suit to recover the property must be brought within twelve years from the expiration of the term stipulated in the agreement. GOPAL SITARAM GUNE v. DESAI, 6 B. 674=7 Ind. Jur. 96 ... 904

Mukadam.

See INSOLVENT ACT, 11 AND 12, VIC. C. 21, 5 B. 1.

Mukhtyar.

Crim. Pro. Code, Act X of 1872, s. 278—Appeal—See PRACTICE, 6 B. 14.

Municipality.

Suit against—Bombay Act, VI of 1873, s. 86—See (ACT VI OF 1873) (BOMBAY DISTRICT, MUNICIPAL), 6 B. 580.

Mutual Accounts.

Limitation—Act IX *of* 1871, *sch. II, cl.* 87—*Reciprocal demands.*—From the month of September, 1873, until the month of May, 1874, the plaintiffs at Bombay and the defendant at Karachi had dealings with one another. It was the practice for the defendant at Karachi to draw *hundis* upon the plaintiffs at Bombay, which the plaintiffs duly accepted and paid at Bombay; and, in order to put the plaintiffs in funds, the defendant was in the habit of drawing *hundis* upon other firms in Bombay in favour of plaintiffs, the amount of which *hundis* the plaintiffs realised from time to time at Bombay. Until the 8th January, 1874, the balance of the account was sometimes in favour of the plaintiffs and sometimes in favour of the defendant. After that date the balance of the account was always in favour of the plaintiffs, who continued to make advances up to the 10th May, 1874. The last payment made by the defendant was on the 27th April, 1874. The last advance made by the plaintiffs was on the 10th May, 1874. On the 10th May, 1874, the total balance due by the defendant was Rs. 8,514-12-2. The plaintiffs calculated interest on this sum up to the 9th April, 1877, and on the 19th April, 1877, filed the plaint in this suit to recover the said amount. The defendant pleaded limitation. The plaintiffs contended that the account between them and the defendant was a mutual account, and that, under cl. 87 of sch. II of the Limitation Act, XV of 1887, the period of limitation dated from the day of the last advance made by them to the defendant, *viz.*, 10th May, 1874.

Held, on the authority of *Ghaseeram* v. *Manohar Doss*, that the account between the plaintiffs and the defendant was a mutual, current and open account within the meaning of cl. 87, and that the suit was not barred.

Literally construed, cl. 87 would apply only to those cases in which both parties have, in the course of their dealings, made *actual* demands on one another. The more reasonable and more probable intention of the framers of the clause appears to have been that it should apply to cases

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where the course of business has been of such a nature as to give rise to reciprocal demands between the parties; in other words, where the dealings between the parties are such that sometimes the balance may be in favour of one party and sometimes of the other. NARRANDAS HEMRAJ v. VISSANDAS HEMRAJ, 6 B. 134

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See LAND TENURE, 5 B. 77.

Native Courts.

See FOREIGN JUDGMENT, 6 B. 292.

Native Jote.

See LIMITATION ACT (XV OF 1977), 6 B. 83.

Negotiable Instrument.

Promissory note—Material alteration,—An alteration which vitiates an instrument must be such as to cause the instrument on the face of it to operate differently from the original instrument. The alteration of the rate of interest in one of the clauses of a promissory note, *held*, to be a material alteration vitiating the note, although the clause so altered was a penal clause to which, even if unaltered, the Court would not give effect. OODEYCHAND v. BHASKAR, 6 B. 371=6 Ind. Jur. 533=Chitty's S.C.C.R. 102

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(1) See IMMOVEABLE PROPERTY, 6 B. 546.

(2) See LIMITATION ACT (XIV OF 1859), 5 B. 322.

Non-joinder.

See MORTGAGE (EQUITY OF REDEMPTION), 5 B. 8.

Notice.

(1) To quit—See LANDLORD AND TENANT, 6 B. 67.

(2) See COMPANY, 5 B. 223.

(3) See MORTGAGE (PRIORITY), 6 B. 404.

(4) See MORTGAGE (REDEMPTION), 6 B. 515.

(5) See REGISTRATION, 6 B. 168, 193.

(6) See VENDOR AND PURCHASER. 6 B. 165.

Order.

Interlocutory—Final decree or order, what is a—Civ. Pro. Code (Act X of 1877), ss. 595, 600—Privy Council, appeal to—Certificate as to value of subject-matter of the suit—See APPEAL (TO PRIVY COUNCIL), 6 B. 260.

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(1) See ACT VI OF 1873 (BOMBAY DISTRICT MUNICIPAL). 6 B. 686.

(2) See CRIM. PRO. CODE (ACT X OF 1872), 6 B. 672.

Parading bullock on the Pola.

See JURISDICTION, 6 B. 116.

Parsis.

(1) *Applicability of the Statute of Frauds to—Statute of Frauds—Stat. 29 Charles II, C. 3—Trust—Resulting trust.*—The plaintiff, who was the widow of G., sued the defendant, the executrix of J, to recover a sum of Rs. 7,394-9-6, part of the purchase-money of a house which had been sold by J in his life-time, and which the plaintiff alleged had been, shortly before his death, conveyed by her husband G to J in trust to sell and hold the proceeds in trust for G's family. The defendant denied the trust, and insisted that J had purchased the house from G. for valuable consideration. Both J and G were Parsis.

Held, that, even assuming that no consideration was given by J to G for the house, the plaintiff was not entitled to succeed.

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Parsis—(*Continued*).

In the absence of consideration, the trust of the house, which was admittedly conveyed by G to J, would have resulted to G, unless, under the provisions of s. 7 of the Statute of Frauds (29 Charles II, c. 3), he (G) had declared in writing some other trust which was to supersede the resulting trust in his own favour. No such declaration of trust in writing was proved. If, on the other hand, the trust did result to G, he, no doubt, might, as equitable owner of the house, have disposed of his interest by will. If he did so, the plaintiff had not qualified herself to sue as his representative. Probate had not been obtained of the will, and until the will was proved, it could not be said that G had made a particular declaration of trust by it. Nor without probate could the plaintiff take up the position of legal representative of her deceased husband entitled to enforce his rights and, amongst others, his rights under the supposed resulting trust. Except as executrix or as administratrix the plaintiff could not recover property, or enforce rights equitably vested in her deceased husband.

The Statute of Frauds (29 Charles II, c. 3), except so far as it has been repealed, applies to Parsis in India. BAI MANECKBAI v. BAI MERBAI, 6 B. 363 ... 698

(2) Gift to sole and separate use among—See GIFT, 5 B. 268.

(3) *In Mofussil of Bombay, English Law how far applicable to—Agreement—Construction*—Lex loci—*Rule in Shelley's Case—Act* IX *of* 1837.—The members of a Parsi family, the heirs of one Framji Cowasji Banaji, deceased, entered into an agreement, dated the 21th May, 1851, by which they agreed that the remaining income (after paying the deceased's debts) of a certain estate which had belonged to the deceased, called the Poway Estate, situated in the island of Salsette, and, therefore, in the Mofussil of the Presidency of Bombay, should be appropriated in certain shares among the heirs mentioned in cl. 9 of the agreement—*i.e.*, among the parties to the agreement, "*but after their death their shares are to be enjoyed and received by their heirs and children from generation to generation for ever.*" It was contended that Parsis being subject to English law, these words conferred an absolute estate in their respective shares upon the various parties to the agreement under the rule in *Shelley's Case*.

Held (affirming the order of Bayley, J.) that, even assuming English law to be applicable, the English law so to be applied could not include the rule in *Shelley's Case*, which is a law of property or tenure based on feudal considerations, and unsuited to the circumstances of India, that the rule of construction to be applied to the agreement must in any case be to give effect to the intention of the parties according to the plain meaning of the language, and that to construe the agreement as giving more than a life-interest to the parties thereto, would be to defeat their obvious intention. MITHIBAI v. LIMJI NOWROJI BANAJI, 6 B. 151 ... 559

(4) *In the Mufassal of the Bombay Presidency, law applicable to*—"*Justice, equity, and good conscience*"—*English law, general and special—Rule in Shelley's Case.*—The law applicable to Parsis in the Mufassal of the Presidency of Bombay is, in the absence of evidence of any specific law or usage applicable to the particular case, "justice, equity, and good conscience alone."

In applying "justice, equity, and good conscience" to the facts of any particular case, the Courts will be guided by the general principles of English law applicable to a similar state of circumstances, and so as, if possible, to give effect to the intentions of the parties concerned, where such intentions are clearly expressed, and are not repugnant to any general principle of English law.

The Courts will not, in such a case, apply rules of English law which, though well established and binding on English Courts, are yet so special in their nature and origin as to be inapplicable to the different circumstances of this country.

The members of a Parsi family, the heirs of one Framji Cowasji Banaji, deceased, entered into an agreement with one another, bearing date the 24th May, 1851, by which they agreed that the remaining income, after paying the deceased's debts, of a certain estate which had belonged to the deceased, called the Poway Estate—an estate situated in the island of

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Salsette, and, therefore, in the mufassal of the Presidency of Bombay—should be apportioned "to the heirs mentioned in cl. 7 (of the agreement)"—*i.e.*, among the various heirs of Framji Cowasji Banaji, deceased, the parties to the agreement—"but, after their death, their shares are to be enjoyed and received by their heirs and children from generation to generation."

Held, that the plain intention of the parties to the agreement, appearing on the face of the agreement, was that they themselves should take only a life estate to the extent of their respective shares in the remaining income of the Poway Estate; and that the rule in *Shelley's Case* should not be applied so as to defeat that plain intention. MITHIBAI v. LIMJI NOWROJI BANAJI, 5 B. 506

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(1) Partnership—Practice—Contract Act IX of 1872, s. 13—See PARTNERSHIP, 6 B. 700.

(2) See CHARTER PARTY, 5 B. 539.

(3) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 177.

(4) See CRIM. PRO. CODE (ACT X OF 1872), 6 B. 670, 672.

(5) See EJECTMENT, 5 B. 208.

(6) See HINDU LAW (JOINT FAMILY), 5 B. 685.

(7) See MORTGAGE (FORECLOSURE), 5 B. 14.

(8) See MORTGAGE (PRIORITY), 6 B. 538.

(9) See MORTGAGE (REDEMPTION), 6 B. 515.

Partition.

Bombay Act V of 1864—Limitation Act IX of 1871, sch. II, art. 46—See LIMITATION ACT (IX OF 1871), 5 B. 25.

Partnership.

(1) Hindu Law—Joint Hindu family—Business carried on by one member as manager—Liability of all as joint owners—Ancestral trade and ordinary partnership, difference between—Indian Contract Act IX of 1872—See HINDU LAW (JOINT FAMILY), 5 B. 38.

(2) Jurisdiction of District Court to wind under s. 265 of Indian Contract Act—The Indian Contract Act IX of 1872, ss. 254 and 265—The Bombay Civil Courts' Act No. XIV of 1869—Power of District Judge to refer to Assistant Judge a case falling under s. 265 of Contract Act—See CONTRACT ACT (IX OF 1872), 5 B. 65.

(3) *Limitation—Suit by representative of a deceased partner for a share of a specific asset of the partnership recovered after the right to a general partnership account is barred.*—A suit may be brought by the representative of a deceased partner against the surviving partner of a firm to recover a share in a sum received by the surviving partner in respect of a partnership transaction within the period of limitation, although a suit to take partnership accounts generally would be barred.

H. J., the plaintiff's father, and the defendant R. were partners in the firm of Hormusji and Rustomji which carried on business in China. In the year 1862 the firm of N.K. & Co. was largely indebted to the firm of Hormusji and Rustomji. At the end of that year the latter firm ceased to do business, but no formal dissolution of the partnership ever took place. In 1869 the defendant R. filed a suit (No. 461 of 1869) in the High Court of Bombay in his own name and that of H. J., his former partner, against the firm of N. K. & Co., for an account of the dealings of that firm with the firm of Hormusji and Rustomji, and by a decretal order dated 19th March, 1870, the suit was referred to the Commissioner to take the accounts as prayed for. On the 17th December, 1872, H. J. died at Hongkong intestate. On 22nd February, 1873, the defendant R. assigned to the second defendant W. for Rs. 20,000 the claim of the firm of Hormusji and Rustomji against the firm of N. K. & Co. The plaintiff did not know of this arrangement, and he only became aware of it in 1880. The plaintiff alleged that of the said sum of Rs. 20,000 the second defendant W. paid to the first defendant R. Rs. 10,000 in 1878, and for the remaining

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Rs. 10,000 gave a promissory note payable in July or August, 1881. The plaintiff took out letters of administration to his father H. J., and brought this suit on 16th July, 1880, claiming a moiety of the Rs. 10,000 already paid by the defendant W. to the first defendant R. and praying that he might be declared entitled to a moiety of the remaining sum of Rs. 10,000 payable by the defendant W., and that the same might be paid ovsr to him.

The defendent R. alleged that he had assigned the claim against the firm of N. K. & Co. to the defendant W., and had received the consideration for such assignment in February, 1873, and contended that if the plaintiff had ever any claim to any portion of the said money (which he denied) such claim was barred by limitation. He also alleged that he had carried on the Suit No. 461 of 1869 without any assistance from the plaintiff's father H. J., or from the plaintiff, who, although applied to, refused to assist him, and he submitted that under no circumstances was the plaintiff entitled to any of the monies claimed by him without giving credit to the defendant for his (plaintiff's) share of the expense of proseouting the said suit and for the amount of proper remuneration to the defendant for the time and labour bestowed by him in the said suit. He also claimed that the partnership accounts of the firm of Hormusji and Rustomji should be taken, and alleged that on such accounts being taken a large sum woud be found due to him from the partnership. The second defendant W. paid into Court the Rs. 10,000 due on the promissory note above mentioned, and was dismissed from the suit. At the hearing the Judge found that, of the other moiety of the consideration for the assignment of February, 1873, a sum of Rs. 1,000 was paid by the defendant W. to the defendant R. in January 23, 1878, and a sum of Rs. 6,000 on September 13, 1879.

Held that the suit was not barred by limitation in respect of the said sums of Rs. 1,000, Rs. 6,000 and Rs. 10,000, and that the plaintiff was entitled to recover a half share of these sums from the defendant R., deducting all sums expended by the defendant in the prosecution of the Suit No. 461 of 1869, no allowance, however, being made to him as remuneration for conducting the suit.

Held, also, that the defendant might deduct the amount (if any) which might be found due to him on taking the partnership accounts, although a separate suit for such accounts would be barred by limitation. MARWANJI HORMUSJI v. RUSTOMJI BURJORJI, 6 B. 628 ... 874

(4) *Parties—Practice—Contract Act* (IX *of* 1872), *s.* 43.—In a suit brought upon a contract made by a firm the plaintiff may select as defendants those partners of the firm against whom he wishes to proceed, allowing his right of suit against those whom he does not make defendants to be barred. LUKMIDAS KHIMJI v. PURSHOTAM HARIDAS, 6 B. 700 ... 922

Party Wall.

Liability for cost of—Building-leases—Agreement to refer disputes to a third person—Effect of such agreement on the right to sue—Award of such third person essential to right of action—Surveyor's certificate—Limitation—Covenant—Right to sue—Stranger to consideration—Landlord and tenants—See ARBITRATION, 6 B. 528.

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See ACT III OF 1874 (HEREDITARY OFFICERS, BOMBAY), 6 B. 129.

Penal Code (Act XLV of 1860).

(1) *S.* 75—*Enhanced punishment—Transportation for life — Imprisonment.*—The accused having been previously convicted of offences punishable, under chap. XII or chap. XVII of the Indian Penal Code, with imprisonment for a term of three years or upwards, was subsequently convicted of an offence under one of these chapters punishable with imprisonment which may extend to three years, and sentenced to imprisonment for seven years.

Held, that a sentence of transportation for seven years was illegal. Under s. 75 of the Indian Penal Code the accused might be transported for life, but he could not be imprisoned for a longer period than six years. EMPRESS v. MAHADU, 6 B. 690=7 Ind. Jur. 101 ... 195

Penal Code (Act XLV of 1860)—(*Concluded*).

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(2) *S.* 75—*Offence—Attempt—Sentence—Conviction of an attempt to commit theft—Previous conviction of theft.*—MELVILL, J., *dissentiente.*—If a person who has been convicted of an offence punishable, under chap. 12 or chap. 17 of the Indian Penal Code, with imprisonment for a term of three years or upwards, is convicted of an attempt to commit any such offence, he does not thereby become liable to the enhanced punishment allowed by s. 75 of the Code. EMPRESS v. NANA RAHIM, 5 B. 140 ... 95

(3) Ss. 109 and 494—See DIVORCE, 6 B. 126.

(4) *Ss.* 354, 375 and 511—*Rape—Attempt to commit rape—Indecent assault.*—An indecent assault upon a woman does not amount to an attempt to commit rape, unless the Court is satisfied that there was a determination in the accused to gratify his passions at all events, and in spite of all resistance. EMPRESS v. SHANKAR, 5 B. 403 ... 266

(5) *Ss.* 395 and 412—*Confession—Evidence—Indian Evidenae Act No. I of* 1872, *s.* 30—*Joint trial—Dacoity—Receiving stolen property.*—A and B were committed for trial; the former for dacoity under s. 395 of the Indian Penal Code, and the latter under s. 412 for receiving stolen property, knowing it to be such. A made two confessions, and in both he stated he had handed over to B some pieces of gold and silver stolen at the dacoity. When B was arrested, a gold ring and a silver wristlet were found in his possession. At the trial, A pleaded guilty, and B claimed to be tried. A goldsmith deposed that he had made the ring and wristlet found with B out of pieces of gold and silver given to him for the purpose by B. On this evidence and on the confessions made by A the Session Judge convicted B. On appeal to the High Court.

Held, that A and B not having been tried jointly for the same offence, the confession of A was inadmissible as evidence against B. There was, therefore, no evidence of the identity of the goods stolen at the dacoity with those found in B's possession, and the case against him failed. Conviction quashed. EMPRESS v. BALA PATEL, 5 B. 63=5 Ind. Jur. 425 ... 43

(6) Ss. 410 and 411—See RECEIVING STOLEN GOODS, 5 B. 338.

(7) S. 414—*Voluntarily assisting in the disposal of stolen property—"Believe"—"Suspect."*—The word "believe" in s. 414 of the Indian Penal Code is much stronger than the word "suspect," and involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property, with which he was dealing, was stolen property. It is not sufficient in such a case to show that the accused person was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired. EMPRESS v. RANGO TIMAJI, 6 B. 402=6 Ind. Jur. 538 ... 724

(8) Ss. 494 *and* 109—*Marrying again during the lifetime of husband—Abetment—Divorce among Rajput Gujaratis in Khandesh—Deed of divorce by husband—Validity of divorce.*—A member of the caste of Ajanya Rajput Guzars residing in Khandesh executed a deed of divorce to his wife. The Court held on the evidence that the deed was proved, and that in this caste a husband was for a sufficient reason, such as incontinence, allowed to divorce his wife; that the deed in the present case had not been executed for a sufficient reason; and that, consequently, the parties entering into a second marriage were guilty of an offence under s. 494 of the Indian Penal Code (XLV of 1860) and that the priest who officiated at that marriage was an abettor under ss. 494 and 109.

Mere consent of persons to be present at an illegal marriage, or their presence in pursuance of such consent, or the grant of accommodation in a house for the marriage, does not necessarily constitute abetment of such marriage. EMPRESS v. UMI, 6 B. 126 ... 542

Plaint.

(1) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 609.

(2) See CRIM. PRO. CODE (ACT X OF 1872), 6 B. 670, 672.

(3) See DECREE, 6 B. 7.

(4) See EVIDENCE, 5 B. 181.

(5) See EXECUTION OF DECREE, 5 B. 496.

(6) See RES JUDICATA, 6 B. 477.

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(1) By defendant of his own fraud—See SMALL CAUSE COURT, 5 B. 295.

(2) Of guilty—See ACT IV OF 1877 (PRESIDENCY MAGISTRATES), 5 B. 85.

Pleading.

(1) Misstatement in pleading of area of land sued for—See EJECTMENT, 5 B. 208.

(2) See REGISTRATION ACT (III OF 1877), 5 B. 143.

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(1) Dispossession—Cause of action—See CRIM. PRO. CODE (ACT X OF 1872), 5 B. 387.

(2) Ejectment—Suit to recover possession under the Specific Relief Act (I of 1877), s. 9—Proper parties in such suit—Misstatement in pleading of area of land sued for—Interest in land—Disclaimer—Estoppel—See EJECTMENT, 5 B. 208.

(3) Mahomedan law—Gift—Possession with mortgagee — Sale — Minors—See MAHOMEDAN LAW (GIFT), 6 B. 650.

(4) Necessity of—Hindu law—Sale of right of entry—Vendor and purchaser—Construction—Intention of parties—Ejectment—Vendor without possession—See VENDOR AND PURCHASER, 6 B. 380.

(5) Necessity of—Mortgage—Decree—See MORTGAGE (PRIORITY), 6 B. 490.

(6) Notice—*San*-mortgage in Gujarat—Priority—Priority as between a purchaser at execution sale and prior mortgagee by unregistered *san*-mortgage—Plea of purchase without notice—At an execution sale the Court sells only what the judgment-debtor could honestly sell—Acts XX of 1866 and VIII of 1871—See REGISTRATION, 6 B. 193.

(7) Priority—See REGISTRATION, 6 B. 168.

(8) Sale—Mahomedan law—See MAHOMEDAN LAW (ALIENATION), 6 B. 645.

(9) Title by possession—Decree—Attachment and sale under a decree of property claimed by a third person—Suit by a third person to establish his title—Evidence—Burden of proof—Civ. Pro. Code (Act VIII of 1859), ss. 230-246—See EJECTMENT, 6 B. 215.

(10) Vendor and purchaser—Hindu law—Possession—Sale of land by a Hindu—Vendor without possession—Sale of right of entry—Conveyance of right of action—Right of purchaser—See VENDOR AND PURCHASER, 6 B. 387.

(11) See CERTIFICATE, 5 B. 206.

(12) See DECREE, 5 B. 493.

(13) See HINDU LAW (PARTITION), 5 B. 499.

(14) See MAHOMEDAN LAW (GIFT), 5 B. 238.

(15) See MORTGAGE (GENERAL), 6 B. 64.

(16) See MORTGAGE (REDEMPTION), 6 B. 515.

(17) See SPECIFIC RELIEF ACT (I OF 1877), 5 B. 446.

(18) See VENDOR AND PURCHASER, 6 B. 165.

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(1) Amendment of plaint—Civ. Pro. Code (Act X of 1877), s. 416—Bombay Act V of 1879, s. 37—Procedure—Substitution of parties—Crim. Pro. Code, Act X of 1872, s. 521—Order by Magistrate for removal of obstruction from a public thoroughfare—Suit against Magistrate to establish right—See CRIM. PRO. CODE (ACT X OF 1872), 6 B. 670.

(2) Amendment of plaint—Civ. Pro. Code (Act X of 1877), [s. 416—Procedure—Substitution of parties—Act X of 1872, ss. 523 and 526—Order by Magistrate for removal of obstruction from public thoroughfare—Suit to establish right—See CRIM. PRO. CODE (ACT X OF 1872), 6 B. 672.

(3) Appeal against a co-plaintiff—See HINDU LAW (INHERITANCE), 5 B. 264.

(4) Appeal—Order refusing to remove a receiver—Civ. Pro. Code—Act X of 1877, ss. 2, 244, 503, 540, 588—Act XXIII of 1861, s. 11—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 45.

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(5) Application for subpœnas to witnesses—See WITNESSES, 6 B. 742.

(6) Civ. Pro. Code, (Act X of 1877), ss. 32, 34 and 53—First hearing—Plaint—Amendment of plaint—Issues—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 609.

(7) Civ. Pro. Code (Act X of 1877), s. 135—Discovery—Inspection—Trial of issue before inspection granted—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 572.

(8) Decree—Execution—Injunction restraining execution—Revival of proceedings by representative of decree-holder—Substitution of name of representative on the record—Limitation Act XV of 1877, sch. II, arts. 178-179—Act IX of 1871, art. 167—See EXECUTION OF DECREE, 5 B. 29.

(9) Joinder of causes of action—Objection not taken in Court of first instance—Civ. Pro. Code (Act X of 1877), s. 44—See LIMITATION ACT XV OF 1877, 5 B. 554.

(10) Joinder of causes of action—Same parties suing in different capacities—Amendment—See COMPANY, 6 B. 266.

(11) Limitation—Period of limitation expiring during vacation—Power of Prothonotary to receive and file memorandum of appeal presented on the day the Court re-opens—See DIVORCE, 6 B. 487.

(12) *Misjoinder—Cause of action—Civ. Pro. Code (Act X of 1877), s. 44, Rule (b).*—The plaintiffs, who were the widow and daughter of A, sued the executors of the will of A's father (B) for administration and account. There were four distinct subjects of claim in the plaint, *viz.*, (1) the estate of A's great-grand-father, (2) the estate of A's grand-father, (3) the jewels and ornaments which formed the *stridhan* of A's mother which were in A's possession at the time of his death, (4) a sum of Rs. 1,90,000 which it was alleged that B had settled on A at the time of his marriage. Subsequently to the filing of the suit the first plaintiff amended the plaint and claimed the jewels and ornaments, which formed the subject-matter of the third claim, as her own property, alleging that they had been presented to her on the occasion of her marriage. The plaint prayed (1) for the declaration that a certain portion of the estate in the hands of the first three defendants (the executors of B) had been ancestral property in B's hands, (2) for an account and administration, (3) that the jewels and ornaments should be delivered up.

Held that there was a misjoinder of causes of action, having regard to the provisions of rule (*b*), s. 44 of the Civ. Pro. Code (Act X of 1877). Part of the claim in the plaint was for a portion of A's estate, and was founded upon the plaintiff's alleged right as heir of A. The other portion of the claim in the plaint, *viz.*, that relating to the ornaments, had no reference to A's estate, and was personal to the first plaintiff herself. ASHABAI v. HAJI TYEB, 6 B. 390 ... 716

(13) *Mukhtyar—Crim. Pro. Code, Act X of 1872, s. 278—Appeal.*—An appellant in a criminal case has a right to appear and be heard by a mukhtyar. IMPERATRIX v. SHIVARAM GUNDO, 6 B. 14 ... 460

(14) Objection taken for first time in second appeal—See HINDU LAW (ADOPTION), 6 B. 524.

(15) Parties—Partnership—Contract Act IX of 1872, s. 43—See PARTNERSHIP, 6 B. 700.

(16) Plaintiffs entitled to more than they claim in plaint—See HINDU LAW (SUCCESSION), 6 B 394.

(17) Pleading—Admission—Effect of admission in pleading of execution of contract—See REGISTRATION ACT (III OF 1877), 5 B. 143.

(18) *Review—Delay—Adoption of daughter's son—Custom—Breaches of custom—New case set up in special appeal.*—An application for review was presented to the High Court more than eighteen months after time, the applicant alleging that, soon after the decision sought to be reviewed, he was engaged in collecting instances of the special custom relied upon by him in support of his claim. The special custom was not set up in the Courts below, but an objection was taken for the first time in special appeal that an issue regarding it should have been raised in the

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lower Courts. No instance of such special custom had been given in evidence. It was urged that the applicant was a minor until shortly before the making of the High Court decree, and was only represented by his adoptive mother as his guardian.

The High Court considered that there was no sufficient excuse for the delay, and rejected the application, observing that, unless upon very strong grounds and under very special circumstances, the Court would hesitate to permit a party at such a stage of his suit to set up a case which was not set up for him in the Courts below, where his professional representatives must have been well aware whether such a case could be legitimately set up, and abstained from any attempt to do so. GOPAL SAFRAY v. HANMANT SAFRAY, 6 B. 107=6 Ind. Jur. 313 ... 529

(19) See APPEAL (GENERAL), 6 B. 113.

(20) See ARBITRATION, 6 B. 663.

(21) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 184, 680 and 6 B. 148.

(22) See DECREE, 6 B. 7.

(23) See DIVORCE, 6 B. 416.

(24) See EXECUTION OF DECREE, 5 B. 673.

(25) See HINDU LAW (JOINT FAMILY), 5 B. 685.

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Limitation—Act XV of 1877, ss. 23 and 26—Continuing nuisance—See EASEMENT, 6 B. 20.

Presumption.

See BENAMI TRANSACTION, 6 B. 717.

Principal and Agent.

(1) Agent—Ratification—Estoppel—See ACT III OF 1874 (HEREDITARY OFFICERS), 6 B. 463.

(2) *Contract—Consideration—Agency—Revocation—Specific performance—Indian Contract Act* (IX *of* 1872), *ss.* 202, 203, 205.—The defendant, by an agreement in the nature of a letter of attorney, constituted the plaintiff and his descendants the hereditary agents of the defendant, gave him authority to collect the rents of his share in an inam village, and promised to pay him an annual salary out of the rents.

Held that as between the parties and during their lifetime, the appointment was valid and binding, whether or not any valuable consideration passed, —the mere acceptance of the office by the plaintiff being a sufficient consideration for the appointment.

But, independently of the terms of the agreement, and whether or not the agency had been created for valuable consideration, the defendant had, under the general provisions of s. 203 of the Indian Contract Act (IX of 1872), a right to revoke the authority, as the mere arrangement that the plaintiff's salary should be paid out of the rents could not be regarded as giving to the plaintiff an interest in the property, the subject-matter of the agency, within the meaning of s. 202.

If the defendant had revoked the agency improperly, the remedy lay, under ordinary circumstances, in a suit by the plaintiff for damages for breach of contract. Where, however, the plaintiff chose to sue for specific performance, and demanded arrears of salary.

Held that, without a valuable consideration for the defendant's promise, the agreement passed by him to the plaintiff would be *nudum pactum*, and the plaintiff would not be entitled to recover, except for work and services actually rendered. VISHNUCHARYA v. RAMCHANDRA, 5 B. 253=5 Ind. Jur. 536 ... 168

(3) *Right to sue—Liability of agent—Charter-party—Undisclosed principal—Actual knowledge—Disclosure of name of principal at time of making the contract—Presumption of liability of agent where name of principal not disclosed—Indian Contract Act* (IX *of* 1872), *s.* 230.—The plaintiffs by charter-party contracted to let the steam-ship *Oakdale* to the defendants upon certain terms. The first clause of the charter-party stated that the plaintiffs "agreed as agents for owners of the said steamship," and subsequent

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clauses provided that the owners should bind themselves to receive the cargo on board, and that the master on behalf of the owners should have a lien on the cargo for freight, &c. The charter-party was signed by the plaintiffs and defendants in their own names. The plaintiffs sued the defendants for breach of the charter-party in refusing to load the said steamship. *Held* that the plaintiffs had contracted as agents, and were, therefore, not entitled to sue.

If a contract made by a person who is an agent is worded so as, when taken as a whole, to convey to the other contracting party the notion that the agent is contracting in that character, he cannot sue or be sued on the contract.

Where one contracting party knows that the other is contracting as an agent of a third person whose name he also knows the presumption, laid down in cl. 2 of s. 230 of the Indian Contract Act (IX of 1872), does not arise, although at the time of making the contract the agent does not disclose the name of his principal. The essential point is the knowledge, and actual knowledge is equivalent to disclosure, the whole object of which would be to convey such knowledge. MACKINNON, MACKENZIE & CO. v. LANG, MOIR & CO., 5 B. 584

(4) Undisclosed principal—Election—Contract Act (IX of 1872), ss. 230, 233, 234—Company—Winding up—Liability of company for loan to secretary, treasurer and agent—See COMPANY, 6 B. 326. ... 385

(5) See RAILWAY COMPANY, 5 B. 371.

Principal and Surety.

(1) The Dekkhan Agriculturist's Relief Act, XVIII of 1879, s. 72—Limitation Act, XV of 1877, sch. II, art. 59—Non-agriculturist principal—Agriculturist surety—Remedy against principal barred, but surety held liable—The Indian Contract Act, IX of 1872, ss. 126 to 147—See LIMITATION ACT (XV OF 1877), 5 B. 647.

(2) See STAMP ACT (I OF 1879), 5 B. 188.

Priority.

(1) See REGISTRATION, 5 B. 442 and 6 B. 166, 495.

(2) See VENDOR and PURCHASER, 6 B. 165.

Probate.

(1) Limited probate—Indian Succession Act, X of 1865, ss. 179, 226—See SUCCESSION ACT (X OF 1865), 6 B. 460.

(2) *Probate in cases not governed by the Indian Succession Act—Power of High Court to grant probate in such cases—Probate to take effect throughout India—Limited probate—Probate duty—Cutchi Memon Mahomedan—Succession Act X of 1865, s. 331—Act XIII of 1865—Hindu Wills Act, s. 2—Act XX of 1841—Act XXVII of 1860, s. 18—Court Fees Act, VII of 1870, sch. I, art. II.*—In cases not governed by the Indian Succession Act (X of 1865), probates and letters of administration granted by the High Court of Bombay in respect of Hindus, Mahomedans and other persons not usually designated as British subjects take effect only, and can only be granted for the purpose of recovering debts and securing debtors paying the same, except so far as is otherwise provided in Act XXVII of 1860; and probate duty is only payable on the amount of such debts.

Cutchi Memoms are not Hindus within the meaning of s. 2 of the Hindu Wills Act (XXI of 1870), and therefore, probate to take effect throughout India cannot be granted in the case of a will of Cutchi Memon testator.

Cutchi Memons are Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established. *In re* HAJI ISMAIL, 6 B. 452

(3) Revocation—Indian Succession Act (X of 1865), s. 234—Practice—Review in testamentary matters—See SUCCESSION ACT (X OF 1865), 5 B. 638. ... 756

(4) *Will—Wills in Mofussil—Civ. Pro. Code (Act X of 1877), s. 50.*—There is no law at present in force in the Mofussil which obliges a person

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Probate—(*Concluded*).

claiming under a will, to obtain probate of the will, or otherwise establish his right as executor, administrator or legatee, before he can sue in respect to any property which he claims under the will. In any suit or proceeding instituted by him it is for the Court, in which the suit or proceeding is pending, to determine, for the purposes of such suit or proceeding, whether the will is genuine and valid, and confers upon the plaintiff or applicant the right which he claims. BHAGVANSING v. BECHARDAS, 6 B. 73=6 Ind. Jur. 259 ... 505

(5) See ARBITRATION, 6 B. 663.

Procedure.

(1) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 184, 575.

(2) See CRIM. PRO. CODE (ACT X OF 1872), 6 B. 670.

(3) See DIVORCE, 6 B. 416.

(4) See EXECUTION OF DECREE, 5 B. 382.

(5) See HINDU LAW (INHERITANCE), 5 B. 264.

(6) See MINOR, 5 B. 310.

Proclamation.

See STAMP ACT (I OF 1879), 5 B. 470.

Promissory Note.

Negotiable instrument—Material alteration—See NEGOTIABLE INSTRUMENT, 6 B. 371.

Public Thoroughfare.

See CRIM. PRO. CODE (ACT X OF 1872), 6 B. 670, 672.

Pujaris.

Suit against—Religious rites and ceremonies—Jurisdiction of the Civil Courts—Civ. Pro. Code, X of 1877, s. 11—See HINDU LAW (RELIGIOUS ENDOWMENTS), 5 B. 80.

Railway Company.

Agreement for interchange of traffic—Principal and agent—Loss of goods—Liability.—The plaintiff delivered to the Madras Railway Company a bale of cloth for carriage from B, a station belonging to the defendants, the G.I.P. Railway Company, and obtained from the Madras Company a receipt which recited that it was granted "subject to the rules and regulations and charges in force on that or any other railway over which the goods might pass." The goods were lost while on the line and in the charge of the defendants the G.I.P. Railway Company, and the plaintiff sued them for damages for breach of the contract of carriage. Between the two railway companies there existed an agreement arranging for the interchange of traffic, which provided, *inter alia*, that goods should be booked through to and from all stations on both lines at certain stated rates; that in such cases, one company should receive payment and should account to the other; that any claim for loss or damage should be paid by the company in whose custody the goods were when lost or damaged, or, if that could not be ascertained, then by both companies rateably; and that no alteration affecting the through traffic should be made by either company, without previous notice to the other The defendants pleaded that the suit was wrongly brought against them, as there was no contract between themselves and the plaintiff.

Held, that the suit whether or not it might also have been brought against the Madras Railway Company, was rightly brought against the defendants, inasmuch as the agreement between the two companies, if it did not actually constitute a partnership between them, showed, at least, that the Madras Railway Company became the agents of the defendants to make the contract for carriage with the plaintiffs. THE G. I. P. RAILWAY COMPANY v. RADHAKISAN KHUSSHALDAS, 5 B. 371=5 Ind. Jur. 646 ... 244

Rajaput Gujaratis.

(1) See DIVORCE, 6 B. 126.

(2) See PENAL CODE (ACT XLV OF 1860), 6 B. 126.

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Rape.

Attempt to commit rape—Indecent assault—Indian Penal Code, ss. 354, 375 and 511—See PENAL CODE (ACT XLV OF 1860), 5 B. 403.

Rateable Distribution.

See CIV. PRO. CODE (ACT X OF 1877), 5 B. 198 ; 6 B. 16.

Receiver.

Practice—Appeal—Order refusing to remove a receiver—Civ. Pro. Code—Act X of 1877, ss. 2, 244, 503, 540, 588—Act XXIII of 1861, s. 11—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 45.

Receiving Stolen Goods.

Within jurisdiction where the theft was committed out of jurisdiction—Jurisdiction—Indian Penal Code, ss. 410 *and* 411—*Commission to take evidence, power of High Court to grant an application of prisoner.*—The prisoner was tried at Bombay, under s. 411 of the Indian Penal Code, on a charge of having dishonestly received and retained stolen property, knowing or having reason to believe the same to be stolen property. He was also charged, under ss. 108 (expl. 3) and 109, with having abetted that offence. It appeared at the trial that the prisoner was a clerk in the employment of a mercantile firm at Port Louis, in the island of Mauritius. On the 29th October and the 1st November, 1879, certain letters addressed by the firm to their commission agent at Bombay, were abstracted from the post office at Port Louis. The letters contained six bills of exchange belonging to the firm for an aggregate amount of Rs. 26 550. On the 1st November, 1879, the prisoner sent all six bills of exchange in a letter to the manager of a Bank at Bombay, requesting that the several amounts might be collected on the prisoner's own account, and remitted to him by bills on Mauritius. The sums were accordingly realized by the Bank, and duly remitted to the prisoner. It was not denied that the prisoner obtained possession of the money and used it as his own. His defence was that the bills had been given to him in payment of a debt. The prisoner was convicted on all the charges ; but, the jurisdiction of the Court having been challenged on his behalf, the question was reserved.

Held, per SARGENT and MELVILL, JJ. (WEST, J., *dissentiente*), that the bills of exchange having been stolen at Mauritius, in which island the Indian Penal Code, is not in force, could not be regarded as "stolen property" within the provisions of s. 410, so as to render the person receiving them at Bombay liable under s. 411 ; that the High Court of Bombay had, therefore, no jurisdiction, and that the conviction must be quashed.

Previously to the trial at the Sessions, the prisoner had applied to the Court for commissions to Pondicherry and Mauritius to take evidence on his behalf. The application was refused, on the ground that the High Court had no authority to issue a commission in such a case, but the learned Judge West, J., reserved the question for the full Court.

Held, that the High Court had no power to issue a commission out of the jurisdiction in a criminal case on an application by the accused. EMPRESS v. S. MOORGA CHETTY, 5 B. 338 (**F.B.**)

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Reciprocal Demands.

See MUTUAL ACCOUNTS, 6 B. 134.

Registration.

(1) Notice—Priority—Possession—Vendor and purchaser—Purchaser without possession—Subsequent purchaser with possession and without notice of prior purchase—See VENDOR and PURCHASER, 6 B. 165.

(2) *Optional, Compulsory—Acts* XX *of* 1866, VIII *of* 1871, *and* III *of* 1877, *s.* 50 *—Priority.*—On the 14th February, 1869, S. and M. mortgaged a house and site to the plaintiff for Rs. 50. The mortgage was not registered. On the 15th June, 1870, S. (M. being then dead) mortgaged the same property to the father of the defendant for Rs. 200. That mortgage was registered. On the 24th June, 1871, S. further mortgaged the property to the plaintiff

Registration—(*Continued*).

for Rs. 96, including the amount due on the previous mortgage. This second mortgage was not registered. Possession was not given under any of the mortgages. In 1873 the defendant obtained a decree on his mortgage against S., and in execution of it purchased the property for Rs. 20 at a Court sale. The certificate of sale, dated the 9th July 1874, was registered, and the defendant was put in possession of the property under it. The plaintiff sued S. on his second mortgage, and obtained a decree upon it in 1875. The defendant was no party to that suit. The plaintiff attached the property in execution of his decree, but the attachment was removed on the application of the defendant. In 1879, the plaintiff sued the defendant on his two mortgages, seeking to enforce them and his decree on the second mortgage against the property. The defendant contended that s. 50 of the Registration Act, III of 1877, operated retrospectively and conferred priority on his mortgage of 1870, in virtue of its registration, even over the plaintiff's earlier mortgage of 1869.

Held, that the plaintiff's unregistered mortgages, being each for a sum under Rs. 100, were, under the Registration Acts of 1866 and 1871, optionally, and not compulsorily, registrable, and that the Registration Act of 1866, under which the defendant's intermediate mortgage of 1870, had been registered, did not bestow any priority on it.

Held, further, that s. 50 of the Registration Act, III of 1877, was not retrospective in its application, and that, as registered purchaser at a Court sale, the defendant took subject to existing liens.

Held, also, that the plaintiff's decree did not operate against the defendant, as he was not made a party to the suit in which that decree was obtained, although the plaintiff had constructive notice of the defendant's mortgage through registration. RUPCHAND v. DAVLATRAM, 6 B. 495 ... 735

(3) *Possession—Notice—San-mortgage in Gujarat—Priority—Priority as between a purchaser at execution sale and prior mortgagee by unregistered san-mortgage—Plea of purchase without notice—At an execution sale the Court sells only what the judgment-debtor could honestly sell—Acts XX of 1866, and VIII of 1871.*—The general rule in the Presidency of Bombay is that, amongst Hindus, possession is necessary in order to perfect a transfer of immoveable property by mortgage or deed of sale as against subsequent incumbrancers or purchasers. The main ground of this rule is that possession is notice to all subsequent intending mortgagees or purchasers of the title of the party in possession.

It is, however, the established and judicially recognized custom of Gujarat, that possession is not necessary in the case of a *san*-mortgage to validate it as against subsequent mortgagees or purchasers. The necessity of possession being thus dispensed with, it seems to follow that a *san*-mortgage, in other respects good, is valid as against a subsequent mortgagee or purchaser, whether or not such mortgagee or purchaser has notice of the *san*-mortgage. To hold that a subsequent mortgagee or purchaser for valuable consideration and without notice of a *san*-mortgage is entitled to priority over it, would be tantamount to depriving the *san*-mortgagee of the benefit of the custom that possession is unnecessary.

A buyer of property at an execution sale who registers his certificate of sale does not thereby acquire a title free from the obligation arising from a *san*-mortgage of previous date. When the Court sells the right, title and interest of a judgment debtor in property, it cannot be regarded as selling more than the judgment-debtor himself could honestly sell. He could honestly sell only subject to any equities existing against himself on the property, and if by concealment of a *san*-mortgage he sold the property as free of that charge, he would commit a fraud. The Court cannot be deemed to do that which would be a fraud if done by the judgment-debtor. If, then, the Court sell only the right, title and interest of the judgment-debtor subject to all existing equities against the property sold, the registration of the Court's conveyance (*viz.*, certificate of sale) cannot enlarge the scope of that conveyance and discharge the property from any unregistered incumbrance which was binding on the judgment-debtor.

Per MELVILL, J.—Such perfect security is now afforded by registration that there appears to be hardly room for the plea of purchase without

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notice. Seeing that a purchaser may secure himself against all unregistered mortgages without possession by simply taking possession or registering his conveyance, he is, if he omit to do so, in *pari delicto* with the prior mortgagee, and it is difficult to see how he is entitled to any relief.

In the case of execution sales under s. 287 of the Civ. Pro. Code (Act X of 1877), notice is given to purchasers that the sale only extends to the right, title and interest of the judgment-debtor, and that the Court ordering the sale does not warrant the title. This being so, it seems clear that a person who buys an avowedly doubtful title, and pays for it on that understanding, cannot claim to be a purchaser without notice.

The provision of the Registration Act, that a registered document shall take effect as regards the property comprised therein against every unregistered document relating to the same property, only applies where the two documents are antagonistic, not where effect can be given to each without infringement of the other: *e. g.*, if A mortgages or sells to B, and afterwards C purchases at a Court's sale the then existing right, title and interest of A, he (C) buys in the first case the equity of redemption and in the second nothing at all. Registration, therefore, cannot help him, for on the very face of his certificate of sale the property comprised therein is not the property previously conveyed to B, but only the residue of A's estate after such conveyance. SOBHAGCHAND v. BHAICHAND, 6 B. 193 (**F.B.**)=6 Ind. Jur. 363

(4) *Presentation—Residence of executant—Intending to register—Special cause—Registration Act, VIII of* 1871, *ss.* 31 *and* 85.—The words "any person intending to register any document" in s. 31 of the Registration Act, VIII of 1871, include, not only the person or persons in whose favour a document is executed, but also any person or persons executing the same. ... 587

Under the provisions of that section, therefore, the presentation of a document for registration, on special cause shown, at the residence of a party executing it, is valid.

The registering officer is the judge of the sufficiency of the special cause; and, if he is satisfied, the Civil Court has no power to question his decision on that point.

Assuming the presentation at the residence of one of the executants of a document for registration to be an irregularity, it is one which, if committed in good faith, is covered by the provision of s. 85 of Act VIII of 1871. ISAK MAHAMED v. BAI KHATIJA, 6 B. 96 ... 521

(5) *Priority—Act* XX *of* 1866—*Act* VIII *of* 1871, *s.* 50—*Act* III *of* 1877, *s.* 50.—S. 50 of Act III of 1877 is not retrospective in its application; and, therefore, a deed of sale registered under Act VIII of 1871, and not having, under that Act, priority over unregistered documents relating to the same property, acquires no new rights of priority by the passing of Act III of 1877, though coming within the larger class of registered documents which, by s. 50 of the later Act, have priority over unregistered documents, KANITKAR v. JOSHI, 5 B. 442 ... 291

(6) *Priority—Possession—Notice—How far registration equivalent to possession—Priority between registered and unregistered documents—Optional and compulsory registration—Mortgage—Indian Registration Acts—Bombay Regulation IX of* 1827—*Acts I of* 1843, *XIX of* 1843, *XVI of* 1864—*XX of* 1866—*VIII of* 1871—*III of* 1877—Lis pendens.—It is a general, but not an invariable, rule that possession in the grantee or assignee is deemed essential amongst Hindus and Mahomedans to the complete transfer of immoveable property, either by gift, sale, or mortgage.

Exceptions to the above rule pointed out.

Neither in England nor in Ireland has *mere* registration been held to amount to notice to subsequent mortgagees or purchasers. In Bombay the Courts have adopted the rule which prevails in America, and have held that registration does amount to notice to all subsequent purchasers of the same property.

Possession has been deemed by Hindu and Mahomedan law, as interpreted in the Presidency of Bombay, to amount to notice of such title as the person in possession may have; and any other person who takes a mortgage or other charge upon immoveable property without ascertaining the

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nature of the claim of him who is in possession, does so at his own risk. This is the rule in England also.

The Indian Registration Acts, prior to the year 1864, like the Middlesex Registry Act (Stat. 7 Anne, c. 20, s. 1); the Yorkshire Registry Acts (Stat. 2 and 3 Anne, c. 4, s. 1); 6 Anne, c. 35, s. 1; 8 Geo. II, c. 6, s. 1), and the Irish Registry Act (Stat. 6 Anne, c., 2, s. 4, Ir.) gave priority of rank to priority of registration. The later Indian Registration Acts—*viz.*, Act XVI of 1864, XX of 1866, VIII of 1871, and III of 1877—proceed upon a different principle. Under them a registered instrument operates from the time at which it would have commenced to operate if no registration had been required or made, and not from the time of its registration, which rule applies both to compulsory and optionally registrable instruments.

The earlier decisions, by which registration has in India been permitted to supply the want of possession, may be attributed to this absolute preference so accorded by the earlier Registration Acts to priority of registration.

In the reported cases under the Indian Registration Acts passed in and subsequently to 1864, which have not (like the previous enactments) given priority of rank to priority of registration, the Courts have also regarded registration as an equivalent for possession where the instrument *earlier in date* has been registered, but unaccompanied by possession. The Courts have gone a step further, and have held registration under Act XVI of 1864 and the subsequent Acts to amount to notice, and, therefore, to atone for the absence of, and to be a sufficient substitute for possession in the validation of title.

The rule, however, that registration is equivalent to possession, cannot be applied to cases where the registration of the instrument earlier in date has been effected subsequently to the execution of the instrument set up against it.

On the 10th December, 1866, M. mortgaged certain immoveable property to the defendant for Rs. 95. The mortgage was neither registered nor accompanied with possession. On the 12th September, 1869, M. executed a mortgage of the same property to K., for Rs. 200. That mortgage was registered, but not accompanied with possession. In 1876, K. sued M. on his mortgage of 1869. The defendant was not a party to that suit. While the suit was pending, M., on the 23rd February 1876, executed another mortgage of the property to the defendant for Rs. 200, including the amount then due to him (defendant) on his mortgage of 1866. That mortgage was registered and accompanied with possession. On the 3rd March 1876, K. obtained a decree against M., directing satisfaction of the mortgage-debt out of the mortgaged property. The property was sold under that decree, and purchased by K. himself for Rs. 50. He obtained a certificate of sale dated the 8th March 1877, which was not registered. On the 25th July 1877, K. sold the property to the plaintiff for Rs. 75 4 0. The deed of sale was not registered. In 1878 the plaintiff sued for possession of the property. The defendant relied upon his mortgages of 1866 and 1876.

Held that the defendant's unregistered mortgage of 1866, which was optionally registrable, was not over-ridden by K's mortgage of 1869, which was compulsorily registrable, and that, therefore, the plaintiff, whose title was derived from K., was not entitled to recover the property from the defendant without redeeming the mortgage of 1866, on which he (defendant) was entitled to rely. The registration of K.'s mortgage in 1869 could not have operated as notice to the defendant when he was taking his mortgage in 1866, and, therefore, was not such a registration in relation to the defendant's earlier mortgage as to fall within the scope of the rule that registration is equivalent to possession.

The operation of K.'s *lis pendens* was sufficient to bind the defendant so far as his mortgage of 1876 was concerned. The doctrine of *lis pendens* is in force in British India. That doctrine rests, as stated by Turner, L.J., in *Bellamy* v. *Sabine*, not upon the principle of constructive notice, but upon the fact that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were

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permitted to prevail. This reason for refusing recognition to alienations *pendente lite* made by a party to a suit is as fully applicable in the case of a registered as of an unregistered conveyance. LAKSHMANDAS SARUP-CHAND v. DASRAT, 6 B. 168 (**F.B.**)

(7) See EVIDENCE, 5 B. 181. ... 570

(8) See LIMITATION ACT (XV OF 1877), 6 B. 75.

(9) See MORTGAGE (PRIORITY), 6 B. 490.

(10) See REGISTRATION ACT (III OF 1877), 5 B. 653.

Registration Act (I of 1843).

See REGISTRATION, 6 B. 168.

Registration Act (XIX of 1843).

See REGISTRATION, 6 B. 168.

Registration Act (XVI of 1864).

(1) See REGISTRATION, 6 B. 168.

(2) See REGISTRATION ACT (III OF 1877), 5 B. 653.

Registration Act (XX of 1886).

(1) See REGISTRATION, 5 B. 442, 6 B. 168, 193, 495.

(2) S. 50—Priority—Notice of prior unregistered mortgage—Possession — Right to redeem—Parties—See MORTGAGE (REDEMPTION), 6 B. 515.

(3) Ss. 53 and 55—See EXECUTION OF DECREE, 5 B. 673.

Registration Act (VIII of 1871).

(1) See REGISTRATION, 6 B. 168, 193, 495.

(2) See REGISTRATION ACT (III OF 1877), 5 B. 653.

(3) Ss. 31, 85—See REGISTRATION, 6 B. 96.

(4) S. 50—See REGISTRATION, 5 B. 442.

Registration Act (III of 1877).

(1) See REGISTRATION, 6 B. 168.

(2) *S.* 17, *cls.* (*b*) *and* (*h*)—*Document creating a right to obtain another document—Pleading—Admission—Effect of admission in pleading of execution of contract—Evidence to prove an admitted document not necessary—Evidence.*—By an agreement, dated 2nd August 1880, the defendant agreed to sell to the plaintiff a certain piece of land with a dwelling-house for Rs. 1,900. At the time of the execution of his agreement the plaintiff paid the defendant Rs. 100 earnest-money, and the agreement provided that the remaining Rs. 1,800 should be paid within a month from the date of the agreement when the deed of conveyance of the property should be executed. The material part of the agreement was as follows:—

"I have received from you Rs. 100, namely, rupees one hundred, as earnest (*i.e.*) at the time of the execution of this bargain-paper. And as to the remaining Rs. 1,800, namely, one thousand and eight hundred, the same are duly to be paid to me within one month from this day, when you will get the deed (or) document made in your favour. And all the expenditure in respect of the deed (or) documents and transferring (the property) to your name you are duly to make on your account . . . . On these terms this informal bargain-paper having been written, is agreed to and delivered."

The plaintiff sued for specific performance, and tendered the agreement in evidence, although unregistered.

Held, that the document, although unregistered, was admissible in evidence under cl. (*h*) of s. 17 of the Registration Act, III of 1877. Being unregistered it could not create or assign the interest intended by the parties to be transferred, and being thus incapable of carrying out the primary intention of the parties, the agreement became one "merely creating a right to obtain another document which would, when executed," effect the desired purpose if the execution were accompanied with registration. The right given by the agreement was merely a right *in personam*, and

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the agreement was admissible in evidence, to show the contract entered into for another conveyance, though not as a conveyance itself.

Where in a suit for specific performance of an agreement, the defendant admitted in his written statement the terms of the agreement and its execution,

Held, that the plaintiff was not called upon to prove the execution of the agreement or to put it in evidence. BURJORJI CURSETJI PANTHAKI v. MUNCHERJI KUVERJI, 5 B. 143 ... 96

(3) S. 17, cl. (c)—Mortgage—Receipts by mortgagee—Suit on mortgage payable on demand—Amendment of plaint—See EVIDENCE, 5 B. 181.

(4) *Ss.* 17, 49, *cls.* (*b*) *and* (*c*)—*Evidence*—*Unregistered document*—*Document to contradict witness*—*Meaning of word "declare" in s.* 17 *of Act* III *of* 1877—*Acknowledgment, necessity for registration of.*—S and R sued their brothers M and V in 1880 for partition of the family property. The defendants pleaded that the property had been partitioned in 1870, and that the various members of the family had been ever since in possession and enjoyment of their respective shares. At the hearing a document was produced by the defendant M, dated the 13th January, 1877, which was proved to have been signed by his three brothers, S, R and V, on the occasion of M's effecting a mortgage of part of the property. This document contained the following words:—

Our eldest brother M has built houses and is building new houses on property appertaining to his share...To the same we three persons and our heirs and representatives have no interest of any kind whatever. If we or they should prefer any claim, then the same is to be null. This release paper we have duly passed in writing jointly and severally and in sound mind." This document had not been registered, and was, therefore, inadmissible as evidence of the alleged partition. In cross-examination of the plaintiff R, he was interrogated as to the circumstances under which the mortgage was made by M on the 13th January, 1877. He said: "I was present when the mortgage was made, but I was ill in bed . . . This was on the 13th January, 1877. . . I did not say on that day that I had no claim to the property." He was then shown the above document, and admitted his signature. The document was then tendered in evidence, not as a release but to contradict the witness.

Held, that the document was admissible for that purpose, as it was not a document which itself declared a right in immoveable property in the sense intended by s. 17 of the Registration Act, III of 1877. It was an acknowledgment that there had, in time past, been a partition between the brothers who signed it and the defendant M, but it was not itself the instrument of partition.

That an acknowledgment of a partition is distinct from the instrument of partition is to be gathered from cl. (*c*) of s. 17 of the Registration Act, III of 1877. Had the terms of cl. (*b*) of that section been satisfied by a mere acknowledgment, cl. (c) would have been superfluous. Its operation is to require an acknowledgment in the form of a receipt to be registered but not an acknowledgment in any other shape as distinguished from the instrument of the transaction.

The word "declare" in s. 17 of the Registration Act, III of 1877, is to be taken in the same sense as the words, "create, assign, &c.," used in the same section, *viz.*, as implying a definite change of legal relation to the property by an expression of will embodied in the document referred to. It implies a declaration of will, not a mere statement of a fact, and thus a deed of partition which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not "declare" a right within the meaning of the section. It is not the expression or declaration of will by which the right is constituted.

Quære.—Whether, if the above document were itself a release operating or intended to operate as a declared volition constituting or severing ownership, it would be received even for the purpose of contradicting a

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witness who had denied that he had previously made a statement inconsistent with his evidence. SAKHARAM KRISHNAJI v. MADAN KRISHNAJI, 5 B. 232

(5) S. 50—See REGISTRATION, 5 B. 442 ; 6 B. 495. ... 154

(6) *S.* 50—*Priority between registered and unregistered documents—Optional and compulsory registration—Acts* XVI *of* 1864, XX *of* 1866, *and* VIII *of* 1871—*Interpretation of statutes*—The registration of documents under Acts XVI of 1864, XX of 1866, or VIII of 1871, does not give them effect as against documents which might have been, but were not, registered under one of those Acts. Section 50 of Act III of 1877 has no retrospective operation upon such documents ; the preference which it gives to registered over unregistered documents is confined to documents registered under Act III of 1877.

According to the registration law, as it stood before Act III of 1877 came into force, there was no competition grounded upon registration between documents optionally and documents compulsorily registrable.

The Legislature, while possessing the power to divest existing rights, is not (in construing statutes) to be understood as intending to exercise that power retrospectively to any greater extent than the express terms of, or necessary implication from, its language requires.

A and B (two brothers) purchased a house on the 19th July, 1871, and mortgaged it to the plaintiff for Rs. 585, by a *san* mortgage, dated the 21st July, 1875, and duly registered. In 1874 the plaintiff sued upon his mortgage, and obtained a decree, directing satisfaction of his claim by the sale of the house. The house was accordingly sold by the Court and purchased by the plaintiff for Rs. 325. He obtained a certificate of sale, dated the 15th October, 1875. The certificate was duly registered. On applying to the Court for possession of the house, the plaintiff was resisted by the defendant on the ground that he was in possession under two mortgages, dated the 20th July, 1871, and executed, the one by A and the other by B. These mortgages were not registered, both of them being for sums less than Rs. 100. The plaintiff's application having been rejected by the Court, he brought a suit for possession of the house. Both the lower Courts allowed his claim, holding that his mortgage and certificate of sale, being registered, were entitled to priority over the unregistered mortgages of the defendant under s. 50 of Act III of 1877. On appeal to the High Court,

Held, that the case was governed by the law of registration as it stood before Act III of 1877 came into force, and that the registration of the plaintiff's mortgage and certificate of sale, both of which were compulsorily registrable, did not confer upon them any priority over the defendant's unregistered mortgages, which were optionally registrable. ICHHARAM KALIDAS v. GOVINDRAM BHOWANISHANKAR, 5 B. 653 ... 431

Regulation V of 1804 (Madras).

See MORTGAGE (FORECLOSURE), 5 B. 14.

Regulation II of 1827.

S. 21—See CASTE QUESTION, 5 B. 83 ; 6 B. 725.

Regulation VIII of 1827 (Bombay).

(1) *Minor certificate of heirship.*—Under the provision of Reg. VIII of 1827 a certificate of heirship cannot be granted to a minor. BAI BAIBA v. BAI DAGUBA, 6 B. 728

(2) See HINDU LAW (INHERITANCE), 5 B. 662. ... 940

Regulation IX of 1827 (Bombay).

See REGISTRATION, 6 B. 168.

Regulation XVI of 1827.

(1) S. 20, Vatan, alienation of—Bombay Act III of 1874, ss. 5, 8, 9, 10—Construction—Certificate of Collector under s. 10—See VATAN, 5 B. 283.

(2) S. 20—See VATAN, 5 B. 435, 437 ; 6 B. 211.

Regulation XVIII of 1827. PAGE

S. 13—See HINDU LAW (ALIENATION), 5 B. 621.

Regulation XXVIII of 1827.

S. 14, cl. 1—See EXECUTION OF DECREE, 5 B. 127.

Religious Office.

Alienation and partition of—Hindu law—Hereditary secular and religious office, alienation of, when valid—Partibility of such offices—Mode of partition of such offices.—Hereditary offices, whether religious or secular, are no doubt treated by the Hindu text writers as naturally indivisible; but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as can be had of such property by means of a performance of the duties of the office and the enjoyment of the emoluments by the different co-parceners in rotation.

There is no reason why the alienation of a religious office to a person standing in the line of succession, and free from objections relating to the capacity of a particular individual to perform the worship of an idol or do any other necessary functions connected with it, should not be upheld. The alienation, therefore, by a divided member of a Hindu family to his sister's son, of the right of worshipping a goddess and receiving a share of the offerings was upheld. MANCHARAM v. PRANSHANKAR, 6 B. 298= 6 Ind. Jur. 426 ... 655

Rent.

(1) See ACT XV OF 1871 (BROACH TALUKDARS), 5 B. 135.

(2) See ACT XVIII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 5 B. 180.

Re-sale.

See CIV. PRO. CODE (ACT X OF 1877), 5 B. 575.

Res Judicata.

(1) Act XXIII of 1861, s. 11—Procedure—Execution—Possession—New cause of action—See EXECUTION OF DECREE, 5 B. 382.

(2) Act X of 1877, s. 13—Act VIII of 1859, s. 2—Limitation—See EXECUTION OF DECREE, 6 B. 54.

(3) *Appeal—Effect of appealing against a judgment—Civ. Pro. Codes, Act* VIII *of* 1859, *s.* 2; *Act* X *of* 1877, *s.* 13, *expl.* 4—*Title—Trespass—Damages.*—When the judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata*, and becomes *res sub judice*; and if the appellate Court declines to decide that issue, and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of appeal. NILVARU v. NILVARU, 6 B. 110 ... 591

(4) Civ. Pro. Code (Act VIII of 1859), s. 2—See HINDU LAW (ALIENATION), 5 B. 48.

(5) *Effect of rejection of plaint for non-appearance of plaintiff—Possessory suit in Mamlatdar's Court and in Civil Court—Bombay Act* III *of* 1876, *s.* 13 *—Specific Relief Act* I *of* 1877, *s.* 9—*Civ. Pro. Code* (*Act* X *of* 1877), *s.* 13—A plaintiff, whose plaint has been rejected for default of appearance in the Mamlatdar's Court under Bombay Act III of 1876, s. 13, cannot bring another possessory suit on the same cause of action in the Civil Court under s. 9 of the Specific Relief Act I of 1877; for the rejection of a plaint under s. 13 of Bombay Act III of 1876 by reason of the failure of the plaintiff to attend with his proofs on the day appointed, is a hearing and final decision of the suit within the meaning of s. 13 of the Code of Civil Procedure (Act X of 1877), and upon the rejection of the plaint the question in the suit becomes *res judicata*. RAMCHANDRA v. BHIKIBAI, 6 B. 477 ... 773

(6) Fraud—Decree when binding—Effect of fraud—Parties and privies to suit—Strangers to suit—Collusive fraud between parties in obtaining decree—Civ. Pro. Code (Act X of 1877), s. 13—Evidence Act (I of 1872), s. 44—Khoja Mahomedan administrator with the will annexed—See FRAUD, 6 B. 703.

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(7) Hindu law—Joint Hindu family —Manager — Practice—Parties—Decree against manager binding on members of family although not parties to suit—Civ. Pro. Code, Act VIII of 1859, s. 2—See HINDU LAW (JOINT FAMILY), 5 B. 685.

(8) Hindu law—Partition—Account—See HINDU LAW (PARTITION), 5 B. 589.

(9) Mamlatdar's finding as to possession—Magistrate's finding as to possession —Code of Criminal Procedure, Act X of 1872, s. 530—Actual possession—Dispossession—Cause of action—See CRIM. PRO. CODE (ACT X OF 1872), 5 B. 387.

(10) Mortgage by co-parcener—Decree—Execution—Sale—Suit by purchaser at sale—See EXECUTION OF DECREE, 5 B. 496.

(11) *Objection by a plaintiff that the matter alleged in defence is* res judicata—*Effect of dismissal of suit under s.* 381 *of Civ. Pro. Code (Act* X *of* 1877) *for default of plaintiff to give security for costs—Defendant precluded from pleading matter which is* res judicata—*Civ. Pro. Code (Act* X *of* 1877), *ss.* 13, 102, 103, 381.—The plaintiff sued the defendants on a promissory note. The defendants filed a written statement, alleging that the note had been obtained by the plaintiff by fraud and false representation. Previously to the filing of the present suit by the plaintiff the defendants had brought a suit against the plaintiff in which they prayed that the said promissory note might be delivered up to be cancelled. Their plaint in that suit contained allegations of fraud and want of consideration identical with those contained in their written statement in the present suit. The plaintiffs in the former suit (the present defendants) having failed to give security for costs, the suit was dismissed under s. 381 of the Civ. Pro. Code (Act X of 1877). It was now contended that the defendants were estopped from pleading, as a defence to the present suit, the fraud and want of consideration which had been alleged by them as plaintiffs in the former suit which had been dismissed.

Held that the defence might be pleaded, and that the question of fraud and want of consideration was not *res judicata* within the meaning of s. 13 of Civ. Pro. Code. The previous suit had been dismissed by reason of the plaintiff's (the present defendant's) failure to give security for costs; and a Court cannot be said to "hear and decide" a matter which it is relieved from hearing and deciding by the plaintiff's default.

Under s. 13 of the Civ. Pro. Code (Act X of 1877) a defendant may be precluded from pleading as a defence matter which is *res judicata*.

Quære—Whether a plaintiff, whose suit has been dismissed under s. 381 can again litigate the subject-matter of the dismissed suit RUNGRAV RAVJI v. SIDHI MAHOMED, 6 B. 482 ... 776

(12) Partition suit—Limitation Act IX of 1871, sch. II, art. 46—Bombay Act V of 1864—See LIMITATION ACT (IX OF 1871), 5 B. 27.

(13) See LIMITATION ACT (XV OF 1877), 6 B. 586.

Resulting Trust.

See PARSIS, 6 B. 363.

Resumption.

(1) See EXECUTION OF DECREE, 5 B. 130.

(2) See IMMOVEABLE PROPERTY, 6 B. 546.

Retrial.

See EVIDENCE, 6 B. 34.

Revenue.

Sale of land for arrears of assessment—Fraudulent purchaser—Trustee for the owner in equity—Act X *of* 1876, *s.* 4, *cl.* (c)—*Claims to set aside a revenue sale—Forfeiture of tenancy—Jurisdiction.*—Whenever the land revenue is in arrear, Government is entitled to sell the land and to realize its due, whoever is the defaulter.

The plaintiff sued to recover possession of certain land [illegible] aside the sale of it by the [illegible] due on the la[illegible]

Revenue—(*Concluded*). PAGE

condition of the latter paying the Government assessment and certain rent in cash and kind to the plaintiff; that the defendant having intentionally made a default in payment of the assessment, fraudulently caused the land to be sold by the Revenue authorities and purchased it himself. The defendant traversed the plaintiff's allegations, and stated that he was in possession of the land as purchaser at the revenue sale. The Subordinate Judge rejected the plaintiff's claim, holding that he failed to prove either the defendant's liability to pay the assessment or any fraud on his part, with respect to the sale of the land, and that the sale could not be set aside. His decree was affirmed, in appeal, by the Assistant Judge on the sole ground that the sale could not be set aside. He did not go into the merits of the case. On appeal to the High Court,

Held that the plaint ought not to have contained any prayer for setting aside the sale, but that, as it contained a prayer for possession, it might be read as praying (or at least that the plaintiff might have been permitted to amend it so that it might simply pray) that the defendant should, under the circumstances alleged by the plaintiff, be declared a trustee of the land for the plaintiff.

Held, also, that if the plaintiff's allegations were true, the plaintiff would be entitled to such a declaration, and the defendant would be discharged of his subtenancy in consequence of his conduct which worked a forfeiture of any right to be continued as tenant.

S. 4, cl. (*c*) of Act X of 1876, excepts from the jurisdiction of the Civil Courts claims to set aside, on account of irregularity, mistake or any other ground except fraud, sales for arrears of land revenue.

Quære—whether the exception of fraud in the above enactment is confined to fraud on the part of officers conducting sales for arrears of land revenue. BALKRISHNA VASUDEV v. MADHAVRAV NARAYAN, 5 B. 73... 50

Review.

(1) Delay—Adoption of daughter's son—Custom—Breaches of custom—Practice—New case set up in special appeal—See PRACTICE, 6 B. 107.

(2) See DIVORCE, 6 B. 416.

(3) See JUDGE, 6 B. 304.

Right to sue.

(1) See ARBITRATION, 6 B. 528.

(2) See PRINCIPAL AND AGENT, 5 B. 584.

Rule against Perpetuities.

How far applicable in a colony subject to English law—See MAHOMEDAN LAW (WAKF), 6 B. 42.

Rule in Shelly's Case.

Agreement—Construction—Parsis in Mufassal of Bombay, English law how far applicable to—*Lex loci*—Act IX of 1837—See PARSIS, 6 B. 151.

(2) See PARSIS, 5 B. 506.

Rusum.

See VATAN, 5 B. 283.

Sale.

By a young person not a minor—Grounds for its cancelment—Sale by seamen—Sale by expectant heirs of reversionary interests—See HINDU LAW (REVERSIONER), 6 B. 309. 8

Sanction.

Mamlatdar's Court—The Code of Criminal Procedure, Act X of 1872, s. 468.—The Mamlatdar's Court, constituted by Bombay Act III of 1876, is a Civil Court within the meaning of s. 468 of the Code of Criminal Procedure; therefore a complaint of an offence mentioned in that section, when such offence is committed before or against the Mamlatdar's Court, [illegible] entertained in the Criminal Courts except with the sanction [illegible] which it is subordinate. 93

Sanction to prosecute.

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Sanction to prosecute granted by District Judge—Jurisdiction—Power of same person as Sessions Judge to try the offence—Crim. Pro. Code (Act X of 1872), ss. 472 and 473.—A District Judge who has, on hearing a Civil appeal, sanctioned the prosecution of a party for forgery, is not debarred by s. 473 of the Code of Criminal Procedure (Act X of 1872) from trying the offence in his capacity of a Sessions Judge. EMPRESS v. GASPER D' SILVA, 6 B. 479 ... 774

San-mortgage in Gujarat.

(1) See MORTGAGE (PRIORITY), 6 B. 404, 538.

(2) See REGISTRATION, 6 B. 193.

Saranjam.

Jaghir—Grant of revenue—Grant of soil—Pensions Act, XXIII of 1871—Evidence—Burden of proof—Impartibility—Primogeniture.—The grant in *jaghir* or *saranjam* is very rarely a grant of the soil, and the burden of proving that it is in any particular case a grant of the soil lies very heavily upon the party alleging it.

It is for the Government to determine how *saranjams* are to be held and inherited, and in cases where the Civil Courts have jurisdiction over claims relating to *saranjams* in consequence of the non-applicability of the Pensions Act, XXIII of 1871 or otherwise, they would be bound to determine such claims according to the rules, general or special, laid down by the British Government. In the absence of such rules the Courts would be guided by the law applicable to impartible property.

Semble, that a *saranjam* is impartible, and on the death of the eldest son descends to his son in preference to his surviving brother. RAMCHANDRA MANTRI v. VENKATRAO MANTRI, 6 B. 598 ... 854

Security.

See CIV. PRO. CODE (ACT X OF 1877), 5 B. 643.

Set-off.

Excise duty—Customs—Salt—(Bombay) Act VII of 1873—Act XVIII of 1877—Duty paid under former Act—Effect of new Act by which duty increased coming into operation before removal of salt—Increased duty paid under protest—Suit to recover excess—See ACT VII OF 1873 (SALT, BOMBAY), 6 B. 251.

Ship.

(1) See BILL OF LADING, 5 B. 313.

(2) See CHARTER PARTY, 5 B. 539.

Shipping.

(1) Charter-party—Agreement for a charter-party—Threatened breach of charter-party—Interim injunction—See CHARTER PARTY, 6 B. 5.

(2) Charter-party—"Safe port or as near thereunto as she may safely get always afloat"—Ship unable to enter port or lie there without previous lightening—Rights of parties—SEE CHARTER PARTY, 5 B. 539.

(3) See BILL OF LADING, 5 B. 313.

Signature.

(1) See LIMITATION ACT (XV OF 1877), 5 B. 89.

(2) See LIMITATION ACT (XIV OF 1859), 5 B. 88.

Slander.

See DEFAMATION, 5 B. 580.

Small Cause Court.

(1) Damages on account of rent—Suit for use and occupation—Trespass—Ejectment—Mesne profits—Jurisdiction—See EJECTMENT, 5 B. 572.

(2) *Jurisdiction—"Damages on account of rent"—Suit for use and occupation—Trespass—Ejectment—Mesne profits.*—The plaintiff obtained a decree declaring him entitled to a certain house. He thereupon gave to the defendant, who was in occupation, notice to pay him rent, and on default of such payment he sued the defendant in the Court of Small Causes to recover "damages on account of rent."

Small Cause Court—(*Concluded*) PAGE

Held, that the suit was not maintainable in a Court of Small Causes, which could not be used as a medium for ejecting, by indirect means, a person in possession of immoveable property.

Held, also, that the plaintiff's suit was only maintainable as a suit for damages on account of trespass, and in such a suit it would be necessary for the plaintiff to prove possession prior to the trespass, or to have obtained a decree in ejectment which would relate back to the date of the trespass. The plaintiff had obtained nothing more than a decree declaring him to be the owner of the house; but this did not necessarily import a right to immediate possession, nor could the plaintiff be allowed to derive from it all the benefit which he might derive from a decree in ejectment. KALIDAS v. VALLABHDAS, 6 B. 79 ... 510

(3) *Jurisdiction—Equitable defence—Plea by defendant of his own fraud—Act* IX *of* 1850, *ss.* 91, 98, 25.—The plaintiff in 1879 took out a summons under s. 91 of the Presidency Town's Small Cause Court Act IX of 1850, calling on his nephew, the defendant, to deliver up possession of certain premises in his occupation belonging to the plaintiff. The plaintiff alleged that he had purchased the premises in question in 1870 from one N. to whom the defendant had mortgaged them in 1866 with power of sale. The plaintiff produced the deed of mortgage to N., and the conveyance to himself. It was admitted on his behalf that he had never received any rent from the defendant, and never had manual possession of the premises occupied by him. But the plaintiff produced a writing of attornment dated April 1873, passed to him by the defendant, whereby the latter acknowledged that he was occupying the premises in question as the plaintiff's tenant, and agreed to pay rent for the same at Rs. 25 a month. His defence was that the mortgage, the sale, and the writing of attornment were all merely colourable, executed for the purpose of defeating his creditors and screening the property from execution; that no money had passed between the parties; that the defendant had never been out of possession, and that the plaintiff now required the Court to assist him in turning his own wrong to his own advantage. At the hearing in the Court of Small Causes the defendant proposed to prove the above facts, and submitted that, under the circumstances, a *bona fide* question of title was raised which ousted the jurisdiction conferred on the Court by s. 91. The Court, however, refused to receive the evidence, and held that it had jurisdiction. On reference to the High Court,

Held, that the defendant was entitled to set up the defence which he did, and that it ousted the jurisdiction of the Court of Small Causes to proceed further with the action—inasmuch as such defence raised a question of adverse title which, in suits under s. 91 of Act IX, 1850, that Court had not jurisdiction to decide. LUCKMIDAS KHIMJI v. MULJI CANJI, 5 B. 295 ... 195

(4) Suit on judgment of—See DECREE, 6 B. 7.

(5) See BILL OF LADING, 5 B. 313.

(6) See FOREIGN JUDGMENT, 6 B. 292.

Specific Performance.

(1) Limitation—Act XV of 1877, sch. II, art. 49—Time when "detainer's possession becomes unlawful"—Sale of immoveable property in the Mufassal—Decree for specific performance operates as a conveyance—Contract for sale of moveable and immoveable property combined—Indian Contract Act, s. 85—Joinder of cause of action—Objection, not taken in the Court of first instance, too late—Act X of 1877, s. 44—See LIMITATION ACT (XV OF 1877), 5 B. 554.

(2) Misjoinder—Civil Procedure Code (Act X of 1877), ss. 28 and 45—Specific Relief Act, I of 1877, s. 42, Illustration (*a*)—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 177.

(3) See PRINCIPAL AND AGENT, 5 B. 253.

Specific Relief Act (I of 1877).

(1) S. 9—Ejectment possession—Suit to recover possession under the Specific Relief Act (I of 1877), s. 9—Proper parties in such suit—Mis-statement in pleading of area of land sued for—Interest in land—Disclaimer—Estoppel—See EJECTMENT, 5 B. 208.

Specific Relief Act (I of 1877)—(*Concluded*).

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(2) S. 9—*Mortgagee in possession—Forcible dispossession by mortgagor—Suit for possession—Fraud— Appeal.*—It is no answer to a suit for possession under s. 9 of the Specific Relief Act, brought against a mortgagor by a mortgagee who has been forcibly dispossessed by the mortgagor, to allege that the mortgage and possession under it were obtained by the fraud of the mortgagee. The mortgagor's proper remedy was by way of a suit to set aside the mortgage and recover possession. SAYAJI v. RAMJI, 5 B. 446. 294

(3) S. 9—See RES JUDICATA, 6 B. 477.

(4) S. 42, Ill. (*a*)—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 177.

Stamp.

(1) *Appeal—Court Fees Act*, VII *of* 1870, *s.* 7, *cl. iv* (*f*)—*Contract Act*, IX *of* 1872, *s.* 265.—The stamp duty payable on an appeal from an order made by a District Judge on an application under s. 265 of the Indian Contract Act (IX of 1872) should be an *ad valorem* fee, as in a suit for accounts, under s. 7, cl. iv (*f*) of the Court Fees Act, VII of 1870. LADUBHAI v. REVICHAND, 6 B. 143 ... 554

(2) Court Fees Act, VII of 1870—Memorandum of appeal—Suit for recovery of land and money—See COURT FEES ACT (VII OF 1870), 6 B. 302.

(3) *Indemnity note, stamp duty on - Stamp Act*, I *of* 1879, *sch.* I, *arts.* 5 *and* 28.—An indemnity note, passed to a railway company by a consignee and his surety in respect of goods delivered to the consignee, and for which he is unable to produce the railway receipt—by which note they undertake to hold the railway company, its agents, and servants, harmless and indemnified in respect of all claims to the said goods—is not an 'indemnity bond' falling under art. 28, sch. I of the Indian Stamp Act, I of 1879, but is an agreement falling under cl. (*c*), art. 5, sch. I of the Act, and, consequently, chargeable only with a stamp duty of *eight* annas. CIVIL REFERENCE NO. 24 OF 1881, 5 B. 478 (F.B.) ... 315

(4) Intention to defraud Government of stamp revenue—Regulation XVIII of 1827, s. 13—Act XXXIV of 1860, s. 13—Act X of 1862, s. 15—Admissibility of insufficiently stamped document—See HINDU LAW (ALIENATION), 5 B 621.

(5) See EXECUTION OF DECREE, 5 B. 127.

(6) See STAMP ACT (I OF 1879), 5 B. 188.

Stamp Act (XXXIV of 1860).

S. 13—See HINDU LAW (ALIENATION), 5 B. 621.

Stamp Act (X of 1862).

S. 15—See HINDU LAW (ALIENATION), 5 B. 621.

Stamp Act (I of 1879).

(1) *Ss.* 7, 12, 13 *and* 14—*Stamp—Contract by principal and surety on same stamp paper, but separately written—Writing on the reverse of a stamp paper—Whether Government notification under the Stamp Act are not* ultra vires *when more stringent than the Act itself.*—In a bond engrossed on a stamp paper of sufficient value, and dated the 19th April, 1879, the contract of the principal was written first, and after his signature followed the contract of the surety, signed by the latter. The document commenced on the side other than that on which the stamp was impressed, and terminated on the side impressed with the stamp. The stamp was not in any way defaced, nor was the paper so written as to admit of the stamp being used again.

Held that the bond constituted only one instrument, and was properly stamped, not being open to objection under ss. 7, 12, 13 and 14 of the Indian Stamp Act, No. I of 1879.

The construction of the words "on the face of the instrument," used in s. 12 of Act I of 1879, considered.

Quaere.—Whether certain Government notifications—to the effect that an instrument, commenced on the side of the paper other than that on which the stamp is impressed and completed on the side on which the stamp is impressed, is, under s. 12 of Act I of 1879, to be treated as unstamped; and prohibiting writing on the reverse of an impressed stamp paper—are

Stamp Act (I of 1879)—(*Concluded*). PAGE

ultra vires as being more stringent than and, therefore, inconsistent with that Act? DOWLATRAM HARJI v. VITHO RADHOJI, 5 B. 188 (F.B.)... 125

(2) Sch. I, arts. 5 and 28—See STAMP, 5 B. 478.

(3) *Sch.* II, *art.* 13, *cl.* (*b*)—*Lease by a cultivator—Definite term—Annual rent.*—Cl. (*b*), art. 13 of sch. II of Act I of 1879, exempts all leases executed in the case of a cultivator without payment or delivery of any fine or premium, whatever the reserved or annual rent may be, provided it be for a definite term not exceeding one year, and also whatever the term may be, provided the annual rent reserved does not exceed Rs. 100. *In re* BHAVAN BADHUR, 6 B. 691 (F.B.)=7 Ind. Jur. 90 ... 916

(4) *Sch.* I, *arts.* 16 *and* 21, *ss.* 21, 23, 24, 27—*Judicial sale—Certificate of sale, stamp duty on—Sale or transfer subject to a mortgage or other lien—Mortgage-debt "part of the consideration"—Interest—Proclamation of sale.*—Where a certificate of sale, granted to the purchaser of property sold by public auction under an order of Court, has expressly set out that such sale is made subject to the mortgage right of a third party, the principal sum (but not the interest) due at the time of the sale on such mortgage is to be deemed "part of the consideration in respect whereof the transfer is chargeable with *ad valorem* duty" under s. 24 of the Indian Stamp Act; so that the whole consideration in respect of which such sale is, under arts. 16 and 21 of sch. I of that Act, liable to stamp duty is the sum of the purchase-money and the principal money so due on the mortgage. The certificate of sale, therefore, whenever it is possible, should set out the exact amount that is due, at the time of the sale, in respect of the principal sum secured by the mortgage.

Semble.—It is otherwise if the mortgage be only recited in the proclamation of sale, and not expressly set out, as an existing incumbrance on the property sold, in the certificate of sale.

Arrears of *interest* due on the mortgage are to be excluded from such calculation, since s. 23 of the Indian Stamp Act—which enacts that "Where interest is expressly made payable by the terms of the instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein"—applies as much in this case as if the document of transfer, on which the stamp duty was to be calculated, had been the document itself which stipulated for the payment of interest. SHA NAGINDAS JEYCHAND v. HALALKHORE NATHWA GHEESLA, 5 B. 470 (F.B.) ... 910

Standing Crops.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 6 B. 592.

Statute 11 and 12 Vic., 21.

S. 60—See INSOLVENT ACT (11 AND 12 VIC., C, 21), 5 B. 1.

Statute of Frauds (Statute, Charles II, C. 3.)

Parsis—Stat. 29, Charles II, C. 3—Trust—Resulting trust—See PARSIS, 6 B. 368.

Street.

Court—Bombay District Municipal Act VI of 1873, ss. 3 and 17—Mehela—Khadki—Ota—See ACT VI OF 1873 (BOMBAY), 6 B. 686.

Succession Act (X of 1865).

(1) *Ss.* 179, 226—*Probate—Limited probate.*—Probate limited to part of the estate cannot be granted in cases where under s. 179 of the Indian Succession Act (X of 1865) the whole estate is vested in the executor. *In re* THAKER MADHAVJI, 6 B. 460 ... 701

(2) *S.* 234—*Probate—Revocation—Practice—Review in testamentary matters.*—S. 234 of the Indian Succession Act (X of 1865) applies to Hindus, and an application to revoke probate of the will of a Hindu may be made under that section.

When once probate in solemn form has been granted, no one who has been cited or has taken part in the proceedings, or who was cognizant of them, can afterwards seek to have it cancelled: *Quære*—whether a review may not be granted.

Succession (Act X of 1865)—(*Concluded*).

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The practice in India in testamentary matters previously to Act V of 1881 was the same as that of the Ecclesiastical Court in England, except so far as that practice might be inconsistent with the Civ. Pro. Code. *In the matter of* PITAMBER GIRDHAR, 5 B. 638 ... 420

(3) S. 331—See PROBATE, 6 B. 452.

Suit.

Meaning of. See EXECUTION OF DECREE, 6 B. 54.

Summary Decision.

See EXECUTION OF DECREE, 5 B. 673.

Surveyor.

See ARBITRATION, 6 B. 528.

Temple Committee.

See HINDU LAW (RELIGIOUS ENDOWMENTS), 5 B. 80.

Temple Property.

Guravki—Sale of right, title and interest of holder—Service land—See GURAVKI, 6 B. 596.

Tenancy.

See REVENUE, 5 B. 73.

Tenure.

See LAND TENURE, 5 B. 77.

Title.

(1) Suit to establish, and for arrears—Limitation Acts XIV of 1859 and IX of 1871—See LIMITATION ACT (XIV OF 1859), 5 B. 68.

(2) See EJECTMENT, 5 B. 572 ; 6 B. 215.

(3) See MORTGAGE (REDEMPTION), 6 B. 139.

(4) See RES JUDICATA, 6 B. 110.

Toda-Giras Hak.

The Pensions' Act XXIII *of* 1871.—In part of Western India annual payments, known as *toda-giras hak*, made by village communities and commuted by them into liabilities to *girasias*, have been recognized as a species of property, however unlawful their origin.

In 1862 a resolution of the Government of Bombay described the position of the *girasias* at that time, and gave them the opinion of resuming the collection of the *toda-giras hak* formerely levied, resorting only to legal proceedings to enforce their claim, or of receiving, from the Government, allowances of an equivalent amount ; the collections, in the latter case, being discontinued on all hands.

The ancestors of the adoptive father of the plaintiff formerly levied *toda-giras hak* ; and after 1862, the Government in respect thereof made payments, under the resolution, to three brothers, of whom one was the plaintiff's father ; the latter receiving a one-third share, which, on his death in 1865, was no longer paid.

Held, that a suit against the Government for payment of this third share with arrears fell under the Pensions' Act XXIII of 1871, s. 4, which prohibits cognizance, save as in the Act provided, " of any suit relating to any pension or grant of money or land revenue conferred or made by the British, or any former Government, whatever may have been the consideration for such pension or grant, or whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted."

Held, that there was no reason, either in the language of the Act itself, or in any antecedent legislation, for construing these words as applicable only to rights in the nature of pensions. MAHARAVAL MOHANSINGHJI *v.* THE GOVERNMENT OF BOMBAY, 5 B. 408 (P.C.)=8 I.A. 77=5 Ind. Jur. 380=4 Sar. P.C.J. 230 ... 269

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Toddy-producing Tree.

Abkari (Bombay) Act V of 1878, ss. 14, 20, 64, 65, 66 and 67—See ACT V OF 1878 (ABKARI), 6 B. 398.

Trader.

See INSOLVENT ACT, 11 and 12 Vic., c. 21, 5 B. 1.

Trespass.

(1) See EJECTMENT, 5 B. 572.
(2) See RES JUDICATA, 6 B. 110.
(3) See SMALL CAUSE COURT, 6 B. 79.

Trust.

(1) Resulting trust—Parsis—Statute of Frauds—Stat. 29, Charles II, c. 13—See PARSIS, 6 B. 363.
(2) See ACT XXVII OF 1866 (TRUSTEES), 5 B. 154.
(3) See GIFT, 5 B. 268.
(4) See MAHOMEDAN LAW (WAKF), 6 B. 42.

Trustee.

(1) Gift—Necessity of endorsement of Government notes in order to complete gift—Donor constituting himself trustee for donee—Enforcement of trust by representatives of donee—Trustee, liability of—Gift to sole and separate use among Parsis—See GIFT, 5 B. 268.
(2) See ACT XXVII OF 1866 (TRUSTEES), 5 B. 154.
(3) See HINDU LAW (RELIGIOUS ENDOWMENTS), 5 B. 393.
(4) See REVENUE, 5 B. 73.

Undue Influence.

Fraud—Deed of sale set aside—Old and illiterate woman near to her death—No independent advice—Inadequate consideration—Terms on which deed will be set aside—Purchase-money declared a charge—Funeral expenses of Hindu widow declared a charge—No allowance for repairs and improvements—See DEED, 5 B. 450.

Use and Occupation.

(1) See EJECTMENT, 5 B. 572.
(2) See SMALL CAUSE COURT, 6 B. 79.

Vakalatnama.

See VAKIL AND CLIENT, 5 B. 258.

Vakil and Client.

Inam chithi—Vakalatnama—Act I *of* 1846, *s.* 7—*Nudum pactum.*—Where the acceptance of a *vakalatnama* by a pleader and the execution of an *inam chithi* (agreement) by his client, intended as remuneration for the professional services of the pleader, were contemporaneous, and the *vakalatnama* was not filed by the pleader until after the execution of the *inam chithi*.

Held that the acceptance of the *vakalatnama* and the execution of the *inam chithi* constituted one transaction, and that the agreement was not illegal under Act I of 1846, s. 7. SHIVRAM HARI v. ARJUN, 5 B. 258 ... 171

Vatan.

(1) *Alienation of—Regulation* XVI *of* 1827, *s.* 20—*Bombay Act* III *of* 1874, *ss.* 5, 8, 9, 10—*Construction—Certificate of Collector under* s. 10.—Previously to the year A.D. 1818, R, the great-grandfather of the plaintiff, settled accounts with Rudrapa, the father of the defendant, in respect of debts due by himself (R) and his ancestors. The amount found due to Rudrapa was Rs. 20,000, and, as security for this sum, R, by deed dated A.D. 1818, mortgaged to Rudrapa certain vatani lands, and also an annual allowance of Rs. 200 received by him (R) on account of a *resum*. Under this deed these properties were to be held by Rudrapa in lieu of interest until repayment of the principal of Rs. 20,000.

Vatan—(*Continued*).

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A dispute subsequently arose as to the amount of the *resum*, and A, the son and successor of R, the mortgagor, having by attachment interrupted Rudrapa's possession (as mortgagee) of the vatani lands, he (Rudrapa) presented a petition of complaint to the Sub-Collector of B, who issued an order on the 10th November, 1830, to the Mamlatdar, directing him to require the parties to refer their disputes to arbitration. The arbitration took place, and on the 20th August, 1831, both parties executed a *rajinama* (Ex. No. 20), which set forth the terms of settlement agreed upon. Rudrapa was to hold the mortgaged lands and *resum* (annual allowance) for fifty years. At the end of that period, the principal debt and all interest thereon was to be deemed to have been paid off, and the lands and *resum* were to be surrendered to the mortgagor or his heir. Under this *rajinama* the mortgagee held uninterrupted possession of the mortgaged property until A. D. 1872. A, one of the signatories of the *rajinama*, died in 1843, and was succeeded as vatandar by R, and R again was succeeded by the present plaintiff, who in 1872 brought this suit against the defendant (Rudrapa's son) to recover possession of the mortgaged property.

The Subordinate Judge held that the mortgage of A.D. 1818 was not genuine, and that the *rajinama* of A.D. 1831, being an alienation of vatani property after the passing of Regulation XVI of 1827, s. 20, was invalid as against vatandars subsequent to the grantor. He, therefore, made a decree for the plaintiff. In appeal, the Assistant Judge held that the mortgage of A.D. 1818 was genuine, but he agreed with the Subordinete Judge in regarding the *rajinama* as a fresh alienation of vatani property, and, therefore, invalid as against the plaintiff, having been executed since the passing of Regulation XVI of 1827, s. 20. He, therefore, affirmed the decree of the Subordinate Judge. The defendant thereupon filed a special appeal in the High Court, which on the 29th September, 1875, reversed the decrees of the Courts below, holding that the *rajinama* was not a fresh alienation of vatani lands, but a compromise of a dispute in regard to an alienation by way of mortgage, in A.D. 1818, of vatan lands, and that the *rajinama* was, therefore, valid, and ought to be enforced and was not affected by Regulation XVI of 1827, s. 20.

Previously to this decree of the High Court the plaintiff had applied for execution of the Subordinate Judge's decree, and had been put into possession of the mortgaged property on the 9th June, 1873.

The decrees of the lower Courts being thus reversed by the High Court, the defendant in 1876 presented a petition to the Subordinate Judge, praying a restoration of the mortgaged property to his possession. The plaintiff did not oppose his application, but the Subordinate Judge refused it, on the ground that he had received a certificate from the Collector, issued under s. 10 of Bombay Act III of 1874, stating that the property, the subject of the application, formed part of a vatan. In appeal, the Assistant Judge affirmed the order of the Subordinate Judge, being of opinion that the receipt of the certificate by the Subordinate Judge compelled him to refrain from giving effect to the decree of the High Court. Thereupon the defendant filed a special appeal in the High Court.

Held, that the certificate of the Collector was unlawfully issued, and that the Subordinate Judge should proceed to give effect to the decree of the High Court of the 29th September, 1875, by reinstating the defendant in possession of the premises mentioned in the *rajinama*.

The certificate, which the Collector is authorized to issue under s. 10 of Bombay Act III of 1874, should be sent to the Court, by whose decree or order the vatan is affected, in the manner mentioned in the section. The Collector's certificate in this case, therefore, had not been issued to the proper Court.

The restitution of the mortgaged property to the defendant in whose possession it was at the commencement of this suit in 1872, and until the execution of the erroneous decree of the Court of first instance in 1873, was not such a passing into the ownership or beneficial possession of any person not a vatandar of the same vatan, as is meant by s. 10 of Bombay Act III of 1874.

Vatan—(*Concluded*).

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The alienation of the vatani property to Rudrapa having, in 1831, received the sanction of the authorized officer of Government, s. 10 of Bombay Act III of 1874 did not apply,—the intention of the act being that whenever alienation of a hereditary officer's vatan has received the sanction of Government, the Collector should not issue his certificate.

The words "without the sanction of Government" in s. 10 of the Act qualify the whole section.

Bombay Act III of 1874 does not authorize the Collector to issue his certificate for the purpose of preventing the rectification of a Subordinate Court's decree by the High Court, or the reinstatement of a person in possession of which he has been deprived by the execution of the erroneous decree of a Subordinate Court. RACHAPA v. AMINGOVDA, 5 B. 283 (F.B.) ... 187

(2) *Mortgage of vatan property—Regulation* XVI *of* 1827, *s.* 20—*Bombay Act* III *of* 1874.—A mortgage by a *vatandar* of *vatan* property, executed at a time when Regulation XVI of 1827 was still in force, was, in its inception, void against the heir of the said *vatandar*; nor did it become in any way validated against the heir by reason of the repeal of that regulation by Act III (Bombay) of 1874. KALU NARAYAN KULKARNI v. HANMAPA, 5 B. 435 ... 287

(3) *Regulation* XVI *of* 1827—*Mortgage of vatan property—Mortgagor's life-interest—Bombay Act* III *of* 1874.—On the 3rd December, 1856, certain *vatan* property was mortgaged by the deceased defendant to the plaintiff, who obtained a decree on the mortgage in 1861, and attached the rents and profits of the *vatan* on the 6th October of the same year. On his (defendant's) death in 1869, his son succeeded to the estate, and obtained a removal of the attachment before 1874. The plaintiff thereon applied for a fresh attachment of the property.

Held that the mortgagor having only life-interest, the *vatan* came into the hands of his son free of the mortgage. JAGJIVANDAS JAVERDAS v. IMDAD ALI, 6 B. 211 ... 598

(4) *Regulation XVI of* 1827, *s.* 20—*Alienation of vatan property by a hereditary vatandar—Bombay Act* III *of* 1874—*Limitation—Adverse possession*—A sale by a *vatandar* of *vatan* property, executed at a time when Regulation XVI of 1827 was still in force, was, in its inception, void against the heir of the *vatandar*; nor did it become in any way the more valid against such heir by reason of the repeal of that regulation by Act III (Bombay) of 1874.

Adverse possession only begins to run against the heir from the time when he is entitled to succeed to the possession of the *vatan* property; *i.e.*, from the date of the death of the *vatandar*. RAVLOJIRAV v. BALVANTRAV VENKATESH, 5 B. 437 ... 288

(5) See ACT III OF 1874 (HEREDITARY OFFICERS, BOMBAY), 6 B. 463.

(6) See JURISDICTION, 5 B. 578.

Vatandar.

(1) Property, immoveable, what is—Suit by vatandar Mahars to recover "aya"—Act XI of 1865, s. 6—Small Cause Courts—Jurisdiction—See IMMOVEABLE PROPERTY, 6 B. 512.

(2) See VATAN, 5 B. 435, 437.

Vendor and Purchaser.

(1) *Hindu law—Necessity of possession—Ejectment—Construction—Intention of parties.*—A Hindu, whose estate is in the possession of a trespasser or a mortgagee, may sell his right of entry as such, or his equity of redemption as such, and the purchaser may thereupon sue to eject the trespasser or to redeem the mortgage; but a bill of sale by a Hindu vendor, purporting to convey *the estate itself*, executed by a person who is not in possession, cannot operate as a present conveyance, nor enable the purchaser to sue in ejectment.

Cases will often arise in which, though a bill of sale may in terms purport to convey the property itself, yet it is clear upon the face of the instrument that the intention of the parties was to convey the right of entry or the

Vendor and Purchaser—(*Concluded*). PAGE

equity of redemption, and nothing more. In such cases the Court should not lay stress on the mere terms of the instrument, but give effect to the intention of the parties, and recognize the purchaser's right of action. BAI SURAJ v. DALPATRAM DAYASHANKAR, 6 B. 380 ... 709

(2) Mortgage—Right to redeem—Good title at time of hearing of suit—Certificate of sale—See MORTGAGE (REDEMPTION), 6 B. 139.

(3) *Notice—Priority—Possession—Purchaser without possession—Subsequent purchaser with possession and without notice of prior purchase - Registration.* —The plaintiff purchased the land in dispute on the 28th February 1878, and on the same day lodged his deed of purchase with the registrar together with the registration fee. It was registered on the 29th April 1878. He was not put in possession of the property,

The defendant purchased the same property on the 1st April 1878, and on the following day lodged his deed of purchase with the registrar together with the registration fee. It was registered on the 26th May 1878. His purchase was accompanied with possession.

In a suit brought by the plaintiff against the vendor and the subsequent purchaser for possession of the property.

Held that the registration of the plaintiff's deed of purchase, not having been effected until after the execution of the defendant's deed, could not have operated as notice of the plaintiff's deed to the defendant, and, therefore, could not be equivalent to possession.

Held, also, that as the defendant was a purchaser, without notice, either actual or constructive, of the plaintiff's prior purchase, and had taken the precaution of obtaining possession, both parties being Hindus and innocent purchasers, the defendant could not be deprived of the benefit of his possession. HASHA v. RAGHO, 6 B. 165 ... 568

(4) *Possession—Sale of land by a Hindu—Vendor without possession—Conveyance of right of action.*—Where a Hindu vendor sold his share in certain land, but expressly stated in the deed of sale that he was out of possession; that the land was in the hands of a third party, to whom it had been mortgaged without the vendor's authority, and that he (vendor) empowered the purchaser to bring a suit against the person in possession in order to recover the vendor's share in the land, with mesne profits.

Held that what the deed contemplated was nothing more than the transfer of the right of entry, although, according to the invariable mode of expression in such documents, the vendor professed, in terms, to convey the property itself.

Held, further that the purchaser acquired the same right of action which his vendor possessed, notwithstanding that the vendor was not in possession at the date of the sale. VASUDEV HARI v. TATIA NARAYAN, 6 B. 387 ... 714

Village Munsif.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 5 B. 180.

Wages.

See CIV. PRO. CODE (ACT X OF 1877), 5 B. 132.

Wazifa Grant.

See MAHOMEDAN LAW (WAKF), 6 B. 88.

Will.

(1) Probate in cases not governed by the Indian Succession Act—Power of the High Court to grant probate in such cases—Probate to take effect throughout India—Limited probate—Probate duty—Cutchi Memon Mahomedan—Succession Act X of 1865, s. 331—Act XIII of 1875—Hindu Wills Act, s. 2—Act XX of 1841—Act XXVII of 1860, s. 18—Court Fees Act VII of 1870, sch. I, art. II—See PROBATE, 6 B. 452.

(2) Probate—Wills—Wills in Mofussil—Civil Procedure Code (Act X of 1877), s. 50—See PROBATE, 6 B. 73.

Winding-up PAGE

(1) See BILL OF EXCHANGE, 5 B. 92.

(2) See COMPANY, 5 B. 42, 223 ; 6 B. 326, 640.

Witnesses.

(1) *Application for subpœnas to—Practice.*—On the 12th October 1879, the plaintiff applied to the Court for subpœnas to his witnesses. The Court refused to grant them, on the ground that the plaintiff had himself originally undertaken to bring his witnesses. (The Court had fixed the 28th October 1879 for the final hearing of the plaintiff's case.)

Held that the plaintiff's failure to bring his witnesses was no sufficient reason for depriving him (the plaintiff) of his right to have subpœnas issued, if he found himself unable to bring his witnesses or to detain them till they could be examined, although it might possibly be, under certain circumstances, a reason for not waiting for them, if the plaintiff's case had been in other respects finished before they could be examined. PANDURANG ANPAI v. KESHAVJI JADHAVJI, 6 B. 742 ... 951

(2) See CIV. PRO. CODE (ACT X OF 1877), 5 B. 184.

(3) See REGISTRATION ACT (III OF 1877), 5 B. 232.

Words and Phrases.

(1) "Any person intending to register any document"—See REGISTRATION, 6 B. 96.

(2) "At or before the first hearing"—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 609.

(3) "Believe"—See PENAL CODE (ACT XLV OF 1860), 6 B. 402.

(4) "Declare"—See REGISTRATION ACT (III OF 1877), 5 B. 232.

(5) "Decree passed against an agriculturist"—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 5 B. 604.

(6) "Immoveable property"—See IMMOVEABLE PROPERTY, 6 B. 512, 546.

(7) "Immoveable property"—See LIMITATION ACT (XIV OF 1859), 5 B. 322.

(8) "Instrument of gaming"—See GAMBLING, 6 B. 19.

(9) "Interest in immoveable property"—See LIMITATION ACT (XIV OF 1859), 5 B. 322.

(10) "Non-resident"—See CIV. PRO. CODE (ACT X OF 1877), 6 B. 100.

(11) "Official liquidator"—See COMPANY, 6 B. 640.

(12) "On the face of the instrument"—See STAMP ACT (I OF 1879), 5 B. 188.

(13) "Prescribed period"—See LIMITATION ACT (IX OF 1871), 5 B. 688.

(14) "Ruzu"—See LIMITATION, 6 B. 683.

(15) "Subject of the suit"—See LIMITATION ACT (XIV OF 1859), 5 B. 322.

(16) "Suit"—See ACT XIV OF 1877 (BROACH AND KAIRA INCUMBERED ESTATES), 5 B. 448.

(17) "Suit"—See EXECUTION OF DECREE, 6 B. 54.

(18) "To enforce decree"—See LIMITATION ACT (IX OF 1871), 5 B. 246.

(19) "Was found"—See JURISDICTION, 6 B. 622.

(20) "Within"—See MORTGAGE (REDEMPTION), 5 B. 22.

Written Statement.

Court fee—The Code of Civil Procedure (Act VIII of 1859) s. 120—Act X of 1877, s. 110—Court Fees' Act VII of 1870, s. 19—See CIV. PRO. CODE (ACT X OF 1877), 5 B. 400.

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